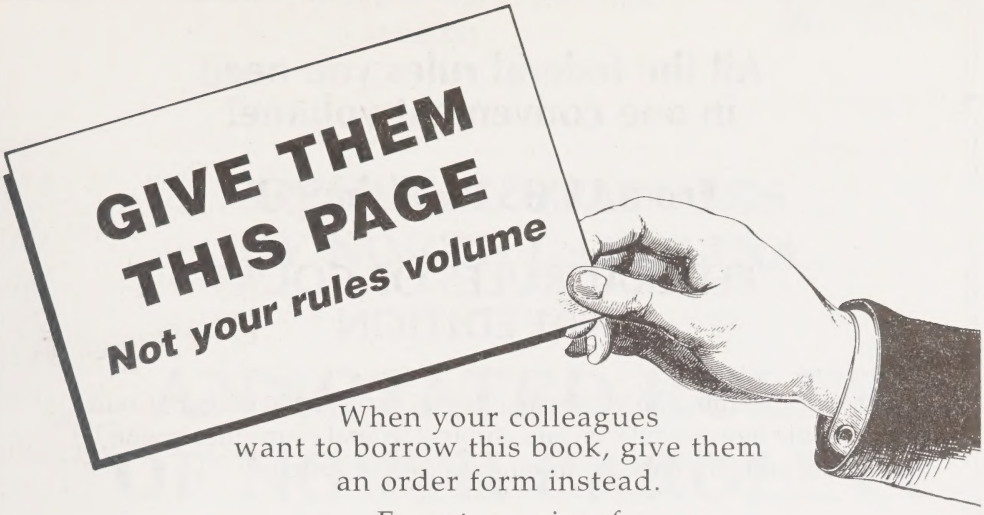
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# GENERAL STATUTES OF NORTH CAROLINA

# ANNOTATED RULES OF NORTH CAROLINA

## 2002 Edition

*Prepared under the Supervision of*
THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA

*Annotated, under the Supervision of*
*The Department of Justice,*
*by the Editorial Staff of the Publishers*
*under the Direction of*
K. S. MAWYER, AND V. H. SPENCER



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# Preface

This is the 2002 edition of the Annotated Rules of North Carolina. It contains rules and amendments thereto received by the publisher through October 1, 2001.

The volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department.

ROY COOPER
*Attorney General*

*November 1, 2001*

# Scope of Volume

**Statutes:**

Federal statutes relating to authentication of records and removal of causes.

**Rules:**

General Rules of Practice for the Superior and District Courts
North Carolina Child Support Guidelines
Rules for Court-Ordered Arbitration in North Carolina
Canons of Ethics for Arbitrators
Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions
Standards of Professional Conduct for Mediators
Prelitigation Farm Nuisance Mediation Program
Year 2000 Prelitigation Mediation Program
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- Appendix A: Timetables for Appeals
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**Annotations:**

To better serve our customers, by making our annotations more current, LEXISNEXIS has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of the more current reading of cases, as they are posted online on LEXIS, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the North Carolina Supreme Court posted on LEXIS as of August 17, 2001, decisions of the North Carolina Court of Appeals posted as of September 18, 2001, and decisions of the appropriate federal courts posted as of September 10, 2001. These cases will be printed in the following reports:

South Eastern Reporter 2nd Series
Federal Reporter 3rd Series
Federal Supplement
Federal Rules Decisions
Bankruptcy Reports
Supreme Court Reporter

Additionally, annotations have been taken from the following sources:

North Carolina Law Review through Volume 79, No. 3, p. 887
Wake Forest Law Review through Volume 36, no. 1, p. 215
Campbell Law Review through Volume 22, no. 2, p. 447
Duke Law Journal through Volume 49, no. 2, p. 599
North Carolina Central Law Journal through Volume 23, no. 1, p. 83
Opinions of the Attorney General

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# GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Adopted Pursuant to G.S. 7A-34
Effective July 1, 1970,
with amendments received effective January 1, 2000.


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2. Calendaring of civil cases.
2.1. Designation of exceptional civil cases and complex business cases.
2.2. Designation of special superior court judge for complex business cases.
3. Continuances.
4. Enlargement of time.
5. Form of pleadings.
6. Motions in civil actions.
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8. Discovery.
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## Rule 1. Philosophy of general rules of practice.

These rules are applicable in the Superior and District Court Divisions of the General Court of Justice. They shall at all times be construed and enforced in such manner as to avoid technical delay and to permit just and prompt consideration and determination of all the business before them.

**Editor's note.** — For North Carolina court system website, see www.aoc.state.nc.us/.

### CASE NOTES

**Applied** in Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975); Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983).

## Rule 2. Calendaring of civil cases.

Subject to the provisions of Rule 40(a), Rules of Civil Procedure and G.S. 7A-146:

(a) The Senior Resident Judge and Chief District Judge in each Judicial District shall be responsible for the calendaring of all civil cases and motions for trial or hearing in their respective jurisdictions. A case management plan for the calendaring of civil cases must be developed by the Senior Resident Judge and the Chief District Court Judge. The Administrative Office of the Courts shall be available to provide assistance to judges in developing a case management program.

The effective date of the plan and any amendments thereto shall be either January 1 or July 1. The plan must be promulgated in writing and copies of the

plan must be distributed to all attorneys of record within the judicial district. In order to provide for statewide dissemination, copies of plans effective January 1 shall be filed with the Administrative Office of the Courts on or before October 31 and on or before April 30 for plans effective July 1.

In districts with Trial Court Administrators, the responsibility for carrying out the case management plan may be delegated to the Trial Court Administrator.

The case management plan must contain a provision that attorneys may request that cases may be placed on the calendar.

(b) The civil calendar shall be prepared under the supervision of the Senior Resident Judge or Chief District Court Judge. Calendars must be published and distributed by the Clerk of Court to each attorney of record (or party where there is no attorney of record) and presiding judge no later than four weeks prior to the first day of court.

(c) Except in districts served by a Trial Court Administrator, a ready calendar shall be maintained by the Clerk of Court for the District and Superior Courts. Five months after a complaint is filed, the Clerk shall place that case on a ready calendar, unless the time is extended by written order of the Senior Resident Judge or the Chief District Judge for their respective jurisdictions. In districts with Trial Court Administrators, a case tracking system shall be maintained.

(d) During the first full week in January and first full week following the 4th of July or such other weeks as the Senior Resident Judge shall designate that are agreeable to the Chief Justice, the Senior Resident Judge of each district shall be assigned to his home district for administrative purposes. During such administrative terms, the Senior Resident Judge shall be responsible for reviewing all cases on the ready calendar, or all cases designated by the Trial Court Administrator, of each county in the judicial district. The Senior Resident Judge shall take appropriate actions to insure prompt disposition of any pending motions or other matters necessary to move the cases toward a conclusion. The Chief District Court Judge shall undertake periodically such an administrative review of the District Court Civil Docket.

(e) When an attorney is notified to appear for the setting of a calendar, pretrial conference, hearing of a motion or for trial, he must, consistent with ethical requirements, appear or have a partner, associate or another attorney familiar with the case present. Unless an attorney has been excused in advance by the judge before whom the matter is scheduled and has given prior notice to his opponent, a case will not be continued.

(f) Requests for a peremptory setting for cases involving persons who must travel long distances or numerous expert witnesses or other extraordinary reasons for such a request must be made to the Senior Resident Judge or Chief District Judge. In districts with Trial Court Administrators, requests should be made to the Trial Court Administrator. A peremptory setting shall be granted only for good and compelling reasons. A Senior Resident Judge or Chief District Judge may set a case peremptorily on his own motion.

(g) When a case on a published calendar (tentative or final) is settled, all attorneys of record must notify the Trial Court Administrator (Clerk of Court in those counties with no Trial Court Administrator) within twenty-four (24) hours of the settlement and advise who will prepare and present judgment, *and when.* (Amended July 1, 1980; May 16, 1988, effective July 1, 1988.)

**Legal Periodicals.** — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

**Failure to Timely Calendar Motion.** — Since civil cases in this State are ordinarily deemed ready for trial five months after filing, and motion for removal could have been calendared for hearing at many earlier court sessions, defendant's failure to put its motion on a hearing calendar until eight months after the case was filed, the hearing date being two months later, was unreasonable and thus a waiver of its right to have the case removed to a different county. Johnson v. Hampton Indus., Inc., 83 N.C. App. 157, 349 S.E.2d 332 (1986).

**Notice of Trial Date.** — While no formal trial date was set under a local rule until the day of the calendar call, this does not alter the requirement that a party receive notice that a trial on the merits has been set for a particular session of court. A calendar request received four days before the start of the session is not sufficient. Dollar v. Tapp, 103 N.C. App. 162, 404 S.E.2d 482 (1991).

**The law imposes certain affirmative duties on parties to a lawsuit to keep abreast of the proceedings in that suit.** — A party once served with a summons has a duty to give the matter the attention a person of ordinary prudence would give to important business. This duty does not negate the notice requirements of this rule, however. Dollar v. Tapp, 103 N.C. App. 162, 404 S.E.2d 482 (1991).

**Notice to Party Not Represented by Counsel.** — Although rule formerly specified that the calendar be sent to each attorney of record and that the copy of the certificate of readiness be sent to opposing counsel, it was implicit in the rule that where a party is not represented by counsel he is entitled to the same notice. Laroque v. Laroque, 46 N.C. App. 578, 265 S.E.2d 444, cert. denied, 300 N.C. 558, 270 S.E.2d 109 (1980).

**Continuance Not Granted to Unprepared Co-counsel.** — Where co-counsel of record appeared on behalf of defendant and moved for a continuance solely on the grounds that he was not prepared to try the case, under subdivision (e) of this rule co-counsel was not entitled to a continuance. Wachovia Bank & Trust Co. v. Templeton Oldsmobile-Cadillac-Pontiac, Inc., 109 N.C. App. 352, 427 S.E.2d 629, cert. denied, 333 N.C. 795, 431 S.E.2d 31 (1993).

**Applied** in Callaway v. Freeman, 71 N.C. App. 451, 322 S.E.2d 432 (1984).

**Cited** in Green v. Eure, 18 N.C. App. 671, 197 S.E.2d 599 (1973); Simmons v. Tuttle, 70 N.C. App. 101, 318 S.E.2d 847 (1984).

## Rule 2.1. Designation of exceptional civil cases and complex business cases.

(a) The Chief Justice may designate any case or group of cases as (a) "exceptional" or (b) "complex business." A senior resident superior court judge, chief district court judge, or presiding superior court judge may ex mero motu, or on motion of any party, recommend to the Chief Justice that a case or cases be designated as exceptional or complex business.

(b) Such recommendation for exceptional cases may include special areas of expertise needed by the judge to be assigned and may include a list of recommended judges. Every complex business case shall be assigned to a special superior court judge for complex business cases, designated by the Chief Justice under Rule 2.2, who shall issue a written opinion upon final disposition of the case.

(c) Such recommendation shall be communicated to the Chief Justice through the Administrative Office of the Courts.

(d) Factors which may be considered in determining whether to make such designations include: the number and diverse interest of the parties; the amount and nature of anticipated pretrial discovery and motions; whether the parties voluntarily agree to waive venue for hearing pretrial motions; the complexity of the evidentiary matters and legal issues involved; whether it will promote the efficient administration of justice; and such other matters as the Chief Justice shall deem appropriate.

(e) The Chief Justice may enter such orders as are appropriate for the pretrial, trial, and other disposition of such designated case or cases. (Adopted January 5, 1988; amended August 28, 1995.)

CASE NOTES

**Applied** in Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

**Cited** in In re North Carolina Hazardous Waste Mgt. Comm'n, 327 N.C. 632, 397 S.E.2d 76 (1990); Watkins v. North Carolina Hazardous Waste Mgt. Comm'n, 397 S.E.2d 78 (N.C. 1990); Lockert v. Lockert, 116 N.C. App. 73, 446 S.E.2d 606 (1994); North Carolina Trust Co. v. Taylor, 131 N.C. App. 690, 508 S.E.2d 809 (1998).

## Rule 2.2. Designation of special superior court judge for complex business cases.

The Chief Justice shall designate one or more superior court judges as special judges to hear and decide complex business cases as provided in Rule 2.1. Any judge so designated shall be known as a Special Superior Court Judge for Complex Business Cases. (Adopted August 28, 1995.)

COMMENT

The portion of this rule providing for the designation of a case as "exceptional" has been in effect in North Carolina since January 5, 1988, and has been utilized numerous times in various situations. The portion of this rule providing for the designation of a "complex business case" was adopted by the North Carolina Supreme Court on August 28, 1995, as a result of a recommendation in the January 1995 Annual Report of THE NORTH CAROLINA COMMISSION ON BUSINESS LAWS AND THE ECONOMY chaired by the North Carolina Attorney General.

The North Carolina Commission on Business Laws and the Economy was established by an executive order of the Governor on April 19, 1994, to recommend "any needed changes in existing statutes and regulations which affect the operation of businesses in North Carolina, particularly Chapter 55 of the North Carolina General Statutes ... and to recommend any needed new statutes, rules and regulations designed to assure that North Carolina offers a legal environment which provides the flexibility and support to allow businesses to operate successfully in this state and which will attract them to locate and incorporate here."

The Commission's report noted that many national corporations incorporate in the state of Delaware because of that state's Chancery Court which provides a high level of judicial expertise on corporate law issues. It also observed the desirability of a state having a substantial body of corporate law that provides predictability for business decision making. Also, it is essential that corporations litigating complex business issues receive timely and well reasoned written decisions from an expert judge.

Accordingly, the Commission recommended that the North Carolina Supreme Court amend Rule 2.1 to allow the Chief Justice to designate certain cases as complex business cases. The Commission also recommended that the Governor appoint at least one expert in corporate law matters as a Special Judge to hear cases designated by the Chief Justice pursuant to Rule 2.2.

The term "complex business case" is purposely not defined in order to give litigants the flexibility to seek a designation as such with respect to any business issue that they believe requires special judicial expertise. It is anticipated that any case involving significant issues arising under Chapters 55, 55B, 57C, 59, 78A, 78B and 78C of the General Statutes of North Carolina would be designated a complex business case.

## Rule 3. Continuances.

An application for a continuance shall be made to the presiding judge of the court in which the case is calendared.

When an attorney has conflicting engagements in different courts, priority shall be as follows: Appellate Courts, Superior Court, District Court, Magistrate's Court.

At mixed sessions, criminal cases in which the defendant is in jail shall have absolute priority. (Amended February 13, 1973.)

**Legal Periodicals.** — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

**The granting of a continuance is within the discretion of the trial court,** and its exercise will not be reviewed in the absence of manifest abuse of discretion. Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975).

**Where a motion for continuance is based on a right guaranteed by the Constitution,** the decision of the trial judge is reviewable as a question of law without a prior determination that there has been a gross abuse of discretion. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

**Error and Prejudice Must Be Shown.** — A new trial will be awarded because of a denial of a motion for continuance only if the defendant shows that there was error in the denial and that the defendant was prejudiced thereby. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

**Attorneys, under the guise of having business requiring their presence elsewhere,** ought not to be allowed to delay, defeat or prevent a litigant from having his case tried or being heard on a motion at some reasonably suitable and convenient time. Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975).

**Applied** in Lee v. Jenkins, 57 N.C. App. 522, 291 S.E.2d 797 (1982); Butler Serv. Co. v. Butler Serv. Group, Inc., 66 N.C. App. 132, 310 S.E.2d 406 (1984).

## Rule 4. Enlargement of time.

The judge or clerk of the court in which the action is pending may by order extend the time for filing answer.

When counsel, by consent under Rule 6 (b), agree upon an enlargement of time, the agreement shall be reduced to writing and filed with the clerk.

## Rule 5. Form of pleadings.

(a) If feasible, each paper presented to the court for filing shall be flat and unfolded, without manuscript cover, and firmly bound. All papers presented to the court for filing shall be letter size (8½″ x 11″), with the exception of wills and exhibits. The Clerk of Superior Court shall require a party to refile any paper which does not conform to this size. This subsection of this rule shall become effective on July 1, 1982. Prior to that date either letter or legal size papers will be accepted.

(b) All papers filed in civil actions, special proceedings and estates shall include as the first page of the filing a cover sheet summarizing the critical elements of the filing in a format prescribed by the Administrative Office of the Courts. The Clerk of Superior Court shall not reject the filing of any paper that does not include the required cover sheet. Instead, the clerk shall file the paper, notify the filing party of the omission and grant the filing party a reasonable time not to exceed five (5) days within which to file the required cover sheet. Until such time as the party files the required cover sheet, the court shall take no further action other than dismissal in the case. (Amended July 1, 1982; further amended September 5, 1996, effective October 1, 1996; further amended June 25, 1997, effective August 1, 1997.)

## Rule 6. Motions in civil actions.

All motions, written or oral, shall state the rule number or numbers under which the movant is proceeding. (See Rule 7 of Rules of Civil Procedure.)

Motions may be heard and determined either at the pre-trial conference or on motion calendar as directed by the presiding judge.

Every motion shall be signed by at least one attorney of record in his individual name. He shall state his office address and telephone number immediately following his signature. The signature of an attorney constitutes a certificate by him that he has read the motion; that to the best of his knowledge, information and belief, there are good grounds to support it; and that the motion is not interposed for delay. (See Rule 7 (b) (2); also Rule 11.)

The court in civil matters, on its motion or upon motion by a party, may in its discretion order that argument of any motion be accomplished by means of a telephone conference without requiring counsel to appear in court in person. Upon motion of any party, the court may order such argument to be recorded in such manner as the court shall direct. The court may direct which party shall pay the costs of the telephone calls. Conduct of counsel during such arguments may be subject to punishment as for direct criminal contempt of court. (Amended January 1, 1985.)

**Legal Periodicals.** — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

**CASE NOTES**

**Rule Number Necessary.** — The trial judge should decline to rule upon motions which did not contain the rule number under which the movant is proceeding. Lehrer v. Edgecombe Mfg. Co., 13 N.C. App. 412, 185 S.E.2d 727 (1972).

**Except When Defense of Insufficiency of Service of Process Asserted in Responsive Pleading.** — Although worded as a motion, the defense of insufficiency of service of process was asserted in defendant's responsive pleading; therefore, the rule requiring that a movant state the rule number under which he is proceeding was inapplicable, and failure of defendant to so state did not constitute waiver of his defense of invalid service of process. Williams v. Hartis, 18 N.C. App. 89, 195 S.E.2d 806 (1973).

**A motion which did not comply with the first paragraph of this rule was not totally defective** since the directive of this rule of practice has the salutary purpose of ensuring that the court and the parties are aware of the grounds upon which the movant is relying, the court's order in the case indicated that the judge was fully aware of the basis for the motion. Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979).

In a child custody proceeding where the defendant filed a motion for modification of a child visitation order, the plaintiff was not prejudiced by failure of the defendant to state the number of the rule under which he was proceeding as required by this rule since the written motion fully informed the plaintiff of the relief he was seeking and his reasons therefor. Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981).

**Where there is an awareness by the trial judge of the grounds,** the motion is adequately stated for the purposes of this rule. McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

**Applied** in Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234 (1971); Duke v. Meisky, 12 N.C. App. 329, 183 S.E.2d 292 (1971); Finley v. Finley, 15 N.C. App. 681, 190 S.E.2d 660 (1972); Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972); Smith v. Smith, 17 N.C. App. 416, 194 S.E.2d 568 (1973); Hamm v. Texaco, Inc., 17 N.C. App. 451, 194 S.E.2d 560 (1973); Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975); Sherman v. Myers, 29 N.C. App. 29, 222 S.E.2d 749 (1976).

**Stated** in Don's Plumbing Co. v. Union Supply Co., 11 N.C. App. 662, 182 S.E.2d 219 (1971); Mull v. Mull, 13 N.C. App. 154, 185 S.E.2d 14 (1971); Clouse v. Chairtown Motors, Inc., 14 N.C. App. 117, 187 S.E.2d 398 (1972).

**Cited** in Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972); Hoglen v. James, 38 N.C. App. 728, 248 S.E.2d 901 (1978); Whitfield v. Wakefield, 51 N.C. App. 124, 275 S.E.2d 263 (1981); Nickels v. Nickels, 51 N.C. App. 690, 277 S.E.2d 577 (1981); In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986); Hill v. Williams, — N.C. App. —, 547 S.E.2d 472, 2001 N.C. App. LEXIS 331 (2001).

## Rule 7. Pre-trial procedure (see Rule 16).

There shall be a pre-trial conference in every civil case, unless counsel for all parties stipulate in writing to the contrary and the court approves the

stipulation. Upon its own motion or upon request of any party, the court may dispense with or limit the scope of the pre-trial conference or order.

In uncontested divorce, default, and magistrate cases and magistrate appeals, a pre-trial conference or order is not required.

A party who has not requested a pre-trial conference may not move for a continuance on the ground that it has not been held.

At least twenty-one days prior to trial date, the plaintiff's attorney shall arrange a pre-trial conference with the defendant's attorney to be held not later than seven days before trial date. At such conference a pre-trial order shall be prepared and signed by the attorneys.

If, after due diligence, plaintiff's attorney cannot arrange a conference with defendant's attorney, he may apply to the presiding judge or other judge holding court in the district (or district court judge with respect to district court cases) who shall make an appropriate order. The defense attorney may initiate pre-trial under the same rules applicable to plaintiff's attorney.

The pre-trial order shall be in substance as shown on the attached sample form.

**Editor's note.** — The form referred to in this rule is set out following Rule 26.

**Legal Periodicals.** — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

**Cited** in Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

## Rule 7.1. Appointment of guardian ad litem for minors.

When any person is charged with a crime wherein the victim is a minor, or a minor is a potential witness to such crime, the court may appoint an attorney, from a list of pro bono attorneys approved by the Chief District Court Judge, as guardian ad litem for such minor victim or witness. (Adopted July 26, 1990, effective October 1, 1990.)

## Rule 8. Discovery.

Counsel are required to begin promptly such discovery proceedings as should be utilized in each case, and are authorized to begin even before the pleadings are completed. Counsel are not permitted to wait until the pre-trial conference is imminent to initiate discovery. (Amended May 16, 1988, effective July 1, 1988.)

**Cross References.** — As to sequence and timing of discovery, see § 1A-1, Rule 26(d).

CASE NOTES

**Applied** in Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980).

**Stated** in Winston-Salem Joint Venture v. City of Winston-Salem, 65 N.C. App. 532, 310 S.E.2d 58 (1983).

**Cited** in Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978); Ramsey v. Keever's Used Cars, 92 N.C. App. 187, 374 S.E.2d 135 (1988).

## Rule 9. Opening statements.

At any time before the presentation of evidence counsel for each party may make an opening statement setting forth the grounds for his claim or defense.

The parties may elect to waive opening statements.

Opening statements shall be subject to such time and scope limitations as may be imposed by the court.

### CASE NOTES

**This rule limits the purpose of the statement** to that of setting forth the grounds of a claim or defense, which means stating the evidence upon which the claim or defense is based. State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986).

**Defendant May Not Make Opening Statement Personally.** — The defendant, while retaining the services of his court-appointed counsel was not entitled to make an opening statement in propria persona. State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978).

**Limitations on Defendant's Opening Statement Not Reversible Error.** — While the trial judge may have more strictly supervised defendant's opening statement than is done in most trials, the limitations he imposed did not sufficiently prejudice the defendant's case to require reversal of his conviction. State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986).

**Quoted** in Keene v. Wake County Hosp. Sys., 74 N.C. App. 523, 328 S.E.2d 883 (1985).

**Cited** in State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331 (1980); State v. Freeman, 93 N.C. App. 380, 378 S.E.2d 545 (1989).

## Rule 10. Opening and concluding arguments.

In all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final.

In a criminal case, where there are multiple defendants, if any defendant introduces evidence the closing argument shall belong to the solicitor.

In a civil case, where there are multiple defendants, if any defendant introduces evidence, the closing argument shall belong to the plaintiff, unless the trial judge shall order otherwise.

**Legal Periodicals.** — For survey of 1982 law on evidence, see 61 N.C.L. Rev. 1126 (1983).

For article, "Rummaging Through a Wilderness of Verbiage: The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

### CASE NOTES

**Trial Judge Controls Sequence of Argument.** — The time and sequence of argument of a case to the jury is controlled by the trial judge under the authority of this rule. State v. Andrews, 12 N.C. App. 421, 184 S.E.2d 69, appeal dismissed, 279 N.C. 727, 185 S.E.2d 704 (1971), cert. denied, 404 U.S. 1041, 92 S. Ct. 726, 30 L. Ed. 2d 734, 407 U.S. 922, 92 S. Ct. 2467, 32 L. Ed. 2d 807 (1972); State v. Parker, 66 N.C. App. 293, 311 S.E.2d 321 (1984).

**And He May Rule at Close of Evidence.** — The trial judge is not required to rule upon the sequence of the argument prior to the closing of the evidence. State v. Andrews, 12 N.C. App. 421, 184 S.E.2d 69, appeal dismissed, 279 N.C. 727, 185 S.E.2d 704 (1971), cert. denied, 404 U.S. 1041, 92 S. Ct. 726, 30 L. Ed. 2d 734, 407 U.S. 922, 92 S. Ct. 2467, 32 L. Ed. 2d 807 (1972).

**The right to closing argument is a substantial legal right** of which a defendant may not be deprived by the exercise of a judge's discretion. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

**Where a defendant offers evidence at trial,** the prosecution has a right to make the opening and closing argument to the jury. State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992).

**Where the defendant in a capital case presented evidence,** the State had the right to give the final closing argument pursuant to this rule. Section 84-14 did not give defendant the right to respond to the State's argument.

State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Where defendant introduced evidence, the state had the right to the opening and closing arguments. State v. Battle, 322 N.C. 69, 366 S.E.2d 454, cert. denied, 487 U.S. 1220, 108 S. Ct. 2876, 101 L. Ed. 2d 911 (1988).

**When, in a capital case, a defendant does not offer evidence** and is entitled to both open and close the argument to the jury, his attorneys may each address the jury as many times as they desire during the closing phase of the argument. The only limit to this right is the provision of § 84-14 allowing the trial judge to limit to three the number of counsel on each side who may address the jury. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

Where defendant in a capital case presented no evidence during the guilt-innocence phase of the trial, he was entitled to present both the opening and final arguments to the jury during the closing arguments for that phase. State v. Mitchell, 321 N.C. 650, 365 S.E.2d 554 (1988).

**If in a non-capital case defendant elects to present evidence,** he is entitled to open the argument to the jury before the prosecution argues, and two of his counsel may address the jury within the time limits prescribed by § 84-14. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

**If defendant in a non-capital case does not present evidence,** he is entitled to both open and close the argument to the jury. In such case he may have one lawyer make the opening argument and one the closing, or he may waive one argument and have both lawyers address the jury during the remaining argument. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

**Where defendant by stipulation waived her opening argument,** failure of the trial judge to allow both of defendant's counsel to make the closing argument was prejudicial error on the non-capital as well as the capital charges against her. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

**When there are several defendants** and one of them elects to offer evidence, the right to open and conclude the arguments belongs to the State. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Defendant's contention that consolidation of cases resulted in prejudicial error to him because he was deprived of his right to open and close the jury arguments when his codefendant elected to testify is without merit. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

**The trial court properly allowed the State to close the argument** where defendant called a witness and examined him but did not glean helpful information from the witness because the witness refused to incriminate himself. State v. Curtis, 18 N.C. App. 116, 196 S.E.2d 278 (1973).

**Proper test as to whether an object has been put in evidence** is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of a witness. If the party shows it to a witness to refresh his recollection, it has not been offered into evidence. State v. Hall, 57 N.C. App. 561, 291 S.E.2d 812 (1982).

**The trial court did not err by granting defendant the right to open and close** the final jury arguments where defendant offered no evidence of his own, but was called to testify by plaintiff as an adverse witness. Hord v. Atkinson, 68 N.C. App. 346, 315 S.E.2d 339 (1984).

**Loss of Right to Open or Close.** — Where defendant offered the photograph into evidence because the witness said it would help him illustrate his testimony, the photograph was then shown to the jury while the witness answered questions posed by defendant and defendant used the photograph to impeach the witness, defendant lost his right to open and close jury argument. State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (1994), cert. denied, 513 U.S. 1134, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995), cert. dismissed, 342 N.C. 417, 465 S.E.2d 547 (1995).

**Closing Argument Improperly Denied.** — Where defendant in embezzlement case did not introduce any evidence within the meaning of this rule, she was improperly deprived of her right to the closing argument to the jury and entitled to a new trial. State v. Shuler, 135 N.C. App. 449, 520 S.E.2d 585 (1999).

**Applied** in State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971); State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331 (1980); State v. Watts, 77 N.C. App. 124, 334 S.E.2d 400 (1985); State v. Childers, 80 N.C. App. 236, 341 S.E.2d 760 (1986); Mutual Benefit Life Ins. Co. v. City of Winston-Salem, 100 N.C. App. 300, 395 S.E.2d 705 (1990).

**Quoted** in State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. Baker, 34 N.C. App. 434, 238 S.E.2d 648 (1977).

**Stated** in State v. Coffey, 326 N.C. 268, 389 S.E.2d 48 (1990); State v. Oxendine, 112 N.C. App. 731, 436 S.E.2d 906 (1993).

**Cited** in Durham v. Quincy Mut. Fire Ins. Co., 311 N.C. 361, 317 S.E.2d 372 (1984).

## Rule 11. Examination of witnesses.

When several counsel are employed by the same party, the examination or cross-examination of each witness for such party shall be conducted by one counsel, but the counsel may change with each successive witness or, with leave of the court, in a prolonged examination of a single witness.

### CASE NOTES

**Discretion of Trial Judge as to Change of Counsel.** — This rule clearly leaves it to the discretion of the trial court to permit a change of counsel if a lengthy examination is imminent. State v. Houston, 19 N.C. App. 542, 199 S.E.2d 668, cert. denied, 284 N.C. 426, 200 S.E.2d 662 (1973).

## Rule 12. Courtroom decorum.

Except for some unusual reason connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

Counsel are at all times to conduct themselves with dignity and propriety. All statements and communications to the court other than objections and exceptions shall be clearly and audibly made from a standing position behind the counsel table. Counsel shall not approach the bench except upon the permission or request of the court.

The examination of witnesses and jurors shall be conducted from a sitting position behind the counsel table except as otherwise permitted by the court [see S. vs. Bass, 5 N.C. App. 431 (1969)]. Counsel shall not approach the witness except for the purpose of presenting, inquiring about, or examining the witness with respect to an exhibit, document, or diagram.

Any directions or instructions to the court reporter are to be made in open court by the presiding judge only, and not by an attorney.

Business attire shall be appropriate dress for counsel while in the courtroom.

All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to. Colloquies between counsel should be avoided.

Adverse witnesses and suitors should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited.

The conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness. Counsel shall not knowingly misinterpret the contents of a paper, the testimony of a witness, the language or argument of opposite counsel or the language of a decision or other authority; nor shall he offer evidence which he knows to be inadmissible. In an argument addressed to the court, remarks or statements should not be interjected to influence the jury or spectators. (See Rule 22, Canons of Ethics and Rules of Professional Conduct, N.C. State Bar, G.S. 4A p. 273.)

Suggestions of counsel looking to the comfort or convenience of jurors should be made to the court out of the jury's hearing. Before, and during trial, a lawyer should attempt to avoid communicating with jurors, even as to matters foreign to the cause.

Counsel should yield gracefully to rulings of the court and avoid detrimental remarks both in court and out. He should at all times promote respect for the court. (See Rule 1, Canons of Ethics and Rules of Professional Conduct, N.C. State Bar, G.S. 4A p. 269.)

**Editor's note.** — The Revised Rules of Professional Conduct may be found in this Rules Volume.

**Legal Periodicals.** — For article discussing the mechanics of objecting, see 4 Campbell L. Rev. 339 (1982).

CASE NOTES

**Applied** in State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982).

**Quoted** in Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 336 N.C. 438, 444 S.E.2d 423 (1994).

**Cited** in State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

## Rule 13. Presence of counsel during jury deliberation.

The right to be present during the trial of civil cases shall be deemed to be waived by a party or his counsel by voluntary absence from the courtroom at a time when it is known that proceedings are being conducted, or are about to be conducted. In such event the proceedings, including the giving of additional instructions to the jury after they have once retired, or receiving the verdict, may go forward without waiting for the arrival or return of counsel or a party.

After the jury has retired to deliberate upon a verdict in a criminal case, at least one attorney representing the defendant shall remain in the immediate area of the courtroom so as to be available at all times during the deliberation of the jury and when the verdict is received.

## Rule 14. Custody and disposition of evidence at trial.

Once any item of evidence has been introduced, the clerk (not the court reporter) is the official custodian thereof and is responsible for its safekeeping and availability for use as needed at all adjourned sessions of the court and for appeal.

After being marked for identification, all exhibits offered or admitted in evidence in any cause shall be placed in the custody of the clerk, unless otherwise ordered by the court.

Whenever any models, diagrams, exhibits, or materials have been offered into evidence and received by the clerk, they shall be removed by the party offering them, except as otherwise directed by the court, within 30 days after final judgment in the trial court if no appeal is taken; if the case is appealed, within 60 days after certification of a final decision from the appellate division. At the time of removal a detailed receipt shall be given to the clerk and filed in the case file.

If the party offering an exhibit which has been placed in the custody of the clerk fails to remove such article as provided herein, the clerk shall write the attorney of record (or the party offering the evidence if he has no counsel) calling attention to the provisions of this rule. If the articles are not removed within 30 days after the mailing of such notice, they may be disposed of by the clerk.

## Rule 15. Electronic media and still photography coverage of public judicial proceedings.

(a) *Definition.*

The terms "electronic media coverage" and "electronic coverage" are used in the generic sense to include coverage by television, motion picture and still photography cameras, broadcast microphones and recorders.

(b) *Coverage allowed.*

Electronic media and still photography coverage of public judicial proceedings shall be allowed in the appellate and trial courts of this state, subject to the conditions below.

(1) The presiding justice or judge shall at all times have authority to prohibit or terminate electronic media and still photography coverage of public

judicial proceedings, in the courtroom or the corridors immediately adjacent thereto.

(2) Coverage of the following types of judicial proceedings is expressly prohibited: adoption proceedings, juvenile proceedings, proceedings held before clerks of court, proceedings held before magistrates, probable cause proceedings, child custody proceedings, divorce proceedings, temporary and permanent alimony proceedings, proceedings for the hearing of motions to suppress evidence, proceedings involving trade secrets, and in camera proceedings.

(3) Coverage of the following categories of witnesses is expressly prohibited: police informants, minors, undercover agents, relocated witnesses, and victims and families of victims of sex crimes.

(4) Coverage of jurors is prohibited expressly at any stage of a judicial proceeding, including that portion of a proceeding during which a jury is selected. The trial judge shall inform all potential jurors at the beginning of the jury selection process of the restrictions of this particular provision which is designated (b)(4).

(c) *Location of equipment and personnel.*

(1) The location of equipment and personnel necessary for electronic media and still photographic coverage of trial proceedings shall be at a place either inside or outside the courtroom in such a manner that equipment and personnel are completely obscured from view from within the courtroom and not heard by anyone inside the courtroom.

(i) If located within the courtroom, this area must be set apart by a booth or other partitioning device constructed therein at the expense of the media. Such construction must be in harmony with the general architectural style and decor of the courtroom and must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(ii) If located outside the courtroom, any booth or other partitioning device must be built so that passage to and from the courtroom will not be obstructed. This arrangement must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(2) Appropriate openings to allow photographic coverage of the proceedings under these rules may be made in the booth or partitioning device, provided that no one in the courtroom will see or hear any photographic or audio equipment or the personnel operating such equipment. Those in the courtroom are not to know when or if any such equipment is in operation.

(3) The presiding judge may, however, exercise his or her discretion to permit the use of electronic media and still photography coverage without booths or other restrictions set out in Rule 15(c)(1) and (c)(2) if the use can be made without disruption of the proceedings and without distraction to the jurors and other participants. Such permission may be withdrawn at any time.

(4) Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the courtroom.

(5) Media personnel shall not exit or enter the booth area or courtroom once the proceedings are in session except during a court recess or adjournment.

(6) Electronic media equipment and still photography equipment shall not be taken into the courtroom or removed from the designated media area except at the following times:

(i) prior to the convening of proceedings;

(ii) during the luncheon recess;

(iii) during any court recess with the permission of the presiding justice or judge; and

(iv) after adjournment for the day of the proceedings.

(7) The Chief Justice of the Supreme Court, and the Chief Judge of the Court of Appeals, may waive the requirements of Rule 15(c)(1) and (2) with respect to judicial proceedings in the Supreme Court and in the Court of Appeals, respectively.

(d) *Official representatives of the media.*

(1) This Court hereby designates the North Carolina Association of Broadcasters, the Radio and Television News Directors Association of the Carolinas, and the North Carolina Press Association, as the official representatives of the news media. The governing boards of these associations shall designate one person to represent the television media, one person to represent the radio broadcasters, and one person to represent still photographers in each county in which electronic media and still photographic coverage is desired. The names of the persons so designated shall be forwarded to the Senior Resident Superior Court Judge, the Director of the Administrative Office of the Courts, and the county manager or other official responsible for administrative matters in the county or municipality in which coverage is desired. Thereafter these persons shall conduct all negotiations with the appropriate officials concerning the construction of the booths or partitioning devices referred to above. Such persons shall also be the only persons authorized to speak for the media to the presiding judge concerning the coverage of any judicial proceedings.

(2) It is the express intent and purpose of this rule to preclude judges and other officials from having to "negotiate" with various representatives of the news media. Since these rules require pooling of equipment and personnel, cooperation by the media is of the essence and the designation of three media representatives is expressly intended to prevent presiding judges from having to engage in discussion with others from the media.

(e) *Equipment and personnel.*

(1) Not more than two television cameras shall be permitted in any trial or appellate court proceedings.

(2) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes, shall be permitted in any proceeding in a trial or appellate court.

(3) Not more than one wired audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup for all media purposes shall be accomplished with existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes may be installed and maintained at media expense. The microphones and wiring must be unobtrusive and shall be located in places designated in advance of any proceeding by the Senior Resident Superior Court Judge of the judicial district in which the court facility is located. Such modifications or additions must be approved by the governing body of the county or municipality which owns the facility. Provided, however, hand-held audio tape recorders may be used upon prior notification to, and with the approval of, the presiding judge; such approval may be withdrawn at any time.

(4) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

(5) In no event shall the number of personnel in the designated area exceed the number necessary to operate the designated equipment or which can comfortably be secluded in the restricted area.

(f) *Sound and light criteria.*

(1) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with the television camera.

(2) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with a still camera.

(g) *Courtroom light sources.*

With the concurrence of the Senior Resident Superior Court Judge of the judicial district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense and provided such modifications or additions are approved by the governing body of the county or municipality which owns the facility.

(h) *Conferences of counsel.*

To protect the attorney-client privilege and the right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, between adverse counsel, or between counsel and the presiding judge held at the bench.

(i) *Impermissible use of media material.*

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent and collateral thereto, or upon any retrial or appeal of such proceedings. (Amended June 13, 1990.)

**CASE NOTES**

**Cited** in State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992); State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998).

## Rule 16. Withdrawal of appearance.

No attorney who has entered an appearance in any civil action shall withdraw his appearance, or have it stricken from the record, except on order of the court. Once a client has employed an attorney who has entered a formal appearance, the attorney may not withdraw or abandon the case without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court. (See Smith vs. Bryant, 264 N.C. 208. See also Rule 43 of Rules of the N.C. State Bar, Volume 4(a) of General Statutes of North Carolina, page 278, entitled "Withdrawal from employment as attorney or counsel.")

**Editor's note.** — The Rules of the North Carolina State Bar, referred to above, are now found in this Rules Volume.

**CASE NOTES**

**This rule is expressly based on Smith v. Bryant,** 264 N.C. 208, 141 S.E.2d 303 (1965). Underwood v. Williams, 69 N.C. App. 171, 316 S.E.2d 342 (1984).

**Attorney-Client Relationship Dissolved at Any Time.** — As between the attorney and his client, the relationship may, in good faith, be dissolved at any time. High Point Bank & Trust Co. v. Morgan-Schultheiss, Inc., 33 N.C. App. 406, 235 S.E.2d 693, cert. denied, 293 N.C. 258, 237 S.E.2d 535 (1977), 439 U.S. 958, 99 S. Ct. 360, 58 L. Ed. 2d 350 (1978).

**But Withdrawal from Litigation Must Be Justified.** — The attorney may not be released from litigation in which he appears for the client without first satisfying the court that his

withdrawal therefrom is justified, and whether he is justified will depend on the circumstances of that particular situation. High Point Bank & Trust Co. v. Morgan-Schultheiss, Inc., 33 N.C. App. 406, 235 S.E.2d 693, cert. denied, 293 N.C. 258, 237 S.E.2d 535 (1977), 439 U.S. 958, 99 S. Ct. 360, 58 L. Ed. 2d 350 (1978).

**Notice Required.** — Where plaintiff's counsel had entered a formal appearance, he was obligated to provide plaintiff with reasonable notice of his intention to withdraw, and where the record failed to show any such facts, on the record plaintiff was entitled to reversal of the summary judgment entered against him immediately upon the withdrawal of his attorney despite plaintiff's request for an opportunity to obtain new counsel. Underwood v. Williams, 69 N.C. App. 171, 316 S.E.2d 342 (1984).

**No more than adequate or reasonable notice is required** for an attorney to withdraw as attorney of record. Hensgen v. Hensgen, 53 N.C. App. 331, 280 S.E.2d 766 (1981).

**Where attorney provided reasonable notice to his client** by filing a motion to withdraw some five months prior to trial, which motion the defendant received, and filed with the superior court and sent to the defendant notice of the hearing to determine the motion to withdraw about three weeks prior to the hearing, and where the trial court granted attorney's motion for withdrawal and ordered said withdrawal, attorney completely complied with the requirements of this rule in withdrawing from representation of defendant. Benton v. Mintz, 97 N.C. App. 583, 389 S.E.2d 410 (1990).

**Where the defendant told his attorney that he did not require his services** any longer, there was just cause for the attorney's withdrawal within the meaning of this rule. County of Wayne ex rel. Scanes v. Jones, 79 N.C. App. 474, 339 S.E.2d 435 (1986).

**The defendant received reasonable notice of his attorney's withdrawal** within the meaning of this rule, as evidenced by the defendant's statement in court that he did not want a lawyer. County of Wayne ex rel. Scanes v. Jones, 79 N.C. App. 474, 339 S.E.2d 435 (1986).

**Trial court did not abuse its discretion** in allowing attorney to withdraw as counsel on the day of trial; the dissolution of the attorney/client relationship, as well as the defendant's reputed unwillingness to pay surveyors hired pursuant to litigation preparation, constituted justifiable cause for attorney's withdrawal. Benton v. Mintz, 97 N.C. App. 583, 389 S.E.2d 410 (1990).

**Cited** in Snover v. Grabenstein, 106 N.C. App. 453, 417 S.E.2d 284 (1992); Dunkley v. Shoemate, 350 N.C. 573, 515 S.E.2d 442 (1999).

## Rule 17. Entries on records.

No entry shall be made on the records of the Superior or District Court by any person except the clerk, his regular deputy, a person specifically directed by the presiding judge, or the judge himself.

### CASE NOTES

**Entry of Magistrate's Judgment.** — Entry of the magistrate's judgment for purposes of § 1A-1, Rule 58 was not less automatic simply because the magistrate himself (rather than a clerk) noted the judgment in the court minutes. Provident Fin. Co. v. Locklear, 89 N.C. App. 535, 366 S.E.2d 599 (1988).

## Rule 18. Custody of appellate reports.

The clerks of the Superior Court shall be officially responsible for the care and preservation of the volumes of the Appellate Division Reports furnished by the State pursuant to G.S. 147-45, and for the General Statutes of North Carolina furnished by the Administrative Office of the Courts under G.S. 7A-300(9).

Each clerk of the Superior Court shall report to the presiding judge of the Superior Court at the first session of court held in January and July each year what volumes, if any, of said reports are missing or have been lost since the last report to the end that the judge may enter an appropriate order for replacement of same pursuant to G.S. 147-51.

## Rule 19. Recordari; supersedeas; certiorari.

The Superior Court shall grant the writ of recordari only upon petition specifying the grounds of the application. The petition shall be verified and the

writ may be granted with or without notice. When notice is given the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties. The decision thereupon shall be final, subject to appeal as in other cases. If the petition is granted without notice, the petitioner shall give an undertaking for costs and for the writ of supersedeas, if prayed for. In such case the writ of recordari shall be made returnable to the session of the Superior Court of the county in which the judgment or proceeding complained of was granted, and ten days' written notice shall be given to the adverse party before the session of the court to which the writ is returnable. At that session the respondent may move to dismiss, or may answer the writ, and the answer shall be verified. After hearing the application upon the petition, answer, affidavits, and evidence offered, the court shall dismiss it or order it placed on the trial docket.

In proper cases and in like manner, the court may grant the writ of certiorari. When a diminution of the record is suggested and the record is manifestly imperfect, the court may grant the writ upon motion in the cause.

CASE NOTES

**Comparison to Power of Court of Appeals to Issue Writ Under § 7A-32.** — The authority of a superior court to grant a writ of certiorari pursuant to this rule in appropriate cases is analogous to the power of the Court of Appeals to issue a writ of certiorari pursuant to § 7A-32(c). State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830 (1993), appeal dismissed, cert. denied, 334 N.C. 436, 433 S.E.2d 181 (1993).

**Cited** in State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

## Rule 20. Sureties.

No member of the bar, in any case, suit, action or proceeding in which he appears as counsel, and no employee of the General Court of Justice, employee of the Sheriff's Department, or other law enforcement officer, shall act as a surety in any suit, action or proceeding pending in any division of the General Court of Justice.

CASE NOTES

**Cited** in State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492 (1984).

## Rule 21. Jury instruction conference.

At the close of the evidence (or at such earlier time as the judge may reasonably direct) in every jury trial, civil and criminal, in the superior and district courts, the trial judge shall conduct a conference on instructions with the attorneys of record (or party, if not represented by counsel). Such conference shall be out of the presence of the jury, and shall be held for the purpose of discussing the proposed instructions to be given to the jury. An opportunity must be given to the attorneys (or party if not represented by counsel) to request any additional instructions or to object to any of those instructions proposed by the judge. Such requests, objections and the rulings of the court thereon shall be placed in the record. If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference.[1]

At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the

[1] In criminal cases, the provisions of G.S. 15A-1231 are also applicable.

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charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

The court may recall the jury after they have retired and give them additional instructions in order: (i) to correct or withdraw an erroneous instruction; or (ii) to inform the jury on a point of law which should have been covered in the original instructions. The provisions of the first two paragraphs of this Rule 21 also apply to the giving of all additional instructions, except that the court in its discretion shall decide whether additional argument will be permitted. (Added September 15, 1981.)

**Legal Periodicals.** — For article, "Rummaging Through a Wilderness of Verbiage; The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

## CASE NOTES

**N.C.R.A.P., Rule 10(b)(2) and this rule were designed to prevent unnecessary new trials** caused by errors in instructions that the court could have corrected if brought to its attention at the proper time. This policy is met when a request to alter an instruction has been submitted and the trial judge has considered and refused the request. In most instances, it is obvious that further objection at the close of the instructions would be unavailing. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

**Conference Need Not Be Recorded.** — The rule does not require that the conference be on the record. State v. Thompson, 59 N.C. App. 425, 297 S.E.2d 177 (1982), appeal dismissed and cert. denied, 307 N.C. 582, 299 S.E.2d 650 (1983).

This rule does not require that the instruction conference be recorded or that the judge's proposed charge be reduced to writing and submitted to counsel. By the very wording of the rule itself, it is clear that the instruction conference contemplated by this rule shall be held "for the purpose of discussing the proposed instructions" and providing an opportunity for counsel to object to any of the instructions proposed by the judge or to request additional instructions. State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982).

**Conference Not Recorded Absent Request.** — Where either party to the trial desires a recorded instruction conference, § 15A-1231(b) requires that party to make such a request to the trial judge. Absent such a request, § 15A-1231(b) is silent and this rule supplements the statute (pursuant to § 7A-34) by requiring the trial court to hold an unrecorded conference. State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983); State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

**Section 15A-1231 and this rule require** the trial court to hold an unrecorded conference in every case and a recorded conference when requested by either party. State v. Clark, 71 N.C. App. 55, 322 S.E.2d 176 (1984), overruled on other grounds, State v. Moore, 327 N.C. 378, 395 S.E.2d 124 (1990).

**No Conflict with § 15A-1231(b).** — Since this rule requires a conference without regard to whether it is requested by a party and § 15A-1231(b) requires a recorded conference only at the request of either party, there is no conflict between the two provisions. Both may be given full effect. State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983).

**Failure to Request Conference.** — Where defendant did not request an instruction conference, he cannot assert as error the trial court's failure to conduct one. State v. Morris, 60 N.C. App. 750, 300 S.E.2d 46 (1983).

Subsection (b) of § 15A-1231 clearly contemplates that a defendant is required to request an instruction conference as a prerequisite for assigning error to the trial court's failure to conduct one. Pursuant to the provisions of § 7A-34, the provision of this rule which requires the trial judge to conduct a jury instruction conference conflicts with subsection (b) of § 15A-1231 and must give way to the provisions of the statute. State v. Morris, 60 N.C. App. 750, 300 S.E.2d 46 (1983).

**Failure to make contemporaneous objection to the jury charge** prevents the court from recalling the jury to correct allegedly prejudicial errors; such failure constitutes a waiver of the right to challenge the instructions on appeal. Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323, cert. denied, 311 N.C. 401, 319 S.E.2d 271 (1984).

**Failure to Request Further Jury Instructions.** — Where trial court submitted two mitigating circumstances instructions (one for mental or emotional disturbance and one for inability to conform conduct to law), at the defendant's request, and defendant failed to request further instructions concerning his organic brain damage, he failed to preserve an objection for review. State v. McNeil, 350 N.C.

657, 518 S.E.2d 486 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

**Where record is silent as to whether a jury instruction conference was held, the defendant must hold himself accountable.** State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Where no instruction conference is held, the defendant should seek a stipulation from the State pursuant to N.C.R.A.P., Rule 11(a) acknowledging the trial court's failure in this regard. Where the State refuses to agree to the stipulation, and objects to such a notation in the record, the defendant should request that trial judge settle the record on appeal pursuant to N.C.R.A.P., Rule 11(c). Where the record is silent, it will be presumed that the trial court acted correctly. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

**Where defense counsel submitted a written request for particular instructions prior to the jury arguments,** which the court denied, defendant was not required by either N.C.R.A.P., Rule 10(b)(2) or this rule to repeat his objection to the jury instructions in order to properly preserve his exception for appellate review. State v. Smith, 311 N.C. 287, 316 S.E.2d 73 (1984).

**Applied** in Radford v. Norris, 63 N.C. App. 501, 305 S.E.2d 64 (1983); Harris v. Scotland Neck Rescue Squad, Inc., 75 N.C. App. 444, 331 S.E.2d 695 (1985); State v. Richardson, 328 N.C. 505, 402 S.E.2d 401 (1991).

**Stated** in Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985); Lumley v. Capoferi, 120 N.C. App. 578, 463 S.E.2d 264 (1995).

**Cited** in State v. Owens, 61 N.C. App. 342, 300 S.E.2d 581 (1983); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987); State v. Martin, 322 N.C. 229, 367 S.E.2d 618 (1988).

## Rule 22. Local court rules.

In order to insure general uniformity throughout each respective judicial district, all trial judges shall observe and enforce the local rules in effect in any judicial district where they are assigned to hold court. The senior resident judge shall see that each judge assigned to hold a session of court in his district is furnished with a copy of the local court rules at or before the commencement of his assignment. (Added September 21, 1981.)

## Rule 23. Summary jury trial.

The senior resident superior court judge of any superior court district or a presiding judge unless prohibited by local rule may upon joint motion or consent of all parties order the use of a summary jury upon good cause shown and upon such terms and conditions as justice may require. The order shall describe the terms and conditions proposed for the summary jury proceeding. Such terms and conditions may include: (1) a provision as to the binding or non-binding nature of the summary jury proceeding; (2) variations in the method for selecting jurors; (3) limitations on the amount of time provided for argument and the presentation of witnesses; (4) limitations on the method or manner of presentation of evidence; (5) appointment of a referee to preside over the summary jury trial; (6) setting the date for conducting the summary jury trial; (7) approval of a settlement agreement contingent upon the outcome of the summary jury proceeding; or (8) such other matters as would in the opinion of the court contribute to the fair and efficient resolution of the dispute. The court shall maintain jurisdiction over the case, and may, where appropriate, rule on pending motions. (Added August 14, 1991.)

### COMMENT

The summary jury trial is a dispute resolution technique pioneered in the federal courts in the early 1980s. Pursuant to reports of its success as a settlement tool, the North Carolina Supreme Court in 1987 authorized the use of summary jury trials in three judicial districts on an experimental basis. Since that time, a number of summary jury trials have been conducted.

In May, 1991, a report prepared by the Private Adjudication Center detailed the North Carolina state courts' experience with the summary jury trial. That report noted that a number of variations in the summary jury trial

process had been used successfully. The report concluded with a number of recommendations subsequently endorsed by the Dispute Resolution Committee of the North Carolina Bar Association. One of the recommendations was that the North Carolina Supreme Court adopt a General Rule of Practice authorizing the use of summary jury trials throughout the state.

Pursuant to that recommendation, this General Rule provides for the use of summary jury trials based upon the voluntary agreement of the parties, manifested by way of a joint motion to the court. The rule further provides that the authority to approve the request lies with the senior resident superior court judge for the county or judicial district in which the action is pending (or a presiding judge unless prohibited by local rule). The request shall be approved if the court finds that it is in the interest of justice for good cause shown. In this context, good cause relates to a judicial determination that the use of a summary jury trial represents a fair and efficient method for pursuing settlement of the dispute.

The Rule does *not* authorize a court to mandate the use of a summary jury trial. Nothing in the rule, however, prohibits a judge or other court administrator from raising the possibility of using a summary jury trial with the parties during a pre-trial conference or other event and explaining the possible benefits of the process.

The summary jury trials conducted to date in North Carolina have employed a number of innovative techniques. These variations, many of which are detailed in the above-referenced report, have ranged from variations on the methods used to select a jury to limitations on the manner in which evidence is presented. In other cases, the parties have requested that the court appoint a referee to preside over the summary jury proceeding. In addition, the parties in several summary jury trials have agreed that the results would be binding, sometimes pursuant to a "high/low agreement" that limits both parties' risk of an aberrant result. The Rule specifically provides that the court has the power to authorize these practices in appropriate cases.

## Rule 23.1. Summary procedure for significant commercial disputes.

(a) The senior resident superior court judge of any superior court district, or a presiding judge unless prohibited by local rule may, upon joint motion or consent of all parties, order Summary Procedures For A Significant Commercial Dispute ("Summary Procedures") in any case within the subject matter jurisdiction of the superior court that does not include a claim for personal, physical or mental injury where: (1) the amount in controversy exceeds $500,000; (2) at least one party is a North Carolina citizen, corporation or business entity (or a subsidiary of such corporation or business entity) or has its principal place of business in North Carolina; and (3) all parties agree to forego any claim of punitive damages and waive the right to a jury trial. The joint motion or consent for summary procedures must be filed with the court on or before the time the answer or other responsive pleading is due.

(b) To the extent they are not inconsistent with these Rules, the North Carolina Rules of Civil Procedure shall apply to Summary Proceedings.

(c) Summary Proceedings are commenced by filing with the court and serving a complaint.

(d) The complaint and any accompanying documents shall be sent, via next-day delivery, to either a person identified in the agreement between the, parties to receive notice of Summary Proceedings or, absent such specification, to each defendant's principal place of business or residence.

(e) The complaint must state prominently on the first page that Summary Proceedings are requested. The complaint also must contain a statement of the amount in controversy exclusive of interest and costs, a statement that one of the parties is a North Carolina citizen, corporation or other business entity, or a subsidiary of such corporation or business entity, or that such citizen, corporation or business entity has its principal place of business in North Carolina, and a statement that the defendant has agreed to submit to the court's jurisdiction for Summary Proceedings.

(f) Any action pending in any other jurisdiction which could have been brought initially as a Summary Proceeding in this state may, subject to the procedures of the court of the other jurisdiction, be transferred to the superior courts of this state and converted to a Summary Proceeding. Any pending

action in this state may be converted to a Summary Proceeding subject to the provisions of this Rule 23.1. Within 15 days of transfer or conversion, the court shall hold a conference at which time a schedule for the remainder of the action shall be established that will conform as closely as feasible to these Rules. Unless cause not to do so is shown, the record from any prior proceedings shall be incorporated into the record of the Summary Proceedings.

(g) A defendant shall serve an answer together with any compulsory counterclaims within thirty days after service of the complaint.

(h) A plaintiff shall serve a reply to any counterclaim within twenty days after service of the counterclaim. Any answer or reply to a counterclaim shall be accompanied by a list of persons consulted, or relied upon, in connection with preparation of the answer or reply. Crossclaims, permissive counterclaims and third-party claims are not permitted absent agreement of all parties. Crossclaims, counterclaims and third-party claims, if any, are subject to the provisions of this Rule 23.1.

(i) A party may, in lieu of an answer, respond to a complaint or counterclaim by moving to dismiss. A motion to dismiss and accompanying brief must be served within thirty days after service of the complaint upon the defendant. A motion to dismiss a counterclaim and accompanying brief must be served within twenty days after service of the counterclaim. An answering brief in opposition to a motion to dismiss is due within fifteen days after service of the motion and accompanying brief. A reply brief in support of the motion to dismiss is due within ten days after service of the answering brief. The opening and answering briefs shall be limited to twenty-five pages, and the reply brief shall be limited to ten pages. Within thirty days after the filing of the final reply brief on all motions to dismiss, if no oral argument occurs, or within thirty days of oral argument if oral argument occurs, the court will either render to the parties its decision on such motions or will provide to the parties an estimate of when such decision will be rendered. Such additional time shall not normally exceed an additional thirty days. If a motion to dismiss a claim is denied, an answer to that claim shall be filed within ten days of such denial.

(j) Within seven days of filing of the answer, a plaintiff shall serve upon the answering defendant a copy of each document in the possession of plaintiff that plaintiff intends to rely upon at trial, a list of witnesses that plaintiff intends to call at trial and a list of all persons consulted or relied upon in connection with preparation of the complaint. Within thirty days of the filing of the answer, the answering defendant shall provide to all other parties a list of witnesses it intends to call at trial and all documents in its possession that it intends to rely upon at trial. A plaintiff against whom a counterclaim has been asserted shall serve upon the defendant asserting the counterclaim, within thirty days after such plaintiff receives from the defendant asserting the counterclaim the materials referred to in the preceding sentence, a list of witnesses it intends to call at trial in opposition to the counterclaim, all documents in its possession that it intends to rely upon at trial in opposition to the counterclaim and all persons consulted or relied upon in connection with preparation of the reply to the counterclaim.

(k) Any party may serve upon any other party up to ten written interrogatories (with any sub-part to be counted as a separate interrogatory) within thirty days after the filing of the last answer. Responses are due within twenty days after service of the interrogatories.

(l) Any party may serve on any other party a request to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents, said request to be served within thirty days after filing of the last answer. The response to a document request is due within thirty days after service of the document request and must include production of the documents at that time for inspection and copying.

(m) Any party may serve on any other party a notice of up to four depositions to begin no sooner than seven days from service of the deposition notice and subsequent to the filing of all answers. A party may also take the deposition of any person on the other party's witness list, as well as the deposition of all affiants designated under Section (s) of this Rule. The first deposition notice by a party shall be served not later than sixty days after the filing of the last answer. All depositions to be taken by a party are to be scheduled and completed within 120 days of the filing of the last answer.

(n) Any party may serve upon any other party up to ten requests for admission (with any sub-part to be counted as a separate request for admission) within thirty days of the filing of the last answer. Responses are due within twenty days after service.

(o) Parties are obligated to supplement promptly their witness list, the documents they intend to rely upon at trial and their discovery responses under this Rule.

(p) Discovery disputes, at the court's option, may be addressed by a referee at the expense of the parties or by the court.

(q) Unless otherwise ordered by the court, all discovery, except for discovery contemplated by Section (s) of this Rule, shall be completed within 180 days after the filing of the last answer.

(r) There shall be no motions for summary judgment in Summary Proceedings.

(s) If the parties notify the court within seven days after the close of discovery that the parties have agreed to forego witnesses at the trial of the case, the parties may submit briefs and appendices in support of their cause as follows:

(1) Plaintiff's Brief — thirty days following close of discovery;

(2) Defendant's Answering Brief — within thirty days after service of plaintiff's brief; and

(3) Plaintiff's Reply Brief — within fifteen days of service after Defendant's Answering Brief.

(t) The briefs must cite to the applicable portions of the record. Affidavits may be used but all affiants must be identified prior to the close of discovery and must, at the option of any other party, be produced for deposition within two weeks from the date discovery would otherwise close. The court shall make factual findings based upon the record presented by the parties.

(u) If the parties elect to forego witnesses at trial and submit briefs pursuant to Section (s) of this Rule, trial shall consist of oral argument, or submission on briefs if oral argument is waived by the parties with the consent of the court, to be scheduled and held by the court within one week of the close of briefing pursuant to Section (s).

(v) If the parties elect to present live witnesses at trial, the trial shall be scheduled to begin between thirty and sixty days after the close of discovery. Within thirty days after the close of discovery, the parties shall provide the court with an agreed upon pre-trial order. The pre-trial order shall include a summary of the claims or defenses of each party, a list of the witnesses each party expects to introduce at trial, a description of any evidentiary disputes, a statement of facts not in dispute and a statement of disputed issues of fact. Absent contrary court order, the trial shall be limited to five days, which shall be allocated equitably between the parties. Within ten days of the close of trial, each party shall file a post-trial brief including proposed findings of fact and conclusions of law. Each brief shall not exceed fifty pages.

(w) Within thirty days after the filing of the final brief, if no oral argument occurs, or within thirty days of argument if oral argument occurs, the court will either render to the parties its decision after trial or will provide the parties an estimate of when the decision will be rendered. Such additional time shall not normally exceed an additional thirty days.

(x) The schedule for trial or decision after trial or on motion to dismiss shall not be extended unless the assigned judge certifies that:

(1) the demands of the case and its complexity make the schedule under this Rule incompatible with serving the ends of justice; or

(2) the trial cannot reasonably be held or the decision rendered within such time because of the complexity of the case or the number of complexity of pending criminal cases. (Adopted August 28, 1995.)

COMMENT

This rule was adopted by the North Carolina Supreme Court on June 1995 as a result of a recommendation in the January 1995 Annual Report of THE NORTH CAROLINA COMMISSION ON BUSINESS LAWS AND THE ECONOMY chaired by the North Carolina Attorney General.

In its report, the Commission observed that, historically, North Carolina has enjoyed a high quality, efficient civil justice system. In recent years, however, civil litigation (and in particular, complex commercial litigation) has become protracted and costly. This is the result of many factors, including more complex laws and regulations, legal tactics and increased caseload.

The North Carolina court system has responded by instituting a number of innovative programs designed to resolve civil disputed more efficiently. These include court-ordered arbitration and a pilot mediation program. Despite the success of these programs, resolution of complex business and commercial disputes in North Carolina can be slow and costly.

The Commission noted that a state court system that offers alternatives to the normal litigation process which can expedite the resolution of significant commercial and business disputes is an important element of a progressive, efficient business environment. States that can offer alternatives are more likely to attract new business organizations and incorporations as well as business expansions.

Accordingly, the Commission recommended that the State establish a summary procedure through which North Carolina citizens and business entities and their subsidiaries, and businesses which are headquartered in the State can more efficiently resolve significant commercial civil disputes. The Commission recommended that the availability of such a summary procedure be limited to civil actions in superior court where 1) at least $500,000 is in controversy, 2) at least one party is a North Carolina citizen or corporation, and 3) all parties consent to the summary proceeding. As part of that agreement, the parties to the summary proceeding must agree to waive punitive damages and a jury trial.

The summary procedure provided for in this Rule can be utilized only with consent of all parties. It does not restrict any parties' rights and is supplementary to, and not inconsistent with, the General Statutes. (See G.S. 7A-34.) Its purpose is to provide an alternative procedure for significant commercial disputes and thereby improve the overall efficiency of the court system.

## Rule 24. Pretrial conference in capital cases.

There shall be a pretrial conference in every case in which the defendant stands charged with a crime punishable by death. No later than ten days after the superior court obtains jurisdiction in such a case, the district attorney shall apply to the presiding superior court judge or other superior court judge holding court in the district, who shall enter an order requiring the prosecution and defense counsel to appear before the court within forty-five days thereafter for the pretrial conference. Upon request of either party at the pretrial conference the judge may for good cause shown continue the pretrial conference for a reasonable time.

At the pretrial conference, the court and the parties shall consider:

(1) simplification and formulation of the issues, including, but not limited to, the nature of the charges against the defendant, and the existence of evidence of aggravating circumstances;

(2) timely appointment of assistant counsel for an indigent defendant when the State is seeking the death penalty; and

(3) such other matters as may aid in the disposition of the action.

The judge shall enter an order that recites that the pretrial conference took place, and any other actions taken at the pretrial conference.

This rule does not affect the rights of the defense or the prosecution to request, or the court's authority to grant, any relief authorized by law, including but not limited to appointment of assistant counsel, in advance of the pretrial conference. (Adopted April 7, 1994, effective June 1, 1994.)

**CASE NOTES**

**Right to Be Present Not Implicated.** — The pretrial conference required in capital cases by this Rule takes place before the jury panel is selected and sworn and is not a stage of the trial; thus, defendant's right to be present at every stage of his trial was not implicated by Rule 24 pretrial conference. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, 518 U.S. 1023, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

**Aggravating Circumstances.** — While this rule requires the trial court and the parties to consider the existence of evidence of aggravating circumstances, nothing in the rule intimates that the prosecution must enumerate with finality all aggravating circumstances it will pursue at trial, nor can a trial court require the prosecution to declare which aggravating circumstances it will rely upon at the punishment phase. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, 518 U.S. 1023, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

**The pretrial conference is an administrative device** intended to clarify the charges against the defendant and assist the prosecutor in determining whether any aggravating circumstances exist which justify seeking the death penalty. Capital defendants do not stand to lose or gain any rights at the conference. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, 518 U.S. 1023, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

**Failure of District Attorney to Apply for Conference.** — As a sanction for the district attorney's failure to timely file a petition for a pretrial conference, the trial court exceeded its authority by prohibiting the state from seeking the death penalty where defendant was charged with first-degree murder. State v. Rorie, 348 N.C. 266, 500 S.E.2d 77 (1998).

## Rule 25. Motions for Appropriate Relief in Capital Cases.

When considering motions for appropriate relief in capital cases, the following procedures should be followed:

(1) All appointments of defense counsel should be made by the senior resident superior court judge in each district or the senior resident superior court judge's judicial designee;

(2) All requests for experts, *ex parte* matters, interim attorney fee awards, and similar matters arising prior to the filing of a motion for appropriate relief should be ruled on by the senior resident superior court judge or the senior resident superior court judge's designee; and

(3) All motions for appropriate relief, when filed, should be referred to the senior resident superior court judge or the senior resident superior court judge's designee for the judge's review and administrative action, including, as may be appropriate, dismissal, calendaring for hearing, entry of a scheduling order for subsequent events in the case, or other appropriate actions. (Adopted May 7, 1998, effective June 1, 1998.)

## Rule 26. Secure Leave Periods for Attorneys.

(A) *Purpose, Authorization.* In order to secure for the parties to actions and proceedings pending in the Superior and District Courts, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this Rule.

(B) *Length, Number.* A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's secure leave

periods pursuant to this Rule and to Rule 33A of the Rules of Appellate Procedure shall not exceed, in the aggregate, three calendar weeks.

(C) *Designation, Effect.* To designate a secure leave period an attorney shall file a written designation containing the information required by subsection (D), with the official specified in subsection (E), and within the time provided in subsection (F). Upon such filing, the secure leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any trial, hearing, in-court or out-of-court deposition, or other proceeding in the Superior or District Courts during that secure leave period.

(D) *Content of Designation.* The designation shall contain the following information:

(1) the attorney's name, address, telephone number and state bar number,

(2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end,

(3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule and to Rule 33A of the Rules of Appellate Procedure,

(4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering with the timely disposition of any matter in any pending action or proceeding, and

(5) a statement that no action or proceeding in which the attorney has entered an appearance has been scheduled, peremptorily set or noticed for trial, hearing, deposition or other proceeding during the designated secure leave period.

(E) *Where to File Designation.* The designation shall be filed as follows:

(1) if the attorney has entered an appearance in any criminal action, in the office of the District Attorney for each prosecutorial district in which any such case or proceeding is pending;

(2) if the attorney has entered an appearance in any civil action, either

(a) in the office of the trial court administrator for each superior court district and district court district in which any such case is pending or,

(b) if there is no trial court administrator for a superior court district, in the office of the Senior Resident Superior Court Judge for that district,

(c) if there is no trial court administrator for a district court district, in the office of the Chief District Court Judge for that district;

(3) if the attorney has entered an appearance in any special proceeding or estate proceeding, in the office of the Clerk of Superior Court of the county in which any such matter is pending;

(4) if the attorney has entered an appearance in any juvenile proceeding, with the juvenile case calendaring clerk in the office of the Clerk of Superior Court of the county in which any such proceeding is pending.

(F) *When to File Designation.* To be effective, the designation shall be filed:

(1) no later than ninety (90) days before the beginning of the secure leave period, and

(2) before any trial, hearing, deposition or other matter has been regularly scheduled, peremptorily set or noticed for a time during the designated secure leave period.

(G) *Procedure When Court Proceeding Scheduled Despite Designation.* If, after a designation of a secure leave period has been filed pursuant to this rule, any trial, hearing, in-court deposition or other in-court proceeding is scheduled or peremptorily set for a time during the secure leave period, the attorney shall file with the official by whom the matter was calendared or set, and serve on all parties, a copy of the designation with a certificate of service attached. Any party may, within ten days after service of the copy of the designation and certificate of service, file a written objection with that official and serve a copy

on all parties. The only ground for objection shall be that the designation was not in fact filed in compliance with this Rule. If no objection is filed, that official shall reschedule the matter for a time that is not within the attorney's secure leave period. If an objection is filed, the court shall determine whether the designation was filed in compliance with this Rule. If the court finds that the designation was filed as provided in this Rule, it shall reschedule the matter for a time that is not within the attorney's secure leave period. If the court finds the designation was not so filed, it shall enter any scheduling, calendaring or other order that it finds to be in the interests of justice.

(H) *Procedure When Deposition Scheduled Despite Designation.* If, after a designation of a secure leave period has been filed pursuant to this Rule, any deposition is noticed for a time during the secure leave period, the attorney may serve on the party that noticed the deposition a copy of the designation with a certificate of service attached, and that party shall reschedule the deposition for a time that is not within the attorney's secure leave period. Any dispute over whether the secure leave period was properly designated pursuant to this Rule shall be resolved pursuant to the portions of the Rules of Civil Procedure, G.S. 1A-1, that govern discovery.

(I) Nothing in this Rule shall limit the inherent power of the Superior and District Courts to reschedule a case to allow an attorney to enjoy a leave during a period that has not been designated pursuant to this Rule, but there shall be no entitlement to any such leave. (Adopted May 6, 1999, effective January 1, 2000.)

**Editor's note.** — This rule is effective January 1, 2000, and applies to all actions and proceedings pending in the Superior and District Courts on and after that date.

## FORMS

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NORTH CAROLINA
..... COUNTY

IN THE GENERAL COURT OF JUSTICE
..... COURT DIVISION
FILE #: .....
FILM #: .....

PLAINTIFF
-v-
DEFENDANT

CERTIFICATE OF READINESS

As counsel of record for ..... (name the party you represent) who is a plaintiff, defendant, third party, (underline one) hereby certify that:

A. I know of no procedural matters which would delay the trial of the case when called for jury trial;

B. All motions existing of record this date have been heard or otherwise disposed of;

C. I know of no parties or witnesses desired that will not be available on the trial date;

D. I know of no current reason that would cause me to move for a continuance:

E. I am ready for trial.

This the ..... day of .....

.....
Attorney

IN THE GENERAL COURT OF JUSTICE
..... COURT DIVISION

Plaintiff(s)
-v-
Defendant(s)

FILE #: .....
FILM #: .....

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## ORDER ON FINAL PRE-TRIAL CONFERENCE

Pursuant to the provisions of Rule 16 of the State Rules of Civil Procedure, and Rule 7, General Rules of Practice, a final pre-trial conference was held in the above-entitled cause on the ..... day of ... .. .. .. .. .. , ....., ....., Esquire, appeared as counsel for the plaintiff(s); ..... Esquire, appeared as counsel for the defendant(s).

(1) It is stipulated that all parties are properly before the court, and that the court has jurisdiction of the parties and of the subject matter.

**Note:** If the facts are otherwise, they should be accurately stated.

(2) It is stipulated that all parties have been correctly designated, and there is no question as to misjoinder or nonjoiner of parties.

**Note:** If the facts are otherwise, they should be accurately stated.

(3) If any of the parties is appearing in a representative capacity, it should be set out whether there is any question concerning the validity of the appointment of the representatives. Letters or orders of appointment should be included as exhibits.

(4) Any third-party defendant(s) or cross-claimant(s) should follow the same procedure as set out in paragraphs (4) and (5) for plaintiff(s) and defendant(s).

(5) In addition to the other stipulations contained herein, the parties hereto stipulate and agree with respect to the following undisputed facts:

(a)

(b)

**Note:** Here set out all facts not in genuine dispute.*

(6) The following is a list of all known exhibits the plaintiff(s) may offer at the trial:

(a)

(b)

**Note:** Here list the pre-trial identification numbers and a brief description of each exhibit.

(7) It is stipulated and agreed that opposing counsel has been furnished a copy of each exhibit identified by the plaintiff(s), except:

**Note:** Here set out stipulations with respect to (a) the exhibits that have been furnished opposing counsel, (b) the arrangements made for the inspection of exhibits of the character which prohibits or makes impractical their reproduction, and (c) any waiver of the requirement to furnish opposing counsel with a copy of exhibits.

**Note:** Here set out with particularity the basis of objection to specific exhibits.

It is permissible to generally reserve the right to object at the trial on grounds of relevancy and materiality.

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*IN CONTRACT CASES, the parties may stipulate upon, or state their contentions with respect to, where applicable (a) whether the contract relied on was oral or in writing; (b) the date thereof and the parties thereto; (c) the substance of the contract, if oral; (d) the terms of the contract which are relied upon and the portions in controversy; (e) any collateral oral agreement, if claimed, and the terms thereof; (f) any specific breach of contract claimed; (g) any misrepresentation of fact claimed; (h) if modification of the contract or waiver of covenant is claimed, what modification or waiver, and how accomplished, and (i) an itemized statement of damages claimed to have resulted from any alleged breach, the source of such information, how computed, and any books or records available to sustain such damage claimed.

IN MOTOR VEHICLE NEGLIGENCE CASES, the parties may stipulate upon, or state their contentions with respect to, where applicable (a) the owner, type and make of each vehicle involved; (b) the agency of each driver; (c) the place and time of accident, conditions of weather, and whether daylight or dark; (d) nature of terrain as to level, uphill or downhill; (e) traffic signs, signals and controls, if any, and by what authority placed; (f) any claimed obstruction of view; (g) presence of other vehicles, where significant; (h) a detailed list of acts of negligence or contributory negligence claimed; (i) specific statutes, ordinances, rules, or regulations alleged to have been violated, and upon which each of the parties will rely at the trial to establish negligence or contributory negligence; (j) a detailed list of nonpermanent personal injuries claimed, including the nature and extent thereof; (k) a detailed list of permanent personal injuries claimed, including nature and extent thereof; (l) the age of any party alleged to have been injured; (m) the life and work expectancy of any party seeking to recover for permanent injury; (n) an itemized statement of all special damages, such as medical, hospital, nursing, etc., with the amount and to whom paid; (o) if loss of earnings is claimed; (p) a detailed list of any property damages, and (q) in death cases, the decedent's date of birth, marital status, employment for five years before date of death, work expectancy, reasonable probability of promotion, rate of earnings for five years before date of death, life expectancy under mortuary table, and general physical condition immediately prior to date of death.

IN THE EVENT THIS CASE DOES NOT FALL WITHIN ANY OF THE CATEGORIES ENUMERATED ABOVE, OR ANY OF THE CATEGORIES SUGGESTED BY THIS FORM, COUNSEL SHOULD, NEVERTHELESS, SET FORTH THEIR POSITIONS WITH AS MUCH DETAIL AS POSSIBLE.

(8) It is stipulated and agreed that each of the exhibits identified by the plaintiff(s) is genuine and, if relevant and material, may be received in evidence without further identification or proof, except:

(9) The following is a list of all known exhibits the defendant(s) may offer at the trial:

(a)

(b)

**Note:** Here list the pre-trial identification and a brief description of each exhibit.

(10) It is stipulated and agreed that opposing counsel has been furnished a copy of each exhibit identified by the defendant(s), except:

**Note:** Here set out stipulations with respect to (a) the exhibits that have been furnished opposing counsel, (b) the arrangements made for the inspection of exhibits of the character which prohibits or makes impractical their reproduction, and (c) any waiver of the requirement to furnish opposing counsel with a copy of exhibits.

(11) It is stipulated and agreed that each of the exhibits identified by the defendant(s) is genuine, and, if relevant and material, may be received in evidence without further identification or proof, except:

**Note:** Here set out with particularity the basis of objection to specific exhibits. It is permissible to generally reserve the right to object at the trial on grounds of relevancy and materiality.

(12) Any third-party defendant(s) and cross-claimant(s) should follow the same procedure with respect to exhibits as required of plaintiff(s) and defendant(s).

**Note:** Attention is called to the provisions of the pre-trial rule with respect to the obligation to immediately notify opposing counsel if additional exhibits are discovered after the preparation of this order.

(13) The following is a list of the names and addresses of all known witnesses the plaintiff(s) may offer at the trial:

**Note:** If either plaintiff or defendant's attorney discover additional witnesses after this listing, attention is called to obligation to notify opposing counsel. There shall be no requirement that all witnesses listed by a party be used, and the court may after satisfactory explanation, in his discretion, permit the use of a witness not listed.

The trial judge may, for good cause made known to him, relieve a party of the requirement of disclosing the name of any witness.

(14) The following is a list of the names and addresses of all known witnesses the defendant(s) may offer at the trial:

(15) Any third-party defendant(s) and cross-claimant(s) should follow the same procedure with respect to witnesses as above outlined for plaintiff(s) and defendant(s). Counsel shall immediately notify opposing counsel if the names of additional witnesses are discovered after the preparation of this order.

(16) There are no pending motions, and neither party desires further amendments to the pleadings, except:

**Note:** Here state facts regarding pending or impending motion. If any motions are contemplated, such as motion for the physical examination of a party, motion to take the deposition of a witness for use as evidence, etc., such motions should be filed in advance of the final pre-trial

conference so that they may be ruled upon, and the rulings stated in the final pre-trial order. The same procedure should be followed with respect to any desired amendments to pleadings.

(17) Additional consideration has been given to a separation of the triable issues, and counsel for all parties are of the opinion that a separation of issues in this particular case would (would not) be feasible.

(18) The plaintiff(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

(19) The defendant(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

(20) Any third-party defendant(s) and cross-claimant(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

**Note:** In all instances possible, the parties should agree upon the triable issues and include them in this order in the form of a stipulation, in lieu of the three preceding paragraphs.

(21) Counsel for the parties announced that all witnesses are available and the case is in all respects ready for trial. The probable length of the trial is estimated to be ..... days.

(22) Counsel for the parties represent to the court that, in advance of the preparation of this order, there was a full and frank discussion of settlement possibilities. Counsel for the plaintiff will immediately notify the clerk in the event of material change in settlement prospects.

**Note:** Counsel shall be required to conduct a frank discussion concerning settlement possibilities at the time of the conference of attorneys, and clients shall either be consulted in advance of the conference concerning settlement figures or be available for consultation at the time of the conference. The court will make inquiry at the time of trial as to whether this requirement was strictly observed.

.....
Counsel for Plaintiff(s)

.....
Counsel for Defendant(s)

Date: ..... Approved and Ordered Filed.

.....
Judge Presiding

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# North Carolina
# Child Support Guidelines

Effective October 1, 1998

*Commentary*

North Carolina G.S. 50-13.4 provides that the Conference of Chief District Judges prescribe uniform statewide presumptive guidelines for the computation of child support obligations of each parent. The statute further provides that the Conference periodically, but at least once every four years, review the guidelines to determine whether their application results in appropriate child support award amounts, and modify the guidelines accordingly.

The North Carolina Child Support Guidelines are based on the Income Shares model, which was developed under the Child Support Guidelines Project funded by the U.S. Office of Child Support Enforcement and administered by the National Center for State Courts. The Income Shares model is based on the concept that child support is a shared parental obligation and that a child should receive the same proportion of parental income he or she would have received if the parents lived together. The Schedule of Basic Child Support Obligations is based primarily on economic research performed pursuant to the Family Support Act of 1988 [P.L. 100-485, §128] which required the U.S. Department of Health and Human Services to conduct a study of the patterns of expenditures on children. The schedule has been updated using changes in the Consumer Price Index.

The Guidelines contained herein are the product of the ongoing review process conducted by the Conference of Chief District Judges. A public hearing was conducted by the Conference to provide interested citizens an opportunity to comment on the Guidelines, and written comment was received from agencies, attorneys, judges and members of the public. These Guidelines are intended to provide adequate awards of child support which are equitable to all parties.

The North Carolina Child Support Guidelines, promulgated by the Conference of Chief District Judges, are published jointly by the North Carolina Administrative Office of the Courts and the Department of Health and Human Services in accordance with G.S. 50-13.4(c). Additional copies of these Guidelines and worksheets for applying the guidelines are available from the offices of the Clerk of Superior Court. For information regarding the use of the Child Support Guidelines, please refer to G.S. 50-13.4(c)

## NORTH CAROLINA CHILD SUPPORT GUIDELINES

Pursuant to G.S. 50-13.4(c), The North Carolina Child Support Guidelines apply as a rebuttable presumption to all child support orders in North Carolina, except as discussed below. The Guidelines must be used for temporary and permanent child support orders. The Guidelines must be used by the Court as the basis for reviewing the adequacy of child support levels in non-contested cases as well as contested hearings. **The Court upon its own motion or upon motion of a party may deviate from the Guidelines in cases where application would be inequitable to one of the parties or to the child(ren).** If the Court orders an amount other than the amount determined by application of the Guidelines, the Court must make written findings of fact that justify the deviation, that state the amount of the award which would have resulted from application of the Guidelines, and that justify the amount of support awarded by the Court.

### Self-Support Reserve; Obligors With Low Incomes

The Guidelines include a self support reserve which ensures that obligors have sufficient income to maintain a minimum standard of living based on the 1997 federal poverty level for one person. For obligors with an adjusted gross income of less than $800, the Guidelines require, absent a deviation, the establishment of a minimum support order ($50). For obligors with adjusted gross incomes above $800, the Schedule of Basic Support Obligations incorporates a further adjustment to maintain the self support reserve for the obligor.

If the obligor's adjusted gross income falls within the shaded area of Schedule, the basic child support obligation and the obligor's total child support obligation are computed using only the obligor's income. This approach prevents disproportionate increases in the child support obligation with moderate increases in income and protects the integrity of the self support reserve. In all other cases, the basic child support obligation is computed using the combined adjusted gross incomes of both parents.

### Determination of Support In Cases Involving High Combined Incomes

The Guidelines apply in cases in which the parents' combined adjusted gross income is equal to or less than $15,000 per month ($180,000 per year). For cases with higher combined adjusted gross income, child support should be determined on a case-by-case basis, provided that the amount of support awarded may not be lower than the maximum basic child support obligation shown in the Schedule of Basic Child Support Obligations.

### Assumptions and Expenses Included In Schedule of Basic Child Support Obligations

The Schedule is based on economic data which represent estimates of total expenditures on child rearing costs to age 18, except for child care, health insurance, and health care costs in excess of $100 per year. Expenses incurred in the exercise of visitation are not factored into the Schedule.

The Schedule presumes that the custodial parent claims the tax exemptions for child(ren) due support. If the custodial parent has no income tax liability, the Court may consider assigning the exemption for the child(ren) to the non-custodial parent, and deviate from the Guidelines by increasing the obligor's support obligation.

### Income

The Schedule of Basic Child Support Obligations is based upon net income converted to gross annual income for ease of application.

For the purposes of these Guidelines, "income" is defined as actual gross income of the parent, if employed to full capacity, or potential income if unemployed or underemployed. All income is assumed to be taxable. Gross income of each parent should be determined as specified below.

(1) Gross Income: Gross Income includes income from any source, except as excluded below, and includes but is not limited to income from salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, workers compensation benefits, unemployment insurance benefits, disability pay and insurance benefits, gifts, prizes and alimony or maintenance received from persons other than the parties to the instant action. While includable as income, non-recurring, one-time payments should be distinguished from ongoing income.

Specifically excluded are benefits received from means-tested public assistance programs, including but not limited to Aid to Families with Dependent Children (AFDC), Supplemental Security Income (SSI), Food Stamps and General Assistance.

Payments received for the benefit of the child(ren) as a result of the disability of the obligor are not considered in determining the amount of the basic child support obligation. However, after determining the amount of the obligor's support obligation under the Guidelines, the Court should compare the obligor's support obligation under the guidelines with the benefits received by the child(ren) due to the obligor's disability, and determine whether an award of child support in addition to the child(ren) disability-related benefits is warranted.

(2) Income from self-employment or operation of a business: For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, gross income is defined as gross receipts minus ordinary and necessary expenses required for self-employment or business operation. Specifically excluded from ordinary and necessary expenses for purposes of these Guidelines are amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by the Court to be inappropriate for determining gross income for purposes of calculating child support. In general, income and expenses from self-employment or operation of a business should be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes.

Expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business should be counted as income if they are significant and reduce personal living expenses. Such payments might include a company car, free housing, or reimbursed meals.

(3) Potential income: If a parent is voluntarily unemployed or underemployed, child support may be calculated based on a determination of potential income, except that a determination of potential income should not be made for a parent who is physically or mentally incapacitated or is caring for a child who is under the age of three years and for whom the parents owe a joint legal responsibility.

Determination of potential income shall be made by determining employment potential and probable earnings level based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community. If the parent has no recent work history and/or vocational training, it is suggested that the Court determine potential income in an amount not less than the minimum hourly wage for a 40-hour work week.

In each case, the Court should consider the prior circumstances of the parties in determining whether or not to impute income.

(4) Income verification: Income statements of the parents should be verified with documentation of both current and past income. Suitable documentation of current earnings (at least one full month) includes pay stubs, employer statements, or receipts and expenses if self-employed. Documentation of current income must be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period. Sanctions may be imposed for failure to comply with this provision on the motion of either party or by the Court on its own motion.

Pre-existing Child Support Obligations and Responsibility for Other Child(ren)

The amount of child support payments actually made by a party under any pre-existing court order(s) or separation agreement(s) should be deducted from the party's gross income. Actual payments of alimony should not be considered as a deduction from gross income but may be considered as a factor to vary from the final presumptive child support obligation.

The amount of a party's financial responsibility (as determined below) for his or her natural or adopted child(ren) currently residing in the household who are not involved in this action should be deducted from gross income. Use of this deduction is appropriate at the time of the establishment of a child support order or in a proceeding to modify an existing order. However, in a proceeding to modify, it may not be the sole basis for a reduction.

The deduction for a party's financial responsibility for other child(ren) is one-half of the basic child support obligation for the number of child(ren) who live with the party and for whom the party owes a duty of support (other than the child(ren) involved in the instant action). For purposes of this deduction, the basic child support obligation for the other child(ren) living with the party is based on the combined adjusted gross incomes of the party and the other responsible parent of such child(ren).

Basic Child Support Obligation

The basic child support obligation is determined using the attached Schedule of Basic Child Support Obligations. For combined monthly adjusted gross income amounts falling between amounts shown in the Schedule, the basic child support obligation should be interpolated.

The number of child(ren) refers to child(ren) for whom the parents share joint legal responsibility and for whom support is being sought.

**Child Care Costs**

Reasonable child care costs incurred due to employment or job search are added to the basic obligation as follows:

(1) When the gross monthly income of the party paying such costs falls below the level indicated below, 100% of child care costs are added.

| | |
|---|---|
| 1 child = $1,100 | 4 children = $1,900 |
| 2 children = $1,500 | 5 children = $2,100 |
| 3 children = $1,700 | 6 children = $2,300 |

At these income levels, the party paying child care costs does not benefit from the tax credit for child care.

(2) When the income of the party exceeds the level indicated above, 75% of child care costs are included since the party would be entitled to the income tax credit for child care expenses.

**Health Insurance**

The cost of health (medical, or medical and dental) insurance for the child(ren) due support is added to the basic child support obligation. The amount included in the child support calculation is the amount of the health insurance premium actually attributable to the child(ren) subject to the order. If this amount is not available or cannot be verified, the total cost of the premium is divided by the total number of persons covered by the policy and then multiplied by the number of child(ren) covered by the policy who are subject to the order.

If coverage is provided through an employer, only the employee's portion of cost should be considered. Medical or dental expenses in excess of $100 per year and uncompensated by insurance should be divided between the parties in proportion to their respective incomes.

**Extraordinary Expenses**

The Court may make adjustments for extraordinary expenses and order payments for such term and in such manner as the Court deems necessary. Extraordinary medical expenses are uninsured expenses in excess of $100 for a single illness or condition. Extraordinary medical expenses include, but are not limited to, such costs as are reasonably necessary for orthodontia, dental treatments, asthma treatments, physical therapy and any uninsured chronic health problem. At the discretion of the Court, professional counseling or psychiatric therapy for diagnosed mental disorders may also be considered as an extraordinary medical expense. Payments for such expenses shall be apportioned in the same manner as the basic child support obligation and ordered paid as the Court deems equitable.

Other extraordinary expenses are added to the basic child support obligation. Other extraordinary expenses include:

(1) Any expenses for attending any special or private elementary or secondary schools to meet the particular educational needs of the child(ren); (2) Any expenses for transportation of the child(ren) between the homes of the parents.

**Determination of Child Support Obligation and Presumptive Award**

Except in cases in which the obligor's income falls within the shaded area of the Schedule, the non-custodial parent's total child support obligation is determined by adding the basic child support obligation plus the amount of work-related child care costs, health insurance premiums for the child(ren), and extraordinary expenses. The non-custodial parent's total child support obligation is determined by multiplying the total child support obligation by the non-custodial parent's percentage of combined adjusted income. The non-custodial parent receives credit for the amount of child care costs, health insurance premiums, and extraordinary expenses that he or she pays out-of-pocket. The recommended child support order is determined by subtracting the amount of child care costs, health insurance premiums for the child(ren), and extraordinary expenses paid by the non-custodial parent from the non-custodial parent's total child support obligation.

**Modification**

In any proceeding to modify an existing order which is three years old or older, a deviation of 15% or more between the amount of the existing order and the amount of child support resulting from application of the Guidelines shall be presumed to constitute a substantial change of circumstances warranting modification. If the order is less than three years old, this presumption does not apply.

## North Carolina

Proposed Monthly Basic Child Support Obligations

| Combined Gross Monthly Income | Effective October 1, 1998 | | | | | |
|---|---|---|---|---|---|---|
| | One Child | Two Children | Three Children | Four Children | Five Children | Six Children |
| 0-800 | 50 | 50 | 50 | 50 | 50 | 50 |
| 850 | 68 | 69 | 69 | 70 | 71 | 72 |
| 900 | 100 | 101 | 102 | 103 | 104 | 105 |
| 950 | 132 | 134 | 135 | 136 | 138 | 139 |
| 1000 | 164 | 166 | 168 | 170 | 171 | 173 |
| 1050 | 196 | 198 | 201 | 203 | 205 | 207 |
| 1100 | 223 | 231 | 233 | 236 | 239 | 241 |
| 1150 | 232 | 263 | 266 | 269 | 272 | 275 |
| 1200 | 240 | 296 | 299 | 302 | 306 | 309 |
| 1250 | 249 | 328 | 332 | 336 | 339 | 343 |
| 1300 | 258 | 361 | 365 | 369 | 373 | 377 |
| 1350 | 266 | 387 | 398 | 402 | 406 | 411 |
| 1400 | 274 | 399 | 430 | 435 | 440 | 444 |
| 1450 | 282 | 411 | 463 | 468 | 473 | 478 |
| 1500 | 290 | 422 | 496 | 501 | 507 | 512 |
| 1550 | 298 | 434 | 513 | 534 | 540 | 546 |
| 1600 | 306 | 445 | 527 | 567 | 573 | 579 |
| 1650 | 314 | 457 | 540 | 597 | 606 | 613 |
| 1700 | 322 | 468 | 554 | 612 | 639 | 646 |
| 1750 | 330 | 480 | 567 | 627 | 672 | 679 |
| 1800 | 338 | 491 | 581 | 642 | 696 | 713 |
| 1850 | 346 | 503 | 594 | 657 | 712 | 746 |
| 1900 | 354 | 514 | 608 | 672 | 728 | 779 |
| 1950 | 362 | 526 | 621 | 686 | 744 | 796 |
| 2000 | 370 | 538 | 635 | 701 | 760 | 814 |
| 2050 | 378 | 549 | 648 | 716 | 777 | 831 |
| 2100 | 386 | 561 | 662 | 731 | 793 | 848 |
| 2150 | 394 | 572 | 675 | 746 | 809 | 866 |
| 2200 | 402 | 584 | 689 | 761 | 825 | 883 |
| 2250 | 410 | 595 | 702 | 776 | 841 | 900 |
| 2300 | 418 | 607 | 716 | 791 | 858 | 918 |
| 2350 | 426 | 618 | 730 | 806 | 874 | 935 |

## North Carolina

Proposed Monthly Basic Child Support Obligations

| Combined Gross Monthly Income | Effective October 1, 1998 | | | | | |
|---|---|---|---|---|---|---|
| | One Child | Two Children | Three Children | Four Children | Five Children | Six Children |
| 2400 | 434 | 630 | 743 | 821 | 890 | 952 |
| 2450 | 442 | 641 | 757 | 836 | 906 | 970 |
| 2500 | 450 | 653 | 770 | 851 | 922 | 987 |
| 2550 | 458 | 664 | 783 | 865 | 938 | 1004 |
| 2600 | 465 | 675 | 796 | 880 | 953 | 1020 |
| 2650 | 472 | 685 | 807 | 892 | 967 | 1035 |
| 2700 | 479 | 694 | 818 | 904 | 980 | 1048 |
| 2750 | 485 | 703 | 829 | 916 | 992 | 1062 |
| 2800 | 492 | 712 | 839 | 927 | 1005 | 1075 |
| 2850 | 498 | 721 | 850 | 939 | 1018 | 1089 |
| 2900 | 504 | 730 | 860 | 950 | 1030 | 1102 |
| 2950 | 511 | 740 | 871 | 962 | 1043 | 1116 |
| 3000 | 517 | 749 | 881 | 974 | 1055 | 1129 |
| 3050 | 524 | 758 | 892 | 985 | 1068 | 1143 |
| 3100 | 530 | 767 | 902 | 997 | 1081 | 1156 |
| 3150 | 536 | 776 | 913 | 1008 | 1093 | 1170 |
| 3200 | 543 | 785 | 923 | 1020 | 1106 | 1183 |
| 3250 | 549 | 794 | 934 | 1032 | 1119 | 1197 |
| 3300 | 555 | 803 | 945 | 1044 | 1131 | 1211 |
| 3350 | 561 | 812 | 955 | 1056 | 1144 | 1224 |
| 3400 | 567 | 821 | 966 | 1068 | 1157 | 1238 |
| 3450 | 574 | 830 | 977 | 1079 | 1170 | 1252 |
| 3500 | 580 | 839 | 988 | 1091 | 1183 | 1266 |
| 3550 | 586 | 848 | 998 | 1103 | 1196 | 1280 |
| 3600 | 592 | 857 | 1009 | 1115 | 1209 | 1293 |
| 3650 | 598 | 866 | 1020 | 1127 | 1222 | 1307 |
| 3700 | 604 | 875 | 1031 | 1139 | 1234 | 1321 |
| 3750 | 610 | 884 | 1041 | 1151 | 1247 | 1335 |
| 3800 | 617 | 893 | 1052 | 1163 | 1260 | 1348 |
| 3850 | 623 | 902 | 1063 | 1174 | 1273 | 1362 |
| 3900 | 629 | 911 | 1074 | 1186 | 1286 | 1376 |
| 3950 | 635 | 920 | 1084 | 1198 | 1299 | 1390 |

## North Carolina

Proposed Monthly Basic Child Support Obligations

| Combined Gross Monthly Income | Effective October 1, 1998 | | | | | |
|---|---|---|---|---|---|---|
| | One Child | Two Children | Three Children | Four Children | Five Children | Six Children |
| 4000 | 638 | 925 | 1090 | 1205 | 1306 | 1397 |
| 4050 | 642 | 930 | 1096 | 1211 | 1312 | 1404 |
| 4100 | 645 | 934 | 1101 | 1217 | 1319 | 1411 |
| 4150 | 648 | 939 | 1106 | 1222 | 1325 | 1418 |
| 4200 | 652 | 944 | 1112 | 1228 | 1331 | 1425 |
| 4250 | 655 | 948 | 1117 | 1234 | 1338 | 1432 |
| 4300 | 658 | 953 | 1122 | 1240 | 1344 | 1438 |
| 4350 | 662 | 958 | 1128 | 1246 | 1351 | 1445 |
| 4400 | 665 | 962 | 1133 | 1252 | 1357 | 1452 |
| 4450 | 668 | 967 | 1138 | 1258 | 1363 | 1459 |
| 4500 | 671 | 972 | 1144 | 1264 | 1370 | 1466 |
| 4550 | 675 | 976 | 1149 | 1270 | 1376 | 1473 |
| 4600 | 678 | 981 | 1154 | 1276 | 1383 | 1479 |
| 4650 | 682 | 987 | 1162 | 1284 | 1392 | 1489 |
| 4700 | 684 | 990 | 1165 | 1287 | 1395 | 1493 |
| 4750 | 686 | 993 | 1168 | 1290 | 1399 | 1496 |
| 4800 | 688 | 997 | 1171 | 1293 | 1402 | 1500 |
| 4850 | 691 | 1000 | 1173 | 1297 | 1406 | 1504 |
| 4900 | 693 | 1004 | 1176 | 1300 | 1409 | 1508 |
| 4950 | 695 | 1007 | 1179 | 1303 | 1413 | 1511 |
| 5000 | 697 | 1010 | 1182 | 1306 | 1416 | 1515 |
| 5050 | 699 | 1014 | 1185 | 1310 | 1420 | 1519 |
| 5100 | 701 | 1017 | 1188 | 1313 | 1423 | 1523 |
| 5150 | 703 | 1020 | 1191 | 1316 | 1426 | 1526 |
| 5200 | 705 | 1024 | 1194 | 1319 | 1430 | 1530 |
| 5250 | 707 | 1027 | 1196 | 1322 | 1433 | 1533 |
| 5300 | 709 | 1030 | 1199 | 1325 | 1436 | 1537 |
| 5350 | 711 | 1033 | 1202 | 1328 | 1440 | 1540 |
| 5400 | 713 | 1036 | 1205 | 1331 | 1443 | 1544 |
| 5450 | 715 | 1040 | 1207 | 1334 | 1446 | 1547 |
| 5500 | 720 | 1047 | 1216 | 1344 | 1457 | 1559 |
| 5550 | 725 | 1053 | 1225 | 1354 | 1467 | 1570 |

## North Carolina

### Proposed Monthly Basic Child Support Obligations

| Combined Gross Monthly Income | Effective October 1, 1998 | | | | | |
|---|---|---|---|---|---|---|
| | One Child | Two Children | Three Children | Four Children | Five Children | Six Children |
| 5600 | 730 | 1060 | 1234 | 1363 | 1478 | 1581 |
| 5650 | 736 | 1067 | 1243 | 1373 | 1488 | 1593 |
| 5700 | 741 | 1074 | 1251 | 1383 | 1499 | 1604 |
| 5750 | 746 | 1081 | 1260 | 1393 | 1509 | 1615 |
| 5800 | 752 | 1088 | 1269 | 1402 | 1520 | 1626 |
| 5850 | 757 | 1095 | 1278 | 1412 | 1531 | 1638 |
| 5900 | 762 | 1101 | 1287 | 1422 | 1541 | 1649 |
| 5950 | 768 | 1108 | 1295 | 1431 | 1552 | 1660 |
| 6000 | 773 | 1115 | 1304 | 1441 | 1562 | 1672 |
| 6050 | 778 | 1122 | 1313 | 1451 | 1573 | 1683 |
| 6100 | 783 | 1129 | 1322 | 1461 | 1583 | 1694 |
| 6150 | 789 | 1136 | 1331 | 1470 | 1594 | 1706 |
| 6200 | 793 | 1142 | 1338 | 1479 | 1603 | 1715 |
| 6250 | 797 | 1148 | 1345 | 1487 | 1612 | 1724 |
| 6300 | 802 | 1154 | 1353 | 1495 | 1620 | 1734 |
| 6350 | 806 | 1160 | 1360 | 1502 | 1629 | 1743 |
| 6400 | 810 | 1167 | 1367 | 1510 | 1637 | 1752 |
| 6450 | 814 | 1173 | 1374 | 1518 | 1646 | 1761 |
| 6500 | 818 | 1179 | 1381 | 1526 | 1654 | 1770 |
| 6550 | 823 | 1185 | 1388 | 1534 | 1663 | 1779 |
| 6600 | 827 | 1191 | 1396 | 1542 | 1672 | 1789 |
| 6650 | 831 | 1197 | 1403 | 1550 | 1680 | 1798 |
| 6700 | 835 | 1203 | 1410 | 1558 | 1689 | 1807 |
| 6750 | 840 | 1209 | 1417 | 1566 | 1697 | 1816 |
| 6800 | 844 | 1215 | 1424 | 1574 | 1706 | 1825 |
| 6850 | 848 | 1222 | 1431 | 1582 | 1715 | 1835 |
| 6900 | 852 | 1228 | 1439 | 1590 | 1723 | 1844 |
| 6950 | 857 | 1234 | 1446 | 1598 | 1732 | 1853 |
| 7000 | 861 | 1240 | 1453 | 1606 | 1740 | 1862 |
| 7050 | 865 | 1246 | 1460 | 1613 | 1749 | 1871 |
| 7100 | 869 | 1252 | 1467 | 1621 | 1758 | 1881 |
| 7150 | 873 | 1258 | 1475 | 1629 | 1766 | 1890 |

## North Carolina

Proposed Monthly Basic Child Support Obligations

| Combined Gross Monthly Income | Effective October 1, 1998 | | | | | |
|---|---|---|---|---|---|---|
| | One Child | Two Children | Three Children | Four Children | Five Children | Six Children |
| 7200 | 878 | 1264 | 1482 | 1637 | 1775 | 1899 |
| 7250 | 882 | 1270 | 1489 | 1645 | 1783 | 1908 |
| 7300 | 886 | 1276 | 1496 | 1653 | 1791 | 1917 |
| 7350 | 890 | 1282 | 1502 | 1660 | 1800 | 1926 |
| 7400 | 894 | 1288 | 1509 | 1668 | 1808 | 1934 |
| 7450 | 898 | 1294 | 1516 | 1675 | 1816 | 1943 |
| 7500 | 902 | 1300 | 1523 | 1683 | 1824 | 1952 |
| 7550 | 907 | 1306 | 1530 | 1690 | 1832 | 1961 |
| 7600 | 911 | 1312 | 1537 | 1698 | 1841 | 1969 |
| 7650 | 915 | 1317 | 1543 | 1706 | 1849 | 1978 |
| 7700 | 919 | 1323 | 1550 | 1713 | 1857 | 1987 |
| 7750 | 923 | 1329 | 1557 | 1721 | 1865 | 1996 |
| 7800 | 927 | 1335 | 1564 | 1728 | 1873 | 2005 |
| 7850 | 931 | 1341 | 1571 | 1736 | 1882 | 2013 |
| 7900 | 935 | 1347 | 1578 | 1743 | 1890 | 2022 |
| 7950 | 940 | 1353 | 1585 | 1751 | 1898 | 2031 |
| 8000 | 944 | 1359 | 1591 | 1759 | 1906 | 2040 |
| 8050 | 948 | 1365 | 1598 | 1766 | 1914 | 2048 |
| 8100 | 952 | 1370 | 1605 | 1774 | 1923 | 2057 |
| 8150 | 956 | 1376 | 1612 | 1781 | 1931 | 2066 |
| 8200 | 960 | 1382 | 1619 | 1789 | 1939 | 2075 |
| 8250 | 964 | 1388 | 1626 | 1796 | 1947 | 2084 |
| 8300 | 968 | 1394 | 1633 | 1804 | 1956 | 2092 |
| 8350 | 973 | 1400 | 1639 | 1812 | 1964 | 2101 |
| 8400 | 977 | 1406 | 1646 | 1819 | 1972 | 2110 |
| 8450 | 981 | 1412 | 1653 | 1827 | 1980 | 2119 |
| 8500 | 985 | 1418 | 1660 | 1834 | 1988 | 2128 |
| 8550 | 989 | 1423 | 1667 | 1842 | 1997 | 2136 |
| 8600 | 993 | 1429 | 1674 | 1849 | 2005 | 2145 |
| 8650 | 997 | 1435 | 1681 | 1857 | 2013 | 2154 |
| 8700 | 1001 | 1441 | 1687 | 1865 | 2021 | 2163 |
| 8750 | 1006 | 1447 | 1694 | 1872 | 2030 | 2172 |

## North Carolina

Proposed Monthly Basic Child Support Obligations

| Combined Gross Monthly Income | Effective October 1, 1998 | | | | | |
|---|---|---|---|---|---|---|
| | One Child | Two Children | Three Children | Four Children | Five Children | Six Children |
| 8800 | 1010 | 1453 | 1701 | 1880 | 2038 | 2180 |
| 8850 | 1014 | 1459 | 1708 | 1886 | 2046 | 2189 |
| 8900 | 1018 | 1465 | 1715 | 1895 | 2054 | 2198 |
| 8950 | 1022 | 1471 | 1722 | 1903 | 2063 | 2207 |
| 9000 | 1026 | 1477 | 1729 | 1910 | 2071 | 2216 |
| 9050 | 1030 | 1482 | 1736 | 1918 | 2079 | 2225 |
| 9100 | 1034 | 1488 | 1743 | 1926 | 2087 | 2234 |
| 9150 | 1038 | 1494 | 1750 | 1933 | 2096 | 2242 |
| 9200 | 1043 | 1500 | 1757 | 1941 | 2104 | 2251 |
| 9250 | 1047 | 1506 | 1763 | 1949 | 2112 | 2260 |
| 9300 | 1051 | 1512 | 1770 | 1956 | 2121 | 2269 |
| 9350 | 1055 | 1518 | 1777 | 1964 | 2129 | 2278 |
| 9400 | 1059 | 1524 | 1784 | 1972 | 2137 | 2287 |
| 9450 | 1063 | 1530 | 1791 | 1979 | 2145 | 2296 |
| 9500 | 1067 | 1536 | 1798 | 1987 | 2154 | 2304 |
| 9550 | 1071 | 1541 | 1805 | 1994 | 2162 | 2313 |
| 9600 | 1075 | 1547 | 1812 | 2002 | 2170 | 2322 |
| 9650 | 1080 | 1553 | 1819 | 2010 | 2179 | 2331 |
| 9700 | 1084 | 1559 | 1826 | 2017 | 2187 | 2340 |
| 9750 | 1088 | 1565 | 1833 | 2025 | 2195 | 2349 |
| 9800 | 1092 | 1571 | 1839 | 2033 | 2203 | 2358 |
| 9850 | 1096 | 1577 | 1846 | 2040 | 2212 | 2366 |
| 9900 | 1100 | 1583 | 1853 | 2048 | 2220 | 2375 |
| 9950 | 1104 | 1589 | 1860 | 2056 | 2228 | 2384 |
| 10000 | 1108 | 1595 | 1867 | 2063 | 2236 | 2393 |
| 10050 | 1112 | 1601 | 1874 | 2071 | 2245 | 2402 |
| 10100 | 1116 | 1607 | 1881 | 2079 | 2254 | 2411 |
| 10150 | 1121 | 1613 | 1889 | 2087 | 2262 | 2421 |
| 10200 | 1125 | 1619 | 1896 | 2095 | 2271 | 2430 |
| 10250 | 1129 | 1625 | 1904 | 2104 | 2280 | 2440 |
| 10300 | 1133 | 1631 | 1911 | 2112 | 2289 | 2449 |
| 10350 | 1137 | 1637 | 1918 | 2120 | 2298 | 2459 |

## North Carolina

Proposed Monthly Basic Child Support Obligations

| Combined Gross Monthly Income | Effective October 1, 1998 | | | | | |
|---|---|---|---|---|---|---|
| | One Child | Two Children | Three Children | Four Children | Five Children | Six Children |
| 10400 | 1141 | 1643 | 1926 | 2128 | 2307 | 2468 |
| 10450 | 1145 | 1649 | 1933 | 2136 | 2316 | 2478 |
| 10500 | 1149 | 1655 | 1941 | 2144 | 2325 | 2487 |
| 10550 | 1153 | 1661 | 1948 | 2153 | 2333 | 2497 |
| 10600 | 1157 | 1667 | 1956 | 2161 | 2342 | 2506 |
| 10650 | 1161 | 1674 | 1963 | 2169 | 2351 | 2516 |
| 10700 | 1165 | 1680 | 1970 | 2177 | 2360 | 2525 |
| 10750 | 1169 | 1686 | 1978 | 2185 | 2369 | 2535 |
| 10800 | 1173 | 1692 | 1985 | 2194 | 2378 | 2544 |
| 10850 | 1177 | 1698 | 1993 | 2202 | 2387 | 2554 |
| 10900 | 1181 | 1704 | 2000 | 2210 | 2396 | 2563 |
| 10950 | 1185 | 1710 | 2007 | 2218 | 2405 | 2573 |
| 11000 | 1189 | 1716 | 2014 | 2226 | 2413 | 2582 |
| 11050 | 1193 | 1721 | 2021 | 2233 | 2421 | 2590 |
| 11100 | 1197 | 1727 | 2028 | 2241 | 2429 | 2599 |
| 11150 | 1200 | 1732 | 2035 | 2248 | 2437 | 2608 |
| 11200 | 1204 | 1738 | 2041 | 2256 | 2445 | 2616 |
| 11250 | 1208 | 1744 | 2048 | 2263 | 2453 | 2625 |
| 11300 | 1212 | 1749 | 2055 | 2271 | 2462 | 2634 |
| 11350 | 1215 | 1755 | 2062 | 2278 | 2470 | 2643 |
| 11400 | 1219 | 1760 | 2069 | 2286 | 2478 | 2651 |
| 11450 | 1223 | 1766 | 2075 | 2293 | 2486 | 2660 |
| 11500 | 1226 | 1772 | 2082 | 2301 | 2494 | 2669 |
| 11550 | 1229 | 1775 | 2087 | 2306 | 2499 | 2674 |
| 11600 | 1231 | 1778 | 2090 | 2310 | 2504 | 2679 |
| 11650 | 1233 | 1781 | 2094 | 2314 | 2508 | 2684 |
| 11700 | 1235 | 1784 | 2097 | 2318 | 2512 | 2688 |
| 11750 | 1237 | 1787 | 2101 | 2322 | 2517 | 2693 |
| 11800 | 1238 | 1790 | 2105 | 2326 | 2521 | 2697 |
| 11850 | 1240 | 1793 | 2108 | 2330 | 2525 | 2702 |
| 11900 | 1242 | 1796 | 2112 | 2334 | 2530 | 2707 |
| 11950 | 1244 | 1799 | 2115 | 2338 | 2534 | 2711 |

## North Carolina

Proposed Monthly Basic Child Support Obligations

| Combined Gross Monthly Income | Effective October 1, 1998 | | | | | |
|---|---|---|---|---|---|---|
| | One Child | Two Children | Three Children | Four Children | Five Children | Six Children |
| 12000 | 1246 | 1801 | 2119 | 2342 | 2538 | 2716 |
| 12050 | 1248 | 1804 | 2123 | 2345 | 2543 | 2720 |
| 12100 | 1250 | 1807 | 2126 | 2349 | 2547 | 2725 |
| 12150 | 1252 | 1810 | 2130 | 2353 | 2551 | 2730 |
| 12200 | 1254 | 1813 | 2133 | 2357 | 2555 | 2734 |
| 12250 | 1256 | 1816 | 2137 | 2361 | 2560 | 2739 |
| 12300 | 1258 | 1819 | 2141 | 2365 | 2564 | 2744 |
| 12350 | 1260 | 1822 | 2144 | 2369 | 2568 | 2748 |
| 12400 | 1262 | 1825 | 2148 | 2373 | 2573 | 2753 |
| 12450 | 1264 | 1828 | 2151 | 2377 | 2577 | 2757 |
| 12500 | 1266 | 1831 | 2155 | 2381 | 2581 | 2762 |
| 12550 | 1267 | 1834 | 2159 | 2385 | 2586 | 2767 |
| 12600 | 1269 | 1836 | 2162 | 2389 | 2590 | 2771 |
| 12650 | 1271 | 1839 | 2166 | 2393 | 2594 | 2776 |
| 12700 | 1273 | 1842 | 2169 | 2397 | 2599 | 2780 |
| 12750 | 1275 | 1845 | 2173 | 2401 | 2603 | 2785 |
| 12800 | 1277 | 1848 | 2177 | 2405 | 2607 | 2790 |
| 12850 | 1279 | 1851 | 2180 | 2409 | 2611 | 2794 |
| 12900 | 1281 | 1854 | 2184 | 2413 | 2616 | 2799 |
| 12950 | 1283 | 1857 | 2187 | 2417 | 2620 | 2803 |
| 13000 | 1285 | 1860 | 2191 | 2421 | 2624 | 2808 |
| 13050 | 1287 | 1863 | 2195 | 2425 | 2629 | 2813 |
| 13100 | 1291 | 1868 | 2201 | 2432 | 2637 | 2821 |
| 13150 | 1295 | 1875 | 2209 | 2441 | 2646 | 2831 |
| 13200 | 1300 | 1881 | 2216 | 2449 | 2654 | 2840 |
| 13250 | 1304 | 1887 | 2223 | 2457 | 2663 | 2850 |
| 13300 | 1308 | 1894 | 2231 | 2465 | 2672 | 2859 |
| 13350 | 1313 | 1900 | 2238 | 2473 | 2681 | 2868 |
| 13400 | 1317 | 1906 | 2245 | 2481 | 2690 | 2878 |
| 13450 | 1321 | 1912 | 2253 | 2489 | 2698 | 2887 |
| 13500 | 1326 | 1919 | 2260 | 2497 | 2707 | 2897 |
| 13550 | 1330 | 1925 | 2267 | 2506 | 2716 | 2906 |

## North Carolina

Proposed Monthly Basic Child Support Obligations

| Combined Gross Monthly Income | Effective October 1, 1998 | | | | | |
|---|---|---|---|---|---|---|
| | One Child | Two Children | Three Children | Four Children | Five Children | Six Children |
| 13600 | 1335 | 1931 | 2275 | 2514 | 2725 | 2916 |
| 13650 | 1339 | 1938 | 2282 | 2522 | 2734 | 2925 |
| 13700 | 1343 | 1944 | 2290 | 2530 | 2742 | 2934 |
| 13750 | 1348 | 1950 | 2297 | 2538 | 2751 | 2944 |
| 13800 | 1352 | 1956 | 2304 | 2546 | 2760 | 2953 |
| 13850 | 1356 | 1963 | 2312 | 2554 | 2769 | 2963 |
| 13900 | 1361 | 1969 | 2319 | 2562 | 2778 | 2972 |
| 13950 | 1365 | 1975 | 2326 | 2571 | 2786 | 2982 |
| 14000 | 1370 | 1982 | 2334 | 2579 | 2795 | 2991 |
| 14050 | 1374 | 1988 | 2341 | 2587 | 2804 | 3000 |
| 14100 | 1378 | 1994 | 2348 | 2595 | 2813 | 3010 |
| 14150 | 1383 | 2000 | 2356 | 2603 | 2822 | 3019 |
| 14200 | 1387 | 2007 | 2363 | 2611 | 2831 | 3029 |
| 14250 | 1392 | 2013 | 2370 | 2619 | 2839 | 3038 |
| 14300 | 1396 | 2019 | 2378 | 2627 | 2848 | 3047 |
| 14350 | 1400 | 2026 | 2385 | 2636 | 2857 | 3057 |
| 14400 | 1405 | 2032 | 2392 | 2644 | 2866 | 3066 |
| 14450 | 1409 | 2038 | 2400 | 2652 | 2875 | 3076 |
| 14500 | 1413 | 2044 | 2407 | 2660 | 2883 | 3085 |
| 14550 | 1418 | 2051 | 2415 | 2668 | 2892 | 3095 |
| 14600 | 1422 | 2057 | 2422 | 2676 | 2901 | 3104 |
| 14650 | 1427 | 2063 | 2429 | 2684 | 2910 | 3113 |
| 14700 | 1431 | 2070 | 2437 | 2692 | 2919 | 3123 |
| 14750 | 1435 | 2076 | 2444 | 2701 | 2927 | 3132 |
| 14800 | 1440 | 2082 | 2451 | 2709 | 2936 | 3142 |
| 14850 | 1444 | 2088 | 2459 | 2717 | 2945 | 3151 |
| 14900 | 1448 | 2095 | 2466 | 2725 | 2954 | 3161 |
| 14950 | 1453 | 2101 | 2473 | 2733 | 2963 | 3170 |
| 15000 | 1457 | 2107 | 2481 | 2741 | 2971 | 3179 |

STATE OF NORTH CAROLINA

_____ County

File No. | IV-D Case No.

Case No. (Code) | URESA Case No.

In The General Court Of Justice
☐ District ☐ Superior Court Divisio

☐ Civil: *Plaintiff* _____

☐ Criminal: STATE

VERSUS

*Name Of Defendant*

**WORKSHEET A**
**CHILD SUPPORT OBLIGATION**
**SOLE CUSTODY**

G.S. 50-13.4(c

| Children | Date Of Birth | Children | Date Of Birt |
|---|---|---|---|
| | | | |
| | | | |
| | | | |

| | Plaintiff | Defendant | Combined |
|---|---|---|---|
| 1. MONTHLY GROSS INCOME | $ | $ | |
| a. Minus pre-existing child support payment | - | - | |
| b. Minus responsibility for other children | - | - | |
| 2. MONTHLY ADJUSTED GROSS INCOME | $ | $ | $ |
| 3. PERCENTAGE SHARE OF INCOME *(line 2 for each parent's income divided by Combined Income)* | % | % | |
| 4. BASIC CHILD SUPPORT OBLIGATION *(apply line 2 Combined to Child Support Schedule.)* | | | $ |
| 5. ADJUSTMENTS *(expenses paid by each parent)* | | | |
| a. Work-related child care costs *(see instructions)* | $ | $ | |
| b. Health insurance premium costs-child(ren) portion only *(total premium ÷ # of persons covered x # of children subject to order = children's portion)* | $ | $ | |
| c. Extraordinary expense *(note duration at bottom if time for adjustment differs from duration of child support obligation)* | $ | $ | |
| d. Total Adjustments *(add two totals for combined amount)* | $ | $ | $ |
| 6. TOTAL CHILD SUPPORT OBLIGATION *(add lines 4 and 5d combined)* | | | $ |
| 7. EACH PARENT'S CHILD SUPPORT OBLIGATION *(line 3 X line 6 for each parent)* | $ | $ | |
| 8. NON-CUSTODIAL PARENT ADJUSTMENT *(enter non-custodial parent's line 5d)* | $ | $ | |
| 9. RECOMMENDED CHILD SUPPORT ORDER *(subtract line 8 from line 7 for the non-custodial parent only. Leave custodial parent column blank)* | $ | $ | |

*Date* | *Prepared By (Type Or Print)*

(NOTE: *This form may be used in both civil and criminal cases.)*

(Over)

## INSTRUCTIONS FOR COMPLETING CHILD SUPPORT WORKSHEET A
## OBLIGEE WITH SOLE CUSTODY OF CHILD(REN)

Worksheet A should be used when the obligee has physical custody of the child(ren) who are involved in the pending action for a period of time that is more than two-thirds of the year (more than 243 days per year).

On line 1, enter the monthly gross incomes of both parties in the appropriate column, subtract the payments made by each parent under previous child support orders for other children of that parent and the amount of the parent's financial responsibility for other children living with that parent, and enter the difference (monthly adjusted gross income) for each parent on line 2. Add the monthly adjusted gross incomes of both parents and enter the result in the third column (Combined) on line 2. Divide each parent's monthly adjusted gross income by the combined monthly adjusted income and enter each parent's percentage share of the combined income on line 3.

On line 4, enter the amount of the basic child support obligation for the child(ren) for whom support is sought by using the Schedule of Basic Child Support Obligations based on the combined income of both parents (line 3) and the number of children involved in the pending action. If the non-custodial parent's income falls within the shaded area of the Schedule, determine the basic child support obligation based on the non-custodial parent's monthly adjusted gross income, rather than the combined income of both parents.

On lines 5a through 5c, enter the amount of work-related child care costs, health insurance premiums for the child(ren), and extraordinary child-related expenses that are paid by either parent under the column for that parent. On line 5d, enter the sum of lines 5a through 5c for each parent, and in the third column (Combined) enter the total expenses paid by both parents. Add line 4 and line 5d (Combined) and enter the result on line 6 (total child support obligation).

On line 7, multiply line 6 by line 3 (percentage share of income) and enter the result in the appropriate column for each parent. On line 8, enter the amount of expenses paid directly by the non-custodial parent (line 5d) under the appropriate column; leave the custodial parent's column blank and do not enter any amount paid by the custodial parent. Subtract line 8 from line 7 for the non-custodial parent only and enter the difference on line 9 (recommended child support order) under the column for the non-custodial parent. Leave the column for the custodial parent blank.

**NOTE TO PLAINTIFF AND DEFENDANT:** *The information required to complete the worksheet is known only to the parties. It is the responsibility of the parties to provide this information to the court so that the court can set the appropriate amount of child support. The Clerk of Superior Court CANNOT obtain this information or fill out this worksheet for you. If you need assistance, you may contact an attorney or apply for assistance at the IV-D agency within your county*

STATE OF NORTH CAROLINA

_____ County

File No. | IV-D Case No.

Case No. (Code) | URESA Case No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

☐ Civil: Plaintiff _____
☐ Criminal: STATE
VERSUS
Name Of Defendant

## WORKSHEET B
## CHILD SUPPORT OBLIGATION
## JOINT OR SHARED
## PHYSICAL CUSTODY

G.S. 50-13.4(c)

| Children | Date Of Birth | Children | Date Of Birth |
|---|---|---|---|
| | | | |
| | | | |

| STOP HERE IF *the number of overnights with either parent is less than 123, shared physical custody does not apply (see Worksheet A).* | Plaintiff | Defendant | Combined |
|---|---|---|---|
| 1. MONTHLY GROSS INCOME | $ | $ | |
| a. Minus pre-existing child support payment | – | – | |
| b. Minus responsibility for other children | – | – | |
| 2. MONTHLY ADJUSTED GROSS INCOME | $ | $ | $ |
| 3. PERCENTAGE SHARE OF INCOME *(line 2 for each parent's income divided by combined income)* | % | % | |
| 4. BASIC CHILD SUPPORT OBLIGATION *(apply line 2 Combined to Child Support Schedule, see AOC-A-162, Rev. 10/98)* | | | $ |
| 5. SHARED CUSTODY BASIC OBLIGATION *(multiply line 4 x 1.5)* | | | $ |
| 6. EACH PARENT'S PORTION OF SHARED CUSTODY SUPPORT OBLIGATION *(line 3 x line 5 for each parent)* | $ | $ | |
| 7. OVERNIGHTS with each parent *(must total 365)* | | | =365 |
| 8. PERCENTAGE WITH EACH PARENT *(line 7 divided by 365)* | % | % | |
| 9. SUPPORT OBLIGATION FOR TIME WITH OTHER PARENT *(line 6 x other parent's line 8)* | $ | $ | |
| 10. ADJUSTMENTS *(expenses paid directly by each parent)* | | | |
| a. Work-related child care costs | $ | $ | |
| b. Health Insurance premium costs - children's portion only | $ | $ | |
| c. Extraordinary expenses | $ | $ | |
| d. Total Adjustments *(For each col., add 10a, 10b, and 10c. Add two totals for combined amount.)* | $ | $ | $ |
| 11. EACH PARENT'S FAIR SHARE OF ADJUSTMENTS *(line 10d combined x line 3 for each parent)* | $ | $ | |
| 12. ADJUSTMENTS PAID IN EXCESS OF FAIR SHARE *(Line 10d minus line 11. If negative number, enter zero.)* | $ | $ | |
| 13. EACH PARENT'S ADJUSTED SUPPORT OBLIGATION *(Line 9 minus line 12.)* | $ | $ | |
| 14. RECOMMENDED CHILD SUPPORT ORDER *(subtract lesser amount from greater amount in line 13 and enter result under greater amount.)* | $ | $ | |

Date | Prepared By (Type Or Print)

(NOTE: *This form may be used in both civil and criminal cases.*)

(Over)

## INSTRUCTIONS FOR COMPLETING CHILD SUPPORT WORKSHEET B
## PARENTS WITH JOINT OR SHARED CUSTODY

Worksheet B should be used when the parents share joint *physical* custody of the child(ren) for whom support is sought. Legal custody of the child(ren) is not relevant with respect to this determination. Worksheet B should be used if one parent has sole *legal* custody but, in fact, the parents exercise joint physical custody of the child(ren) as defined below. On the other hand, the worksheet should not be used simply because the parents share joint legal custody of the child(ren).

Joint physical custody is defined as custody for at least one-third of the year (more than 122 overnights per year) - not one-third of a shorter period of time, e.g. one-third of a particular month. For example, child support would not be abated merely because the child spends an entire month with one parent during the the summer. **Worksheet B should be used only if both parents have custody of the child(ren) for at least one-third of the year and the situation involves a true sharing of expenses, rather than extended visitation with one parent that exceeds 122 overnights.** To be a true sharing of physical custody, costs for the child should be divided between the parents based on their respective percentage shares of income. To the extent that one parent assumes a disproportionate share of costs (for example, one parent buys all of the child's clothes), the worksheet should not be used or should be modified accordingly.

In cases involving joint or shared physical custody, the basic child support obligation is multiplied by 1.5 to take into account the increased cost of maintaining two primary homes for the child(ren). Each parent's child support obligation is calculated based on the percentage of time that the child(ren) spends with the *other* parent. The support obligations of both parents are then offset against each other, and the parent with the higher support obligation pays the difference between the two amounts.

Lines 1 through 4 of Worksheet B are calculated in the same manner as lines 1 through 4 of Worksheet A. Multiply line 4 by 1.5 and enter the result on line 5. On line 6, multiply line 5 by each parent's percentage share of income (line 3) and enter the result under the appropriate column for each parent.

On lines 7 and 8, enter the number of nights the child(ren) spend with each parent during the year and calculate the percentage of total overnights spent with each parent. If the child(ren) does not spend at least 123 overnights with each parent, Worksheet B should not be used. On line 9, multiply plaintiff's line 6 by defendant's line 8 and enter the result under the column for plaintiff, then multiply defendant's line 6 by plaintiff's line 8 and enter the result under the column for defendant.

Lines 10a through 10d of Worksheet B are calculated in the same manner as lines 5a through 5d of Worksheet A. On line 11, multiply line 10d (Combined) by line 3 for each parent and enter the result under the column for that parent. Subtract line 11 from line 10d for each parent and enter the result on line 12 (if negative, enter zero).

Subtract line 12 from line 9 for each parent and enter the result on line 13 under the appropriate column. In some cases, the result may be a *negative* number. If the result is negative, enter it as a negative number on line 13, *not* as a positive number or as a zero. If plaintiff's line 13 is greater than defendant's line 13, enter the difference between these two amounts on line 14 under plaintiff's column and leave defendant's column blank. If defendant's line 13 is greater than plaintiff's line 13, enter the difference between these two amounts on line 14 under defendant's column and leave plaintiff's column blank. [Note that if either of the number on line 13 is a *negative* number, you must change the sings when you subtract. For example, $100 minus negative $50 equals $150.]

**NOTE TO PLAINTIFF AND DEFENDANT:** *The information required to complete the worksheet is known only to the parties. It is the responsibility of the parties to provide this information to the Court so that the Court can set the appropriate amount of child support. The Clerk of Superior Court CANNOT obtain this information or fill out this worksheet for you. If you need assistance, you may contact an attorney or apply for assistance at the IV-D agency within your county.*

STATE OF NORTH CAROLINA

_____ County

| File No. | IV-D Case No. |
|---|---|
| Case No. (Code) | URESA Case No. |

In The General Court Of Justice
☐ District ☐ Superior Court Division

☐ Civil: Plaintiff _____
☐ Criminal: STATE
VERSUS
Name Of Defendant

## WORKSHEET C
## CHILD SUPPORT OBLIGATION
## SPLIT CUSTODY

G.S. 50-13.4(c)

| Children | Date Of Birth | Children | Date Of Birth |
|---|---|---|---|
| | | | |
| | | | |
| | | | |

| | Plaintiff | Defendant | Combined |
|---|---|---|---|
| 1. MONTHLY GROSS INCOME | $ | $ | |
| a. Minus pre-existing child support payment | – | – | |
| b. Minus responsibility for other children | – | – | |
| 2. MONTHLY ADJUSTED GROSS INCOME | $ | $ | $ |
| 3. PERCENTAGE SHARE OF INCOME *(line 2 for each parent's income divided by Combined Income)* | % | % | |
| 4. BASIC CHILD SUPPORT OBLIGATION *(apply line 2 Combined to Child Support Schedule, see AOC-A-162, Rev. 10/98)* | | | $ |
| 5a. SPLIT CUSTODY ADJUSTMENT *(enter number of children living with each parent & total number of children)* | | | |
| 5b. Number of children with each parent divided by total number of children | | | |
| 5c. Multiply line 4 x line 5b for each parent | $ | $ | |
| 6a. PLAINTIFF'S SUPPORT FOR CHILDREN WITH DEFENDANT *(multiply defendant's line 5c x plaintiff's line 3)* | $ | | |
| 6b. DEFENDANT'S SUPPORT FOR CHILDREN WITH PLAINTIFF *(multiply plaintiff's line 5c x defendant's line* | | $ | |
| 7a. Work-Related Child Care Costs Adjustments *(expenses paid directly by each parent)* | $ | $ | |
| 7b. Health Insurance Premium Costs - Children's Portion | $ | $ | |
| 7c. Extraordinary expenses | $ | $ | |
| 7d. TOTAL ADJUSTMENTS *(for each column add 7a, 7b, and 7c. Add two totals for combined amount.)* | $ | $ | $ |
| 8. EACH PARENT'S FAIR SHARE OF ADJUSTMENTS *(line 7d combined x line 3 for each parent)* | $ | $ | |
| 9. ADJUSTMENTS PAID IN EXCESS OF FAIR SHARE *(Line 7d minus line 8. If negative number, enter zero.)* | $ | $ | |
| 10. EACH PARENT'S ADJUSTED SUPPORT OBLIGATION *(line 5a or 5b minus line 9 for each parent)* | $ | $ | |
| 11. RECOMMENDED CHILD SUPPORT ORDER *(subtract lesser amount from greater amount on line 10 and enter result under greater amount)* | $ | $ | |

Date

Prepared By (Type Or Print)

(NOTE: *This form may be used in both civil and criminal cases.)*

(Over)

## INSTRUCTIONS FOR COMPLETING CHILD SUPPORT WORKSHEET C
## SPLIT CUSTODY OF CHILD(REN)

Worksheet C is used when there is more than one child involved in the pending action and each parent has physical custody of at least one of the children.

Lines 1 through 4 of Worksheet C are calculated in the same manner as lines 1 through 4 of Worksheet A. C line 5a, enter the number of children living with each parent and the total number of children for whom suppo is sought. Divide the number of children living with each parent by the total number of children and enter the result in the appropriate column for each parent on line 5b. (For example, if there are three children of the parties and one child lives with the plaintiff, divide one by three and enter 33.33% in plaintiff's column, then divide two by three and enter 66.67% in defendant's column on line 5b.) Multiply line 4 by line 5b for each parent and enter the results on line 5c.

On line 6a, multiply *defendant's* line 5c by *plaintiff's* line 3 (plaintiff's percentage share of income) and enter the result in the column for *plaintiff*. Multiply *plaintiff's* line 5c by defendant's line 3 and enter the result on line 6b.

Lines 7a through 7d of Worksheet C are calculated in the same manner as lines 5a through 5d of Worksheet . On line 8, multiply line 7d (Combined) by line 3 for each parent and enter the result under the column for that parent. Subtract line 8 from line 7d for each parent and enter the result on line 9 (if negative, enter zero).

Subtract line 9 from line 6a or 6b for each parent and enter the result on line 10 under the appropriate colum In some cases, the result may be a negative number. If the result is negative, enter it as a negative number o line 10, *not* as a positive number or as a zero. If *plaintiff's* line 10 is *greater* than defendant's line 10, enter t difference between these two amounts on line 11 under *plaintiff's* column and leave defendant's column blan If *defendant's* line 10 is *greater* than plaintiff's line 10, enter the difference between these two amounts on li 11 under *defendant's* column and leave plaintiff's column blank. [Note that if either of the numbers on line 1 is a *negative* number, you must change the signs when you subtract. For example, $100 minus negative $50 equals $150.]

**NOTE TO PLAINTIFF AND DEFENDANT:** *The information required to complete the worksheet is known only to the parties. It is the responsibility of the parties to provide this information to the Court so that the Court can set the appropriate amount of child support. The Clerk of Superior Court CANNOT obtain this information or fill out this worksheet for you. If you need assistance, you may contact an attorney or apply for assistance at the IV-D agency within your count*

# RULES FOR COURT-ORDERED ARBITRATION IN NORTH CAROLINA

Adopted August 28, 1986.
Effective January 1, 1987,
with amendments received through September 10, 1997.


Rule
1. Actions subject to arbitration.
2. Arbitrators.
3. Arbitration hearings.
4. The award.
5. Trial de novo.
6. The court's judgment.
7. Costs.
8. Administration.
9. Application of rules.

Index follows Rules.


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**Editor's note.** — The Rules for Court-Ordered Arbitration were initially adopted as a pilot program applicable to the Third, Fourteenth and Twenty-Ninth Judicial Districts by order of the Supreme Court on August 28, 1986. The order of the court provided:

"The North Carolina General Assembly authorized the Supreme Court of North Carolina 'by such rules as it shall determine appropriate' to 'provide for an experimental, pilot program in three judicial districts selected by the Court, of mandatory, nonbinding arbitration of all claims for money damages of $15,000 or less ... provided ... that no state funds shall be used to implement the pilot program,' 1985 Sess. Laws ch. 698, § 23 [See G.S. § 7A-37]. The Court has determined that such a pilot program should be instituted in this state on an experimental basis provided funds can be obtained to conduct the program.

Now, therefore, provided sufficient funds can be obtained to conduct the program, the Court orders:

(1) An experimental, pilot program of mandatory, nonbinding arbitration shall be operated for two years in the Third, Fourteenth, and Twenty-Ninth Judicial Districts;

(2) The program shall operate pursuant to the attached 'Rules for Court-Ordered Arbitration';

(3) These rules shall become effective on 1 January 1987;

(4) These rules shall be promulgated by their publication, together with this order, in the Advance Sheets of the Supreme Court and the Court of Appeals of North Carolina."

By order dated May 5, 1988, the expiration date of this pilot program was extended from December 31, 1988, to October 1, 1989.

Subsequently, by order dated September 14, 1989, the Supreme Court provided for the operation of these rules on a permanent basis in the Third, Fourteenth and Twenty-Ninth Judicial Districts, and in other judicial districts designated by the Administrative Office of the Courts, subject to the availability of funds. The order of the court provides:

"WHEREAS, the North Carolina General Assembly, by Ch. 301 of the 1989 Session Laws [see G.S. § 7A-37.1], authorized statewide court-ordered, nonbinding arbitration in certain civil actions, and further authorized the Supreme Court of North Carolina to adopt rules governing this procedure and to supervise its implementation and operation through the Administrative Office of the Courts.

NOW, THEREFORE, the Court orders:

(1) The program shall operate on a permanent basis in the Third, Fourteenth, and Twenty-Ninth Judicial Districts, and in all other judicial districts designated by the Administrative Office of the Courts, in consultation with local court officials, subject to the availability of funds appropriated for this purpose;

(2) Effective immediately, the program shall operate pursuant to the attached 'Rules for Court-Ordered Arbitration in North Carolina';

(3) These rules shall be promulgated by their publication, together with this order, in the Advance Sheets of the Supreme Court and the Court of Appeals of North Carolina."

## Rule 1. Actions subject to arbitration.

(a) *Types of actions; Exceptions.* All civil actions filed in the trial divisions of the General Court of Justice which are not assigned to a magistrate and all appeals from judgments of magistrates in which there is a claim or there are claims for monetary relief not exceeding $15,000 total, exclusive of interest, costs and attorneys' fees, are subject to court-ordered arbitration under these rules, except actions:

(1) Which are class actions;

(2) In which there is a substantial claim for injunctive or declaratory relief;

(3) Involving:

(i) family law issues,

(ii) title to real estate,

(iii) wills and decedents' estates, or

(iv) summary ejectment;

(4) Which are special proceedings;

(5) In which a claim is asserted for an unspecified amount exceeding $10,000 in compliance with N.C.R. Civ. P. 8(a)(2), unless the court finds that the amount of the claim actually does not exceed $15,000 total, after consideration of the case, upon its motion or the motion of a party;

(6) Involving a claim for monetary recovery in an unspecified amount later to be determined by an accounting or otherwise, if the claimant certifies in the pleading asserting the claim that the amount of the claim will actually exceed $15,000; or

(7) Which are certified by a party to be companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue.

(b) *Arbitration by agreement.* The court may submit any other civil action to arbitration under these rules or any modification thereof, pursuant to agreement by the parties approved by the court.

(c) *Court-ordered arbitration in cases having excessive claims.* The court may order any case submitted to arbitration under these rules at any time before trial if it finds that the amount actually in issue is $15,000 or less, even though a greater amount is claimed.

(d) *Exemption and withdrawal from arbitration.* The court may exempt or withdraw any action from arbitration on its own motion, or on motion of a party, made not less than 10 days before the arbitration hearing and a showing that: (i) the amount of the claim(s) exceed(s) $15,000; (ii) the action is excepted from arbitration under Arb. Rule 1(a); or (iii) there is a strong and compelling reason to do so.

**Administrative History.**

| | |
|---|---|
| Pilot Rule Adopted: | 28 August 1986. |
| Pilot Rule Amended: | 4 March 1987. |
| Permanent Rule Adopted: | 14 September 1989. |
| Amended: | 8 March 1990 — (a) and (d). |

**COMMENT**

The purpose of these rules is to create an efficient, economical alternative to traditional litigation for prompt resolution of disputes involving money damage claims up to $15,000. The $15,000 jurisdictional limit by statute and Arb. Rule 1(a) applies only to the claim(s) actually asserted, even though the claim(s) is or are based on a statute providing for multiple damages, *e.g.*, N.C. Gen. Stat. §§ 1-538, 75-16. An arbitrator may award damages in any amount which a party is entitled to recover. These rules do not affect the jurisdiction or functions of the magistrates where they have been assigned such jurisdiction. Counsel are expected to value their cases reasonably without court involvement. The court has inherent authority to order overvalued cases to arbitration. The court's authority and responsibility for conducting all proceedings and for the final judgment in a case are not affected by these

rules, which merely give the court a new civil procedure. A false certification under Arb. Rule 1(a)(6) might trigger N.C.R. Civ. P. 11(a) and N.C. Gen. Stat. § 6-21.5 sanctions or State Bar disciplinary action.

"Family law issues" in Arb. Rule 1(a)(3)(i) includes all family law cases such as divorce, guardianship, adoptions, juvenile matters, child support, custody and visitation. Actions which are "special proceedings" or involve summary ejectment, referred to in Arb. Rule 1(a), are actions so designated by the General Statutes.

Arb. Rules 1(a)(5) and 1(c) are the court's authority for submitting any case to arbitration in accordance with these rules. Moreover, a court may establish a local administrative procedure (*e.g.,* review of case files by a clerk) to ensure that cases subject to Arb. Rule 1(a)(5) are brought to a judge's attention.

Arb. Rule 1(b) allows binding or non-binding arbitration of any case by agreement and permits the parties to modify these rules for a particular case. Court approval of any modification will give a variant proceeding the court's imprimatur and ensure adherence to their primary purpose. For example, arbitrators under these rules are not expected to decide protracted cases without fair compensation. These rules do not provide adequate compensation for arbitrators in protracted cases. Court review and approval of extraordinary stipulations are required to ensure fair compensation by the parties.

Arb. Rule 1(c) is a safeguard against overevaluation of a claim to evade arbitration. It would become operative on motion of a party. This rule *does not* require (nor forbid) the court to examine any case on its own motion to determine its true value. The court may establish an administrative procedure for reviewing pleadings in cases appropriate for consideration by a judge for referral under Arb. Rule 1(c). *See also* the *Comment* to Arb. Rule 1(a).

Exemption or withdrawal may be appropriate under Arb. Rule 1(d)(1)(iii) in a challenge to established precedent in an action in which a trial de novo and subsequent appeal are probable or a case in which there has been prior mediation through the North Carolina Attorney General's office.

Cases involving pre-litigation contractual agreements for private arbitration under federal law, such as the Federal Arbitration Act or under state law, such as this State's Uniform Arbitration Act, should be exempted from court-ordered arbitration under these rules, unless all the parties waive their rights under their arbitration agreement. If parties agree to arbitrate the issue(s) in a case after an action has been filed, their stipulation of agreement should state clearly whether the arbitration is to be in accordance with these rules or subject to state or federal law. In the latter instance the case should be exempted from arbitration.

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**Cross References.** — As to court ordered mediated settlement conferences in superior court civil actions, see § 7A-38. See also, Rules Implementing Court Ordered Mediated Settlement Conferences, in this volume.

**Editor's note.** — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

**Legal Periodicals.** — For article, "Court-Ordered Arbitration Comes to North Carolina and the Nation," see 21 Wake Forest L. Rev. 901 (1986).

For note, "No Frills Justice: North Carolina Experiments with Court-Ordered Arbitration," see 66 N.C.L. Rev. 395 (1988).

For article, "American Law Institute Study on Paths to a 'Better Way': Litigation, Alternatives, and Accommodation," see 1989 Duke L.J. 808.

For article, "Arbitration and Constitutional Rights," see 71 N.C.L. Rev. 81 (1992).

Legal Periodicals. - For article, Fowler, Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure, see 21 Campbell L. Rev. 191 (1999).

## Rule 2. Arbitrators.

(a) *Selection.*

(1) The court shall select and maintain a list of qualified arbitrators, which shall be a public record. Unless the parties file a stipulation identifying their choice of an arbitrator on the court's list within the first 20 days after the 60-day period fixed in Arb. Rule 8(b) begins to run, the court will appoint an arbitrator, chosen at random from the list, and will notify the parties of the arbitrator selected in the notice of hearing.

(2) Parties may choose an arbitrator who is not on the court's list provided the arbitrator consents, the court approves the choice, and the arbitrator otherwise meets all the requirements of Arb. Rule 2 with the exception of the requirement to complete the arbitrator training as prescribed by the Administrative Office of the Courts. The stipulation of agreement on an arbitrator, the arbitrator's consent, and the court order approving such stipulation shall be filed within the same 20-day period for choosing an arbitrator on the court's list.

(b) *Eligibility.* An arbitrator shall be a member of the North Carolina State Bar and have been licensed to practice law for five years. The arbitrator shall have been admitted in North Carolina for at least the last two years of the five year period. Admission outside North Carolina may be considered for the balance of the five year period, so long as the arbitrator was admitted as a duly licensed member of the bar of a state(s) or a territory(ies) of the United States or the District of Columbia.

In addition, an arbitrator shall complete the arbitrator training course prescribed by the Administrative Office of the Courts and be approved by the Senior Resident Superior Court Judge and the Chief District Court Judge for such service. Arbitrators so approved shall serve at the pleasure of the appointing court(s).

(c) *Fees and expenses.* Arbitrators shall be paid a $75 fee by the court for each arbitration hearing when they file their awards with the court. An arbitrator may be reimbursed for expenses actually and necessarily incurred in connection with an arbitration hearing and paid a reasonable fee not exceeding $75 for work on a case not resulting in a hearing upon the arbitrator's written application to, and approval by, the Senior Resident Superior Court Judge, or the Chief Judge of the District Court, of the court in which the case was pending.

(d) *Oath of office.* Arbitrators shall take an oath or affirmation similar to that prescribed in N.C. Gen. Stat. § 11-11, in a form approved by the Administrative Office of the Courts, before conducting any hearings.

(e) *Disqualification.* Arbitrators shall be disqualified and must recuse themselves if as a judge in the same action they would be disqualified or obliged to recuse themselves. Disqualification and recusal may be waived by the parties upon full disclosure of any basis for disqualification or recusal.

(f) *Replacement of arbitrator.* If an arbitrator is disqualified, recused, unable, or unwilling to serve, a replacement shall be appointed in a random manner by the court.

**Administrative History.**

| | |
|---|---|
| Pilot Rule Adopted: | 28 August 1986. |
| Pilot Rule Amended: | 4 March 1987. |
| Permanent Rule Adopted: | 14 September 1989. |
| Amended: | 8 March 1990 — (a) and (b). |
| Amended: | 1 August 1995 — (b) |

**COMMENT**

Under Arb. Rule 2(a) the parties have a right to choose one arbitrator from the list if they wish to do so, but they have *the burden of taking the initiative if they want to make the selection,* and they must do it promptly.

The parties in a particular case may choose a person to be an arbitrator who is not on the list required by Arb. Rule 2(a)(1), provided that person consents, the choice is approved by the Senior Resident Superior Court Judge if the case is filed in Superior Court or the Chief District Court Judge if the case is filed in District Court, and the person otherwise meets the requirements of Arb. Rule 2. The stipulation of agreement on an arbitrator, the arbitrator's consent, and the order approving such stipulation and consent must be filed within the 20-day period mentioned in Arb. Rule 2(a)(1).

Under Arb. Rule 2(c) filing of the award is the

final act at which payment should be made, closing the matter for the arbitrator. The arbitrator should make the award when the hearing is concluded. Hearings must be brief and expedited so that an arbitrator can hear at least three per day. See Arb. Rule 3(n).

Payments and expense reimbursements authorized by Arb. Rule 2(c) are made subject to court approval to insure conservation and judicial monitoring of the use of funds available for the program.

Since the arbitrator has the authority of a judge except for the contempt power, *see* Arb. Rule 3(g), the arbitrator's behavior should comport with the ethics rules for lawyers, *e.g.*, N.C.R. Prof'l Conduct 9.2, and judges, *e.g.*, the N.C. Code of Judicial Conduct. In some instances, *e.g., id.*, Canon 5.E., there may be conflicts, in which case the arbitrator should consult with the Senior Resident Superior Court Judge or the Chief Judge of the District Court, depending on the court in which the case is filed. The court should review the list of arbitrators periodically; in the court's discretion, names may be removed from the Arb. Rule 2(a)(1) list. If an arbitrator's performance or conduct does not comport with the spirit of these rules, the arbitrator's name may be removed from the Arb. Rule 2(a)(1) list by the appointing judge(s).

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**Editor's note.** — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

**Legal Periodicals.** — For comment, "An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts," see 71 N.C.L. Rev. 1857 (1993).

## Rule 3. Arbitration hearings.

(a) *Hearing scheduled by the court.* Arbitration hearings shall be scheduled by the court and held in a courtroom, if available, or in any other public room suitable for conducting judicial proceedings and shall be open to the public.

(b) *Pre-hearing exchange of information.* At least 10 days before the date set for the hearing, the parties shall exchange:

(1) Lists of witnesses they expect to testify;

(2) Copies of documents or exhibits they expect to offer in evidence; and

(3) A brief statement of the issues and their contentions.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation and witnesses and documents, for all or part of the hearing. Failure to comply with Arb. Rule 3(b) may be cause for sanctions under Arb. Rule 3(*l*).

(c) *Exchanged documents considered authenticated.* Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(d) *Copies of exhibits admissible.* Copies of exchanged documents or exhibits are admissible in arbitration hearings.

(e) *Witnesses.* Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(f) *Subpoenas.* N.C.R. Civ. P. 45 shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(g) *Authority of arbitrator to govern hearings.* Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all contempt matters to the court.

(h) *Law of evidence used as guide.* The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(i) *No ex parte communications with arbitrator.* No ex parte communications between parties or their counsel and arbitrators are permitted.

(j) *Failure to appear; Defaults; Rehearing.* If a party who has been notified of the date, time and place of the hearing fails to appear without good cause therefor, the hearing may proceed and an award may be made by the arbitrator against the absent party upon the evidence offered by the parties present, but not by default for failure to appear. If a party is in default for any other reason but no judgment has been entered upon the default pursuant to N.C.R. Civ. P. 55(b) before the hearing, the arbitrator may hear evidence and may issue an award against the party in default. The court may order a rehearing of any case in which an award was made against a party who failed to obtain a continuance of a hearing and failed to appear for reasons beyond the party's control. Such motion for rehearing shall be filed with the court within the time allowed for demanding trial de novo stated in Arb. Rule 5(a).

(k) *No record of hearing made.* No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(*l*) *Sanctions.* Any party failing or refusing to participate in an arbitration proceeding in a good faith and meaningful manner shall be subject to sanctions by the court on motion of a party, or report of the arbitrator, as provided in N.C.R. Civ. P. 11, 37(b)(2)(A) — 37(b)(2)(C) and N.C. Gen. Stat. § 6-21.5.

(m) *Proceedings in forma pauperis.* The right to proceed *in forma pauperis* is not affected by these rules.

(n) *Limits of hearings.* Arbitration hearings shall be limited to one hour unless the arbitrator determines at the hearing that more time is necessary to ensure fairness and justice to the parties.

(1) A written application for a substantial enlargement of time for a hearing must be filed with the court and the arbitrator, if appointed, and must be served on opposing parties at the earliest practicable time, and no later than the date for prehearing exchange of information under Arb. Rule 3(b). The court will rule on these applications after consulting the arbitrator if appointed.

(2) An arbitrator is not required to receive repetitive or cumulative evidence.

(o) *Hearing concluded.* The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion [to] receive post-hearing briefs, but not evidence, if submitted within 3 days after the hearing has been concluded.

(p) *Parties must be present at hearings; Representation.* All parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Only individuals may appear *pro se.*

(q) *Motions.* Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(1) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions deterred to the arbitrator in the exchange of information required by Arb. Rule 3(b).

(2) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

**Administrative History.**

| | |
|---|---|
| Pilot Rule Adopted: | 28 August 1986. |
| Pilot Rule Amended: | 4 March 1987. |
| Permanent Rule Adopted: | 14 September 1989. |
| Amended: | 8 March 1990 — (b), (j), (o), and (q). |

## COMMENT

Good faith compliance with Arb. Rule 3(b) is required by professional courtesy and fairness as well as the spirit of these rules. Failure to comply with Arb. Rule 3(b) may justify a sanction of limiting of evidence otherwise admissible under Arb. Rules 3(c) — 3(f) and 3(g).

Arb. Rule 3(d) contemplates that the arbitrator shall return all evidence submitted when the hearing is concluded and the award has been made. Original documents and exhibits should not be marked in any way to identify them with the arbitration, to avoid possible prejudice in any future trial.

The purpose of Arb. Rule 3(n) is to ensure that hearings are limited and expedited. Failure to limit and expedite the hearings defeats the purpose of these rules. In this connection, note the option in Arb. Rule 3(b) for use of prehearing stipulations and/or sworn or unsworn statements to meet time limits.

Under Arb. Rule 3(o) the declaration that the hearing is concluded by the arbitrator formally marks the end of the hearing. Note Arb. Rule 4(a), which requires the arbitrator to file the award within three days after the hearing is concluded or post-hearing briefs are received. The usual practice should be a statement of the award at the close of the hearing, without submission of briefs. In the unusual case where an arbitrator is willing to receive post-hearing briefs, the arbitrator should specify the points to be addressed promptly and succinctly. Time limits in these rules are governed by N.C.R. Civ. P. 6 and N.C. Gen. Stat. §§ 103-4, 103-5.

An arbitrator may at any time encourage settlement negotiations and may participate in such negotiations if all parties are present in person or by counsel. See Arb. Rule 3(p).

Under Arb. Rule 3(q)(1), the court will rule on prehearing motions which dispose of all or part of the case on the pleadings, or which relate to procedural management of the case. The court will normally defer to the arbitrator's consideration motions addressed to the merits of a claim requiring a hearing, the taking of evidence, or examination of records and documents other than the pleadings and motion papers, except in cases in which a N.C.R. Civ. P. 12(b) motion is filed in lieu of a responsive pleading.

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**Editor's note.** — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

**Legal Periodicals.** — For article, Fowler, Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure, see 21 Campbell L. Rev. 191 (1999).

## CASE NOTES

**Violation of This Rule May Result in a Loss of N.C. Arb. Rule 5(a) Rights.** — The trial court's order enforcing an arbitration award, which implicitly imposed the sanctions of striking defendants' request for trial de novo or of entering judgment against defendants, was within the purview of § 1A-1, Rule 37(b)(2)(c), did not constitute an abuse of the court's discretion, and did not violate N.C. Arb. Rule 5(a). Mohamad v. Simmons, 139 N.C. App. 610, 534 S.E.2d 616 (2000).

**Defendants violated subsection (p) of this rule** where they failed to attend the hearing in person, and where no evidence in the record reflected that counsel purporting to appear on defendants' behalf or the representative of defendants' liability insurance carrier were authorized "to make binding decisions . . . in all matters" on behalf of defendants. Mohamad v. Simmons, 139 N.C. App. 610, 534 S.E.2d 616 (2000).

## Rule 4. The award.

(a) *Filing the award.* The award shall be in writing, signed by the arbitrator and filed with the court within 3 days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later.

(b) *Findings; Conclusions; Opinions.* No findings of fact and conclusions of law or opinions supporting an award are required.

(c) *Scope of award.* The award must resolve all issues raised by the pleadings and may exceed $15,000.

(d) *Copies of award to parties.* The court shall forward copies of the award to the parties or their counsel.

**Administrative History.**

| | |
|---|---|
| Pilot Rule Adopted: | 28 August 1986. |
| Pilot Rule Amended: | 4 March 1987. |
| Permanent Rule Adopted: | 14 September 1989. |

**COMMENT**

The arbitrator should issue the award when the hearing is over and should not take the case under advisement. *See* Arb. Rule 4(a). If the arbitrator wants post-hearing briefs, the arbitrator must receive them within three days, consider them, and file the award within three days thereafter. See Arb. Rule 3(o) and its *Comment.*

See Arb. Rule 1(a) and its *Comment* in connection with Arb. Rule 4(c).

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**Editor's note.** — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

**Legal Periodicals.** — For article, Fowler, Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure, see 21 Campbell L. Rev. 191 (1999).

## Rule 5. Trial de novo.

(a) *Trial de novo as of right.* Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing a written demand for trial de novo with the court, and service of the demand on all parties, on an approved form within 30 days after the arbitrator's award has been filed, or within 10 days after an adverse determination of an Arb. Rule 3(j) motion to rehear.

(b) *Filing fee.* A party filing a demand for trial de novo shall pay a filing fee equivalent to the arbitrator's compensation, which shall be held by the court until the case is terminated and returned to the demanding party only if there has been a trial in which, in the trial judge's opinion, the position of the demanding party has been improved over the arbitrator's award. Otherwise, the filing fee shall be deposited into the State's General Fund.

(c) *No reference to arbitration in presence of jury.* A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

(d) *No evidence of arbitration admissible.* No evidence that there have been arbitration proceedings or any fact concerning them may be admitted in a trial de novo, or in any subsequent proceeding involving any of the issues in or parties to the arbitration, without the consent of all parties to the arbitration and the court's approval.

(e) *Arbitrator not to be called as witness.* An arbitrator may not be deposed or called as a witness to testify concerning anything said or done in an arbitration proceeding in a trial de novo or any subsequent civil or adminis-

trative proceeding involving any of the issues in or parties to the arbitration. The arbitrator's notes are privileged and not subject to discovery.

(f) *Judicial immunity.* The arbitrator shall have judicial immunity to the same extent as a trial judge with respect to the arbitrator's actions in the arbitration proceeding.

**Administrative History.**

| | |
|---|---|
| Pilot Rule Adopted: | 28 August 1986. |
| Pilot Rule Amended: | 4 March 1987. |
| Permanent Rule Adopted: | 14 September 1989. |
| Amended: | 8 March 1990 — (a), (b), (e), and (f). |

**COMMENT**

Arb. Rule 5(c) does not preclude cross examination of a witness in a later proceeding concerning prior inconsistent statements during arbitration proceedings, if done in such a manner as not to violate the intent of Arb. Rules 5(c) and 5(d).

See also the *Comment* to Arb. Rule 6 regarding demand for trial de novo.

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**Editor's note.** — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

**Legal Periodicals.** — For article, Fowler, Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure, see 21 Campbell L. Rev. 191 (1999).

## Rule 6. The court's judgment.

(a) *Termination of action by agreement before judgment.* The parties may file a stipulation of dismissal or consent judgment at any time before entry of judgment on an award.

(b) *Judgment entered on award.* If the case is not terminated by agreement of the parties, and no party files a demand for trial de novo within 30 days after the award is filed, the clerk or the court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be mailed to all parties or their counsel.

**Administrative History.**

| | |
|---|---|
| Pilot Rule Adopted: | 28 August 1986. |
| Pilot Rule Amended: | 4 March 1987. |
| Permanent Rule Adopted: | 14 September 1989. |
| Amended: | 8 March 1990 — (b). |

**COMMENT**

A judgment entered on the arbitrator's award is not appealable because there is no record for review by an appellate court. A trial de novo is not an "appeal," in the sense of an appeal to the North Carolina Court of Appeals from Superior Court or District Court, from the arbitrator's award. By failing to demand a trial de novo the right to appeal is waived. Demand for jury trial pursuant to N.C.R. Civ. P. 38(b) does not preserve the right to a trial de novo. There must be a separate, specific, timely demand for trial de novo after the award has been filed.

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**Editor's note.** — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

**Legal Periodicals.** — For article, Fowler, Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure, see 21 Campbell L. Rev. 191 (1999).

## Rule 7. Costs.

(a) *Arbitration costs.* The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(b) *Costs following trial de novo.* If there is trial de novo, court costs may, in the discretion of the trial judge, include costs taxable under Arb. Rule 7(a) incurred in the arbitration proceedings.

(c) *Costs denied if party does not improve position in trial de novo.* A party demanding trial de novo whose position is not improved at the trial may be denied costs in connection with the arbitration proceeding by the trial judge, even though that party prevails at trial.

**Administrative History.**

| | |
|---|---|
| Pilot Rule Adopted: | 28 August 1986. |
| Pilot Rule Amended: | 4 March 1987. |
| Permanent Rule Adopted: | 14 September 1989. |
| Amended: | 8 March 1990 — (c). |

**Editor's note.** — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

## Rule 8. Administration.

(a) *Actions designated for arbitration.* The court shall designate actions eligible for arbitration upon the filing of the complaint or docketing of an appeal from a magistrate's judgment and give notice of such designation to the parties.

(b) *Hearings rescheduled; 60 day limit; Continuance.*

(1) The court shall schedule hearings with notice to the parties to begin within 60 days after: (i) the docketing of an appeal from a magistrate's judgment, (ii) the filing of the last responsive pleading, or (iii) the expiration of the time allowed for the filing of such pleading.

(2) A hearing may be scheduled, rescheduled or continued to a date after the time allowed by this rule only by the court before whom the case is pending upon a written motion and a showing of a strong and compelling reason to do so.

(c) *Date of hearing advanced by agreement.* A hearing may be held earlier than the date set by the court, by agreement of the parties with court approval.

(d) *Forms.* Forms for use in these arbitration proceedings must be approved by the Administrative Office of the Courts.

(e) *Delegation of nonjudicial functions.* To conserve judicial resources and facilitate the effectiveness of these rules, the court may delegate nonjudicial, administrative duties and functions to supporting court personnel and authorize them to require compliance with approved procedures.

(f) *Definitions.* "Court" as used in these rules means, depending upon the context in which it is used:

(1) The Senior Resident Superior Court Judge, if the action is pending in the Superior Court Division, or the delegate of such judge;

(2) The Chief District Court Judge, if the action is pending in the District Court Division, or the delegate of such judge; or

(3) Any assigned judge exercising the court's jurisdiction and authority in an action.

**Administrative History.**

| | |
|---|---|
| Pilot Rule Adopted: | 28 August 1986. |
| Pilot Rule Amended: | 4 March 1987. |
| Permanent Rule Adopted: | 14 September 1989. |
| Amended: | 8 March 1990 — (a), (b), (d), and (f). |

COMMENT

One goal of these rules is to expedite disposition of claims involving $15,000 or less. See Arb. Rule 8(a). The 60 days in Arb. Rule 8(b)(1) will allow for discovery, trial preparation, pretrial motions disposition and calendaring. A motion to continue a hearing will be heard by a judge mindful of this goal. Continuances may be granted when a party or counsel is entitled to such under law, *e.g.* N.C.R. Civ. P. 40(b); rule of court, *e.g.* N.C. Prac. R. 3; or customary practice.

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**Editor's note.** — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

## Rule 9. Application of rules.

These Rules shall apply to cases filed on or after their effective date and to pending cases submitted by agreement of the parties under Arb. Rule 1(b) or referred to arbitration by order of the court in those districts designated for court-ordered arbitration in accordance with G.S. §§ 7A-37 and 7A-37.1.

**Administrative History.**

| | |
|---|---|
| Pilot Rule Adopted: | 28 August 1986. |
| Pilot Rule Amended: | 4 March 1987. |
| Permanent Rule Adopted: | 14 September 1989. |
| Amended: | 8 March 1990. |

COMMENT

A common set of rules has been adopted. These rules may be amended only by the Supreme Court of North Carolina. The enabling legislation, G.S. §§ 7A-37 and 7A-37.1, vests rule-making authority in the Supreme Court, and this includes amendments.

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**Editor's note.** — As to the applicability of the Rules for Court-Ordered Arbitration, see the order of the Supreme Court preceding these rules.

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# NORTH CAROLINA CANONS OF ETHICS FOR ARBITRATORS

Adopted August 19, 1999.

Canon
1. An arbitrator shall uphold the integrity and fairness of the arbitration process.
2. An arbitrator shall disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias.
3. An arbitrator, in communicating with parties, shall avoid impropriety or the appearance of impropriety.
4. An arbitrator shall conduct proceedings fairly and diligently.
5. An arbitrator shall make decisions in a just, independent and deliberate manner.
6. An arbitrator shall be faithful to the relationship of trust and confidentiality inherent in that office.
7. Ethical considerations relating to arbitrators appointed by one party.
8. Canons are subject to laws and professional responsibility principles; choice or law.

Index follows Rules.

## Canon 1. An arbitrator shall uphold the integrity and fairness of the arbitration process.

A. Fair and just processes for resolving disputes are indispensable in our society. Arbitration is an important method for deciding many types of disputes. For arbitration to be effective, there must be broad public confidence in and understanding of the integrity and fairness of the process. Therefore, an arbitrator has a responsibility not only to the parties but also to the courts, the public and the process of arbitration itself and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator has a responsibility to the public, parties whose rights will be decided, the courts, and other participants in the proceeding. These Canons shall be construed and applied to further these objectives.

B. It may be inconsistent with the integrity of the arbitration process for persons to solicit appointment for themselves. However, persons may indicate a general willingness to serve as arbitrators, e.g., by listing themselves with institutions that sponsor arbitration, or with courts that have court-annexed arbitration programs. Arbitrators may advertise, consistent with the law.

C. Persons may accept appointment as arbitrators only if they believe that they can be available to conduct the arbitration promptly. They shall exercise judgment whether their skills or expertise are sufficient to support demands of the arbitration and, if these skills or expertise are not sufficient, they shall decline to serve or withdraw from the arbitration, with the court's approval in court-administered arbitration, and notice to the parties.

D. After accepting appointment and while serving as an arbitrator, a person shall avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest likely to affect impartiality or which might reasonably create the appearance of partiality or bias. For one year after decision of a case, persons who have served as arbitrators shall avoid entering into any such relationship, or acquiring any such interest, in the circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest, unless all parties to the arbitration consent to any such relationship or acquiring any such interest.

E. Arbitrators shall conduct themselves in a way that is fair, in word and action, to all parties and must not be swayed by outside pressure, public clamor, fear of criticism or self-interest. If an arbitrator determines that he or

she cannot serve impartially, that arbitrator shall decline appointment or withdraw from serving and shall notify the parties, and the court in court-administered arbitrations.

F. When an arbitrator's authority is derived from the parties' agreement, the arbitrator shall not exceed that authority nor do less than required to exercise that authority completely. Where the parties' agreement sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, the arbitrator must comply with such procedures or rules.

G. An arbitrator shall make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

H. An arbitrator's ethical obligations begin upon acceptance of appointment and continue throughout all stages of the proceeding. In addition, wherever specifically set forth in these Canons, certain ethical obligations begin as soon as a person is asked to serve as an arbitrator and continue for one year after the decision in the case has been given to the parties.

I. An experienced arbitrator should participate in development of new practitioners in the field and should engage in efforts to educate the public about the value and use of arbitration procedures. An arbitrator should provide pro bono services, as appropriate. (Adopted August 19, 1999, effective October 1, 1999.)

**COMMENT**

References to "commercial" in American Bar Association & American Arbitration Association, *Code of Ethics for Arbitrators in Commercial Disputes*, Canon I (1977) (*Code*), 33 Bus. Law. 311 (1977), from which these Canons have been adapted, have been deleted. Excess verbiage has been deleted. The catchline has been changed from "should" to "shall" to underscore the mandatory nature of the principle; "should" has been omitted in Canon I.A in the penultimate sentence, and the language amended, to underscore this. "Should" in the last sentence has been changed to "shall." "Should" has been changed to "shall" or "must" in other parts of the Canon.

Other additions in Canon I.A follow the Preamble to North Carolina Dispute Resolution Commission, *Standards of Conduct for Mediators*, 344 N.C. 753 (*Standards*). The addition in Canon I.B gives examples of circumstances in which persons may offer services as arbitrators. It is consistent with N.C. Ct-Ord. Arb. R. 2(a). Unlike the Code, Canon I.B says it "may be" inconsistent with the integrity of the arbitration process to solicit appointment as an arbitrator. This is because of the difficulty, e.g., in drawing a line between advertisement permitted by law and solicitation that is condemned in some professional standards, e.g., those for lawyers. Arbitrators must be mindful of fairness, neutrality, disclosure and conflict of interest principles stated in these Canons. The last sentence in Canon I.B makes it clear that the Canons should not be read to forbid arbitrator advertising where, e.g., commercial free speech principles under the Constitution allow it. The addition in Canon I.C is taken from *Standards* I.B-I.C and covers situations of court-appointed arbitrators under, e.g., the Uniform Arbitration Act, N.C. Gen. Stat. § 1-567.4, or in court-annexed arbitrations; these arbitrators are subject to court order appointing them, and the court is the final arbiter of these issues. The thrust of Canon I.C is consistent with Revised North Carolina Rules of Professional Conduct 1.1 (*Rule*), although the latter deals with competence of a lawyer, and the Canon governs competence to serve as an arbitrator. Canon I.D states a one-year rule instead of the "reasonable time" principle of the *Code*. The one-year rule has been substituted to coincide with the time in the Federal Arbitration Act, 9 U.S.C. §§ 9-11, during which a party can move to set aside an award. The Uniform Act, N.C. Gen. Stat. §§ 1-567.13—1-567.14, requires set-aside applications to be made within 90 days of an award. Fed. R. Civ. P. 60(b) and N.C.R. Civ. P. 60(b) limit certain judgment set-aside motions to one year. One year has been chosen as the time when nearly all conflict issues would arise and be resolved. The addition to Canon I.D, penultimate sentence, follows the consent rule in Rule 1.12(a). Additions in Canon II.E follow *Standard* ll.C, with additions to cover court-annexed arbitration or arbitrations where a court has appointed an arbitrator under, e.g., the Uniform Act. "Asked" replaces "requested" in Canon I.H. The phrase "continues for one year" has been added to coincide with the one-year rule for Canon I.D.

Canon I.I has been adapted from Society of Professionals in Dispute Resolution, *Ethical*

*Standards of Professional Conduct*, Support of the Profession (1987) (*SPIDR Standards*), reprinted in Rena A. Gorlin, Codes of Professional Responsibility 327 (2d ed. 1990); unlike standards applicable to arbitrators in proceedings, Canon I.I is hortatory, not mandatory. The *Rules* do not include the equivalent of ABA, *Model Rules of Professional Conduct*, Rule 6.1, which says a lawyer should aspire to provide 50 hours of public service a year. *See* Alice Neece Moseley et al., *An Overview of the Revised North Carolina Rules of Professional Conduct: An Examination of the Interests Promoted and Subordinated*, 32 Wake Forest L. Rev. 939, 990-91 (1997). Since these Canons would apply to all arbitrators, including non-lawyers, and Canon I.I states aspirations to provide continuing education, there is no inconsistency with the *Rules*. Canon I.I is consistent with North Carolina attorneys' obligations to take 12 hours of continuing legal education a year. Other lawyers teach this CLE, and these lawyers have the same role as Canon I.I would contemplate for experienced arbitrators.

The Canon's language has been tightened.

Canon I generally parallels North Carolina Code of Judicial Conduct, Canons 1-3 (*Code of Judicial Conduct*), See also National Academy of Arbitrators et al., *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, ¶¶ 1.A-1.C.2, III.A (May 30, 1996) (*Academy Code*); International Bar Association, *Ethics for International Arbitrators*, Arts. 1-2 (1986) (*IBA Ethics*), 26 Int'l Legal Mat'ls 584 (1987), 6A Benedict on Admiralty, Doc. No. 7-12D (Frank L. Wiswall, Jr. ed., 7th rev. ed. 1999), *SPIDR Standards*, General Responsibilities & Responsibilities to the Parties § 1, Background and Qualifications.

**Canon 2. An arbitrator shall disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias.**

A. Persons asked to serve as arbitrators shall, before accepting, disclose:

(1) any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Persons asked to serve as arbitrators shall disclose any such relationships which they personally have with any party or its lawyer, or with any individual whom they have been told will be a witness. They shall also disclose any such relationships involving their spouses or minor children residing in the household or their current employers, partners or business associates; and

(3) any information required by a court in the case of court-administered arbitrations.

B. Persons asked to accept appointment as arbitrators shall make a reasonable effort to inform themselves of any interests or relationships described in Canon II.A.

C. The obligation to disclose interests or relationships described in Canon II.A is a continuing duty which requires a person accepting appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Disclosure shall be made to all parties unless other disclosure procedures are provided in the rules or practices of an institution or court administering the arbitration. Where more than one arbitrator has been appointed, the other arbitrators shall be informed of interests and relationships which have been disclosed.

E. If an arbitrator is asked by all parties to withdraw, the arbitrator shall do so, provided however, if a court is administering the arbitration, the arbitrator shall inform the court of the request and shall comply with court orders. If an arbitrator is asked to withdraw by less than all of the parties because of alleged partiality or bias, the arbitrator shall withdraw unless any of these circumstances exists:

(1) If the parties' agreement, or arbitration rules to which the parties have agreed, establish procedures for determining challenges to arbitrators, those procedures shall be followed;

(2) If the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly, and that withdrawal would cause unfair delay or expense to another party or would be contrary to the interest of justice; or

(3) The court administering the arbitration decides otherwise.

F. The parties may waive disqualification of an arbitrator upon full disclosure of any basis for disqualification, and upon approval of the court in court-administered arbitrations. (Adopted August 19, 1999, effective October 1, 1999.)

**COMMENT**

Excess verbiage has been deleted. "Asked" has been substituted for "requested." "Shall" has been substituted for "should" throughout the Canon; *see Comment* for Canon I.

Canon II.A's provisions have been stated clearly in the conjunctive ("and"). Canon II.A(2) has been amended to follow *Code of Judicial Conduct*, Canon 3(C)(2) as to spouses and minor children. Canon II.A(3) has been added for court-annexed arbitration or arbitration administered by a court under, e.g., the Uniform Act. Although Canon VIII.B generally provides that these Canons state principles paramount to institutional (e.g., the *Code*) ethics standards, Canon VIII.B states an exception for Canon II.D's disclosure principles. Canon II.E has been modified to account for situations where a court administers arbitration, e.g., court-annexed arbitration, but also where a court appoints an arbitrator, e.g., pursuant to the Uniform Act, N.C. Gen. Stat. § 1-567.4. Canon II.F has been added; it is taken from N.C. Ct.-Ord. Arb. R. 2(e); however, court approval is required only if a court has appointed an arbitrator in a court-annexed arbitration or pursuant to, e.g., the Uniform Act.

Canon II generally follows *Code of Judicial Conduct*, Canon 3(C), although Canon II does not specify degrees of kinship as the *Code of Judicial Conduct* does. *See also Academy Code*, ¶¶ 2.B, 3.A; *IBA Ethics*, Arts. 1, 3-4; *SPIDR Standards*, Responsibilities to the Parties § 4.

## Canon 3. An arbitrator, in communicating with parties, shall avoid impropriety or the appearance of impropriety.

A. If the parties' agreement or arbitration rules referred to in that agreement establish the manner or content of communications between the arbitrator and the parties, the arbitrator shall follow those procedures notwithstanding any contrary provision in Canons III.B and III.C.

B. Unless otherwise provided in applicable arbitration rules or in the parties' agreement, arbitrators shall not discuss a case with any party in the absence of other parties, except in these circumstances:

(1) Discussions may be had with a party concerning such matters as setting the time and place of hearings or making other arrangements for conducting proceedings. The arbitrator shall promptly inform other parties of the discussion and shall not make any final determination concerning the matter discussed before giving each absent party an opportunity to express its views.

(2) If all parties request or consent to it, such discussion may take place.

C. Unless otherwise provided in applicable arbitration rules or in the parties' agreement, whenever an arbitrator communicates in writing with one party, the arbitrator shall send a copy of the communication to other parties at the same time. whenever the arbitrator receives a written communication concerning the case from a party which has not already been sent to other parties, the arbitrator shall send that communication to other parties. (Adopted August 19, 1999, effective October 1, 1999.)

**COMMENT**

"Shall" has been substituted for "should" throughout Canon III; *see Comment* to Canon I. *Code* III.B(2), stating "If a party fails to be present at a hearing after having been given due notice, the arbitrator may discuss the case with any party present," has been deleted as

redundant with Canon IV.F. Revisions have also tightened the text; the last phrase clarifies "to do so." *See also Code of Judicial Conduct*, Canon 2, for which Canon III is a rough parallel in some respects; *Academy Code*. ¶ 2.D; *IBA Ethics*, Art. 5.

**Canon 4. An arbitrator shall conduct proceedings fairly and diligently.**

A. An arbitrator shall conduct proceedings in an evenhanded manner and treat all parties with equality and fairness at all stages of the proceedings.

B. An arbitrator shall perform duties diligently and conclude the case as promptly as circumstances reasonably permit.

C. An arbitrator shall be patient, dignified and courteous to parties, their lawyers, witnesses, and all others with whom the arbitrator deals in that capacity and shall encourage similar conduct by all participants in the proceedings. This does not preclude an arbitrator's imposing sanctions if permitted by law or by the parties' agreement.

D. Unless otherwise agreed by the parties or provided in arbitration rules to which the parties have agreed, an arbitrator shall accord to all parties the right to appear in person and to be heard after due notice of the time and place of hearing.

E. An arbitrator shall not deny a party the opportunity to be represented by counsel.

F. If a party fails to appear after due notice, an arbitrator may proceed with the arbitration when authorized to do so by the parties or by law. An arbitrator may do so only after receiving assurance that notice has been given to the absent party.

G. When an arbitrator determines that more information than has been presented by the parties is required to decide a case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence.

H. It is not improper for an arbitrator to suggest to the parties that they discuss settling the case. An arbitrator may not be present or otherwise participate in settlement discussions unless asked to do so by all parties. An arbitrator may not pressure a party to settle.

I. Nothing in these Canons is intended to prevent a person from acting as a mediator, conciliator or other neutral in a dispute in which he or she has been appointed as an arbitrator, if asked to do so by all parties or where authorized or required to do so by applicable law or rules.

J. Where there is more than one arbitrator, the arbitrators shall afford each other full opportunity to participate in all aspects of the proceedings.

K. In court-annexed arbitrations where one or more of the parties is proceeding without counsel, at the hearing the arbitrator shall discuss the nature of the arbitration process with all parties and counsel present, including the arbitrator's role, time allotted for each party's case, order of proceedings, and the right to trial de novo (if applicable) if a party not in default is dissatisfied with the arbitrator's award, unless parties waive these explanations. (Adopted August 19, 1999, effective October 1, 1999.)

**COMMENT**

Language has been tightened, and excess verbiage has been deleted. "Shall" or "may" has been substituted for "should" throughout Canon IV; *see Comment* to Canon I.

Canon IV.C has been amended to follow *Code of Judicial Conduct*, Canon 3(A)(3). The final sentence recognizes that arbitrators may be empowered to impose sanctions in, e.g., court-annexed arbitration or by the parties' agreement, in addition to the arbitrator's ethical obligation to encourage proper conduct. Canon IV.H is consistent with *Standard* IV.B. Canon IV.I has been modified to take into account procedures other than mediation or conciliation, e.g., early neutral evaluation, etc. Canon IV.K has been added; it only applies to court-

annexed arbitration. Where there has been an agreement to arbitrate governed by, e.g., the Uniform Act, but parties have not appointed an arbitrator pursuant to the Act and the court does so under, e.g., N.C. Gen. Stat. § 1-567.4, there is no reason to require that arbitrator to explain the nature of arbitration. Many court-annexed arbitrations involve small claims where parties may appear without counsel; fairness and efficiency suggest that an explanation at the beginning of the hearing, unless waived, will expedite the proceeding. Parties in court-annexed arbitration may agree to binding arbitration with no trial de novo; if this is the case, there is no need to explain a right to trial de novo. Canon IV.K was suggested by *Standard* IV.A.

*See also Academy Code*, ¶¶ 1.A, 2.J, 4-5; *IRA Ethics*, Arts. 7-8, *SPIDR Standards*, Responsibilities to the Parties §§ 2, 5-6. The Uniform Act and the International Commercial Arbitration and Conciliation Act provide for representation by counsel. N.C. Gen. Stat. §§ 1-567.7, 1-567.48(b).

## Canon 5. An arbitrator shall make decisions in a just, independent and deliberate manner.

A. An arbitrator shall, after careful deliberation, decide all issues submitted for determination. An arbitrator may decide no other issues.

B. An arbitrator shall decide all issues justly, exercising independent judgment, and shall not permit outside pressure to affect the decision.

C. An arbitrator shall not delegate the duty to decide to any other person, unless the parties agree to such delegation.

D. If all parties agree to settle issues in dispute and ask an arbitrator to embody that agreement in an award, an arbitrator may do so but is not required to do so unless satisfied with the propriety of the settlement terms. Whenever an arbitrator embodies the parties' settlement in an award, the arbitrator shall state in the award that it is based on the parties' agreement. (Adopted August 19, 1999, effective October 1, 1999.)

### COMMENT

Revisions tighten the text and omit excess verbiage. "Shall" has been substituted for "should" throughout Canon V; *see Comment* to Canon I. The new material in Canon V.C makes it clear that parties can agree that an arbitrator may delegate decisionmaking in whole or in part, e.g., to conciliators as provided in the North Carolina International Commercial Arbitration and Conciliation Act. *See also Academy Code*, ¶¶ 2.G-2.I, 6.

## Canon 6. An arbitrator shall be faithful to the relationship of trust and confidentiality inherent in that office.

A. An arbitrator is in a relationship of trust to the parties and shall not at any time use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others or to affect adversely the interest of another.

B. Unless the parties agree otherwise, or the law or applicable rules require, an arbitrator shall keep confidential all matters relating to the arbitration proceedings and decision.

C. It is not proper at any time for an arbitrator to inform anyone of the decision before it is given to all parties. Where there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone concerning the arbitrators' deliberations. After an arbitration award has been made, it is not proper for an arbitrator to assist in post-arbitral proceedings, except as required by law, or as agreed by the parties.

D. In many types of arbitrations it is customary for arbitrators to serve without pay. In some types of cases it is customary for arbitrators to receive compensation for services and reimbursement for expenses. Where such payments are to be made, all persons asked to serve, or who serve as arbitrators, shall be governed by the same high standards of integrity and fairness as apply to their other activities in the case. Accordingly, such persons

shall scrupulously avoid bargaining with parties over the amount of payments, or engaging in communications concerning payments, which would create an appearance of coercion or other impropriety. Absent provisions in the parties' agreement, in rules to which the parties have agreed, or in applicable law, certain practices relating to payments are generally recognized as preferable to preserve the integrity and fairness of the arbitration process. These practices include:

(1) It is preferable that before the arbitrator finally accepts appointment, the basis of payment be established and that all parties be informed in writing.

(2) In cases conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, payments shall be arranged by the institution to avoid the necessity for arbitrators communicating directly with parties concerning the subject.

(3) Where no institution is available to assist in making arrangements for payments, it is preferable that any discussions with arbitrators concerning payments take place in the presence of all parties.

(4) In cases where arbitration is court-administered, court rules, orders and practices shall be followed. (Adopted August 19, 1999, effective October 1, 1999.)

COMMENT

Excess verbiage has been deleted, and language has been tightened. "Shall" replaces "should" throughout Canon VI, except in Canon VI.D(3), where "should" has been omitted. Canon VI.C has been modified to allow parties to agree to use the arbitrator in other neutral roles, e.g., as a post-award mediator. Although Canon VIII.B generally provides that these Canons state principles paramount to institutional (e.g., the *Code*) ethics standards, Canon VIII.B states an exception for Canon VI.D(2)'s payment principles Canon VI.D(4) has been added to take into account, e.g, court annexed arbitration. *See also Academy Code*, ¶¶ 2.C, 2.K, 3.A; *IBA Ethics*, Arts. 6, 9, *SPIDR Standards*, Responsibilities to the Parties § 3, Disclosure of Fees.

## Canon 7. Ethical considerations relating to arbitrators appointed by one party.

A. *Obligations under Canon I.* Non-neutral party-appointed arbitrators shall observe Canon I obligations to uphold the integrity and fairness of the arbitration process, subject to these provisions:

(1) Non-neutral arbitrators may be predisposed to the party appointing them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, non-neutral arbitrators shall not engage in delaying tactics or harassment of a party or witness and shall not knowingly make untrue or misleading statements to other arbitrators.

(2) Provisions of Canon I.D relating to relationships and interests do not apply to non-neutral arbitrators.

B. *Obligations under Canon II.* Non-neutral party-appointed arbitrators shall disclose to all parties, and to other arbitrators, interests and relationships which Canon II requires to be disclosed. Disclosure required by Canon II is for the benefit of the party appointing the non-neutral arbitrator and for the benefit of other parties and arbitrators so that they may know of bias which may exist or appear to exist. This obligation is subject to these provisions:

(1) Disclosure by non-neutral arbitrators must be sufficient to describe the general nature and scope of any interest or relationship, but need not include as detailed information as is expected from persons appointed as neutral arbitrators.

(2) Non-neutral arbitrators are not obliged to withdraw if asked to do so by a party who did not appoint them, notwithstanding Canon II.E.

C. *Obligations under Canon III.* Non-neutral party-appointed arbitrators shall observe Canon III's obligations concerning communications with parties, subject to these provisions:

(1) In an arbitration in which two party-appointed arbitrators are expected to appoint the third arbitrator, non-neutral arbitrators may consult with the party who appointed them concerning acceptability of persons under consideration for appointment as the third arbitrator.

(2) Non-neutral arbitrators may communicate with the party who appointed them concerning any other aspect of the case, provided they first inform the other arbitrators and the parties that they intend to do so. If such communication occurred before the person was appointed as arbitrator, or before the first hearing or other meeting of parties with the arbitrators, the non-neutral arbitrator shall, at the first hearing or meeting, disclose that such communication has taken place. In complying with Canon VII.C(2), it is sufficient that there be disclosure that such communication has occurred without disclosing the content of the communication. It is also sufficient to disclose at any time the intention to follow the procedure of having such communications in the future, and there is no requirement thereafter that there be disclosure before each separate occasion when such a communication occurs.

(3) When non-neutral arbitrators communicate in writing with a party that appointed them concerning any matter as to which communication is permitted under these Canons, they are not required to send copies of such writing to other parties or arbitrators.

D. *Obligations under Canon IV.* Non-neutral party-appointed arbitrators shall observe Canon IV's obligations to conduct proceedings fairly and diligently.

E. *Obligations under Canon V.* Non-neutral party-appointed arbitrators shall observe Canon V's obligations concerning making decisions, but such arbitrators may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations under Canon VI.* Non-neutral party-appointed arbitrators shall observe Canon VI's obligations to be faithful to the relationship of trust inherent in the office of arbitrator, but such arbitrators are not subject to Canon VI.D's provisions with respect to payments by the party appointing them. (Adopted August 19, 1999, effective October 1, 1999.)

**COMMENT**

"Shall" or "must" has been substituted for "should" in Canon VII; *see Comment* to Canon I. Excess verbiage has been deleted; sentences have been tightened; Canons VII.E and VII.F have been rewritten to convey the same sense as the *Code*. Nothing in *Rule* 1.12(d) conflicts with Canon VII.

## Canon 8. Canons are subject to laws and professional responsibility principles; choice or law.

A. These Canons are subject to applicable constitutional, statutory, decisional or administrative rules, State or federal, and when these conflict with these Canons, the Canon provision shall be deemed superseded if it is not possible to give effect to the rule and these Canons.

B. These Canons and other ethics or similar rules which may apply to an arbitrator in any other capacity e.g., as a professional, shall be read in pari materia, giving effect to these Canons and the ethics rules if possible. If an arbitrator is subject to other arbitrator ethics rules, e.g., the ABA-AAA Code of Ethics for Arbitrators in Commercial Disputes, and these Canons, these Canons shall govern if there is a conflict of standards; provided however, that

the principle of primacy in Canon VIII.B shall not apply to disclosure principles in Canon II.D and payment principles in Canon VI.D(2).

C. These Canons apply to arbitrations in North Carolina, or arbitrations administered by a court in North Carolina, to arbitrations where the parties choose North Carolina law exclusive of conflict of laws principles in the contract or other agreement, or where it is determined that North Carolina law exclusive of conflict of laws principles applies, regardless of where the arbitration is conducted. (Adopted August 19, 1999, effective October 1, 1999.)

**COMMENT**

Canon VIII is not part of the *Code*. However, given the possibility of conflicting rules of court, professional responsibility rules, legislation or constitutional principles, statement of the obvious in Canon VIII.A-B seems appropriate. Canon VIII.B provides that if an arbitrator is subject to professional or other ethics rules because of that arbitrator's status as, e.g., a lawyer, these Canons and the professional ethics rules shall be read in pari materia, giving effect to both if possible.

*Rule* 8.5 suggested Canon VIII.C, which is intended to cover court-annexed arbitrations, arbitrations where a court has appointed an arbitrator pursuant to, e.g., the Uniform Act, N.C. Gen. Stat. § 1-567.4, and arbitrations where parties have chosen North Carolina law or where North Carolina law, exclusive of conflict of laws principles, applies. This means that parties and the arbitrator cannot step across a state line and escape these principles.

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# RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

Adopted October 2, 1991,
with revisions effective September 20, 2000.


Rule
1. Initiating mediated settlement conferences.
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## Rule 1. Initiating mediated settlement conferences.

A. *Purpose of mandatory settlement conferences.* Pursuant to G.S. 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules, including binding or non-binding arbitration as permitted by law [see, for example, N.C.G.S. 7A-37.1, Arb. Rule 1(b)].

B. *Initiating the mediated settlement conference in each action by court order.*

(1) *Order by Senior Resident Superior Court Judge.* The Senior Resident Superior Court Judge of any judicial district may, by written order, require all persons and entities in Rule 4 to attend a pre-trial mediated settlement conference in civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) *Timing of the order.* The Senior Resident Superior Court Judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Rules 1.A.B.(3) and 3.B. herein shall govern the content of the order and the date of completion of the conference.

(3) *Content of order.* The court's order shall (1) require the mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on an A.O.C. form.

(4) *Motion for court ordered mediated settlement conference.* In cases not ordered to mediated settlement conference, any party may file a written

motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(5) *Motion to dispense with mediated settlement conference.* A party may move the Senior Resident Superior Court Judge, to dispense with the mediated settlement conference ordered by the Judge. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

(6) *Motion to authorize the use of other settlement procedures.* A party may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure in lieu of a mediated settlement conference. Such motion shall state the reasons the authorization is requested and that all parties consent to the motion. The Court may order the use of any agreed upon settlement procedure authorized by Supreme Court or local rules. The deadline for completion of the authorized settlement procedure shall be as provided by rules authorizing said procedure or, if none, the same as ordered for the mediated settlement conference.

C. *Initiating the mediated settlement conference by local rule.*

(1) *Order by local rule.* In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the Senior Resident Superior Court Judge of said districts may, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in any civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) *Scheduling orders or notices.* In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rul, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(3) *Scheduling Conferences.* In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) *Application of Rule 1.B.* The provisions of Rule 1.C.(4), (5) and (6) shall apply to Rule 1.C. except for the time limitations set out therein.

(5) *Deadline for completion.* The provisions of Rule 3.B. determining the deadline for completion of the mediated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.C. The

deadline for completion shall be set by the Senior Resident Superior Court Judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.

(6) *Selection of mediator.* The parties may select and nominate, and the Senior Resident Superior Court Judge may appoint, mediators pursuant to the provisions of Rule 2., except that the time limits for selection, nomination, and appointment shall be set by local rule. All other provisions of Rule 2. shall apply to mediated settlement conferences conducted pursuant to Rule 1.C.

**Cross References.** — As to court ordered, mediated settlement conferences in superior court civil actions, see § 7A-38.

## Rule 2. Selection of mediator.

A. *Selection of certified mediator by agreement of parties.* The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order, however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on an A.O.C. form.

B. *Nomination and court approval of a non-certified mediator.* The parties may select a mediator who does not meet the certification requirements of these Rules but who, in the opinion of the parties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate the action and who agrees to mediate indigent cases without pay.

If the parties select a non-certified mediator, the plaintiff's attorney shall file with the court a Nomination of Non-Certified Mediator within 21 days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and opposing counsel have agreed upon the selection and rate of compensation.

The Senior Resident Superior Court Judge shall rule on said nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the court's decision. The nomination and approval or disapproval of the court shall be on an A.O.C. form.

C. *Appointment of mediator by the court.* If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on an A.O.C form. The motion shall state whether any party prefers a certified attorney mediator, and if so, the Senior Resident Judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified, non-attorney mediator, and if so, the Senior Resident Judge shall appoint a certified non-attorney mediator if one is on the list of certified mediators desiring to mediate cases in the district. If no preference is expressed, the Senior Resident Judge may appoint a certified attorney mediator or certified non-attorney mediator.

Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a Notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator, certified pursuant to these Rules, under a procedure established by said Judge and set out in Local Rules or other written document. Only mediators who agree to mediate indigent cases without pay shall be appointed. The Dispute Resolution Commission shall furnish for the consideration of the Senior Resident Superior Court Judge of any district where mediated settlement conferences are authorized to be held, the names, addresses and phone numbers of those certified mediators who want to be appointed in said district.

D. *Mediator information directory.* To assist the parties in the selection of a mediator by agreement, the Senior Resident Superior Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all certified mediators who wish to mediate cases in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county.

E. *Disqualification of mediator.* Any party may move the Senior Resident Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

**Rule 3. The mediated settlement conference.**

A. *Where conference is to be held.* Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. *When conference is to be held.* As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.B.(1) shall state a deadline for completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order.

C. *Request to extend deadline for completion.* A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge may grant the request by setting a new deadline for the completion of the conference, which date may be set at any time prior to trial. Notice of the Judge's action shall be served immediately on all parties and the mediator by the person who sought the extension and shall be filed with the court.

D. *Recesses.* The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the

conference is recessed, no further notification is required for persons present at the conference.

E. *The mediated settlement conference is not to delay other proceedings.* The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

**Rule 4. Duties of parties, attorneys and other participants in mediated settlement conferences.**

A. *Attendance.*

(1) The following persons shall attend a mediated settlement conference:

(a) *Parties.*

(i) All individual parties.

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) *Insurance company representatives.* A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) *Attorneys.* At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

B. *Notifying lien holders.* Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. *Finalizing agreement.* If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent

judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

D. *Payment of mediator's fee.* The parties shall pay the mediator's fee as provided by Rule 7.

E. *Related Cases.* Upon application by any party or person, the Senior Resident Superior Court Judge may order that an attorney of record or a party in a pending Superior Court Case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in Superior Court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this rule. Any such attorney, party or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the Senior Resident Superior Court Judge who entered the order.

**CASE NOTES**

**Sanctions for Failure to Attend.** — Trial court did not abuse its discretion by striking defendant's answer and entering default where corporate defendant had no good cause for failing to have officer mediation settlement conference and was not excused. The sanctions entered were specifically authorized by former Rule 37(b)(2)c (repealed by 1993 Session Laws, c. 553, s. 1.). Triad Mack Sales & Serv., Inc. v. Clement Bros. Co., 113 N.C. App. 405, 438 S.E.2d 485 (1994).

**Trial court had inherent authority to sanction a party** for failing to execute a mediated settlement agreement by refusing to sign the agreement after it orally agreed to the terms. Few v. Hammack Enters., Inc., 132 N.C. App. 291, 511 S.E.2d 665 (1999).

**DRC COMMENTS TO RULE 4**

**DRC Comment to Rule 4.C.**

N.C. State § 7A-38.1(1) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

**DRC Comment to Rule 4.E.**

Rule 4.E. was adopted to clarify a Senior Resident Superior Court Judge's authority in those situations where there may be a case related to a Superior Court case pending in a different forum. For example, it is common for there to be claims asserted against a third-party tortfeasor in a Superior Court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party, or insurance carrier representative in the Superior Court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E. specifically authorizes a Senior Resident Superior Court Judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain a similar provision which provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related Superior Court Case.

## Rule 5. Sanctions for failure to attend mediated settlement conferences.

If a party or other person required to attend a mediated settlement conference fails to attend without good cause, the Senior Resident Superior Court Judge may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees,

mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law. (See also Rule 7.F. and the Comment to Rule 7.F.)

**CASE NOTES**

**Striking Answer and Entering Default for Failure to Attend.** — Trial court did not abuse its discretion by striking defendant's answer and entering default where corporate defendant had no good cause for failing to have officer mediation settlement conference and was not excused. The sanctions entered were specifically authorized by former Rule 37(b)(2)c (repealed by 1993 Session Laws, c. 553, s. 1.). Triad Mack Sales & Serv., Inc. v. Clement Bros. Co., 113 N.C. App. 405, 438 S.E.2d 485 (1994).

**Quoted** in Few v. Hammack Enters., Inc., 132 N.C. App. 291, 511 S.E.2d 665 (1999).

## Rule 6. Authority and duties of mediators.

A. *Authority of mediator.*

(1) *Control of conference.* The mediator shall at all times be in control of the conference and the procedures to be followed.

(2) *Private consultation.* The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) *Scheduling the conference.* The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. *Duties of mediator.*

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1;

(h) The duties and responsibilities of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) *Disclosure.* The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) *Declaring impasse.* It is the duty of the mediator timely to determine that an impasse exists and that the conference should end.

(4) *Reporting results of conference.* The mediator shall report to the court on an A.O.C. form within 10 days of the conference whether or not an agreement

was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. The mediator's report shall inform the court of the absence of any party, attorney, or insurance representative known to the mediator to have been absent from the mediated settlement conference without permission. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

(5) *Scheduling and holding the conference.* It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

**Rule 7. Compensation of the mediator.**

A. *By agreement.* When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. *By court order.* When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125 which is due upon appointment.

C. *Change of appointed mediator.* Pursuant to Rule 2.A., the parties have twenty-one (21) days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. If the court approves the substitution, the parties shall pay the court's original appointee the $125 one time, per case administrative fee provided for in Rule 7.B.

D. *Indigent cases.* No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling upon such motions, the Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

E. *Postponement fees.* As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing attorney. If a mediation is postponed within seven (7) business days of the scheduled date, the fee shall be $125. If the settlement conference is postponed within three (3) business days of the scheduled date, the fee shall be $250. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

F. *Payment of compensation by parties.* Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

G. *Sanctions for failure to pay mediator's fee.* Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.

**DRC COMMENTS TO RULE 7**

**DRC Comment to Rule 7.B.**

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

**DRC Comment to Rule 7.E.**

Though MSC Rule 7.E. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavailable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

**DRC Comment to Rule 7.F.**

If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

**DRC Comment to Rule 7.G.**

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. MSC Rule 7.G. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

## Rule 8. Mediator certification and decertification.

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a Trial Court Mediation Training Program certified by the Dispute Resolution Commission;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code, The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000, or

(ii) a member similarly in good standing of the Bar of another state; demonstrates familiarity with North Carolina court structure, legal terminol-

ogy and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney; and

(b) has at least five years of experience as a judge, practicing attorney, law professor or mediator, or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8B.(1) or Rule 8B.(2).

(2) A non-attorney may be certified if he or she has completed the following:

(a) a six hour training on North Carolina court organization, legal terminology, civil court procedure, the attorney-client privilege, the unauthorized practice of law, and common legal issues arising in Superior Court cases, provided by a trainer certified by the Dispute Resolution Commission;

(b) provide to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B.(2)(c);

(c) one of the following; (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission; and after completing the 20 hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and either a four year college degree or four years of management or administrative experience in a professional, business, or governmental entity; or (ii) ten years of management or administrative experience in a professional, business, or governmental entity.

(d) Observe three mediated settlement conferences meeting the requirements of Rule 8.C. conducted by at least two different certified mediators, in addition to those required by Rule 8.C.

C. Observe two mediated settlement conferences conducted by a certified Superior Court mediator;

(1) at least one of which must be court ordered by a Superior Court,

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein, in cases pending in the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, North Carolina Superior Court or the US District Courts for North Carolina.

D. Demonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any ethical standards hereafter adopted by this Court;

F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

G. Pay all administrative fees established by the Administrative Office of the Courts; and

H. Agree to mediate indigent cases without pay.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator.

**Legal Periodicals.** — For comment, "An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts," see 71 N.C.L. Rev. 1857 (1993).

**Rule 9. Certification of mediation training programs.**

A. Certified training programs for mediators of Superior Court civil actions shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court;

(4) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(5) Demonstrations of mediated settlement conferences;

(6) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(7) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

C. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission.

**Rule 10. Local rule making.**

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.1, implementing mediated settlement conferences in that district.

**Rule 11. Definitions.**

A. The term, Senior Resident Superior Court Judge, as used throughout these rules, shall refer both to said judge or saidjudge's designee.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

**Rule 12. Time limits.**

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

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# STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

Adopted June 24, 1999; Amended effective August 16, 2001.

Preamble

Rule

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the partys options within the process.

V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

VIII. Protecting the Integrity of the Mediation Process. A mediator shall encourage mutual respect between the parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

Index follows Rules.

## PREAMBLE

These standards are intended to instill and promote public confidence in the mediation process and to be a guide to mediator conduct. As with other forms of dispute resolution, mediation must be built on public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner which will merit that confidence. These standards apply to all mediators who participate in mediated settlement conferences pursuant to NCGS 7A-38.1, NCGS 7A-38.3, or NCGS 7A-38.4 in the State of North Carolina or who are certified to do so.

Mediation is a process in which an impartial person, a mediator, works with disputing parties to help them explore settlement, reconciliation, and understanding among them. In mediation, the primary responsibility for the resolution of a dispute rests with the parties.

The mediator's role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives. A mediator does not render decisions on the issues in dispute.

### Rule I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

A. A mediator's most important qualification is the mediator's competence

in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.

B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and withdraw if requested by any party.

C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his judgment whether his skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw. (Adopted June 24, 1999, effective October 1, 1999.)

**Editor's note.** — The order adopting the above rules provided that the Standards of Professional Conduct for Superior Court Mediators adopted by the Court on December 30, 1998, should remain in effect until October 1, 1999.

**Rule II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.**

A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.

C. The mediator shall decline to serve or shall withdraw from serving if:

(1) a party objects to his serving on grounds of lack of impartiality or

(2) the mediator determines he cannot serve impartially. (Adopted June 24, 1999, effective October 1, 1999.)

**Rule III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.**

A. A mediator shall not disclose, directly or indirectly, to any nonparty, any information communicated to the mediator by a party within the mediation process.

B. A mediator shall not disclose, directly or indirectly, to any party to the mediation, information communicated to the mediator in confidence by any other party, unless that party gives permission to do so. A mediator may encourage a party to permit disclosure, but absent such permission, the mediator shall not disclose.

C. The confidentiality provisions set forth in A. and B. above notwithstanding, a mediator has discretion to report otherwise confidential information to a party, nonparty, or law enforcement personnel in the following circumstances:

(1) the mediator is under a statutory duty to report the confidential information, see, for example N.C. Gen. Stat. § 7A-38.1 and § 7A-38.4 which provide for an exception to confidentiality when the mediator has reason to believe that a child or elder has been or may be abused.

(2) a party to the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat.

(3) a party to the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat.

(4) a party's conduct during the mediation results in direct bodily injury or death to a person.

D. Nothing in this standard prohibits the use of information obtained in a mediation for instructional purposes, or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable. (Adopted June 24, 1999, effective October 1, 1999; Amended effective August 16, 2001.)

**Rule IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the partys options within the process.**

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require. A mediator shall also inform the parties of the following:

(1) that mediation is private;

(2) that mediation is informal;

(3) that mediation is confidential to the extent provided by law;

(4) that mediation is voluntary, meaning that the parties do not have to negotiate during the process nor make or accept any offer at any time;

(5) the mediator's role; and

(6) what fees, if any, will be charged by the mediator for his services.

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator may and shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

C. Where a party appears to be acting under undue influence, or without fully comprehending the process, issues, or options for settlement, a mediator shall explore these matters with the party and assist the party in making freely chosen and informed decisions.

D. If after exploration the mediator concludes that a party is acting under undue influence or is unable to fully comprehend the process, issues or options for settlement, the mediator shall discontinue the mediation.

E. In appropriate circumstances, a mediator shall encourage the parties to seek legal, financial, tax or other professional advice before, during or after the mediation process. A mediator shall explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors. (Adopted June 24, 1999, effective October 1, 1999.)

**Rule V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.**

A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He may assist them in making informed and thoughtful decisions, but shall not impose his judgment for that of the parties concerning any aspect of the mediation.

B. Subject to Section A. above and Standard VI. below, a mediator may raise questions for the parties to consider regarding the acceptability, sufficiency, and feasibility, for all sides, of proposed options for settlement—including their impact on third parties. Furthermore, a mediator may make suggestions for the parties' consideration. However at no time shall a mediator make a

decision for the parties, or express an opinion about or advise for or against any proposal under consideration.

C. Subject to Standard IV. E. above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.

D. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power or ability, gross unfairness resulting from non-disclosure or fraud by a participant, or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality. (Adopted June 24, 1999, effective October 1, 1999.)

**Rule VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.**

A Mediator may, in areas where he is qualified by training and experience, raise questions regarding the information presented by the parties in the mediation session. However, the mediator shall not provide legal or other professional advice whether in response to statements or questions by the parties or otherwise. (Adopted June 24, 1999, effective October 1, 1999.)

**Rule VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.**

A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his own interest in maintaining cordial relations with the professional, if such interests are in conflict.

C. A mediator who is a lawyer or other professional shall not advise or represent either of the parties in future matters concerning the subject of the dispute.

D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.

E. A mediator shall not use information obtained during a mediation for personal gain or advantage.

F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.

G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.

H. A mediator shall not give or receive any commission, rebate, or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral of clients for mediation services. (Adopted June 24, 1999, effective October 1, 1999.)

**Rule VIII. Protecting the Integrity of the Mediation Process. A mediator shall encourage mutual respect between the parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.**

A. A mediator shall make reasonable efforts to ensure a balanced discussion

and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.

B. When a mediator discovers an intentional abuse of the process, such as nondisclosure of material information or fraud, the mediator shall encourage the abusing party to alter the conduct in question. The mediator is not obligated to reveal the conduct to the other party, (and subject to Standard V. D. above) nor to discontinue the mediation, but may discontinue without violating the obligation of confidentiality. (Adopted June 24, 1999, effective October 1, 1999.)

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# RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING THE PRELITIGATION FARM NUISANCE MEDIATION PROGRAM

Effective July 1, 1996, with revisions effective September 1, 2000.


Rule
1. Submission of dispute to prelitigation farm nuisance mediation.
2. Exemption from G.S. 7A-38.1.
3. Selection of mediator.
4. The prelitigation farm mediation.
5. Authority and duties of the mediator.
6. Compensation of the mediator.
7. Waiver of mediation.
8. Mediator's certification that mediation concluded.
9. Certification and decertification of mediators of prelitigation farm nuisance disputes.
10. Certification of mediation training programs.

Index follows Rules.


## Rule 1. Submission of dispute to prelitigation farm nuisance mediation.

A. Mediation shall be initiated by the filing of a Request for Prelitigation Mediation of Farm Nuisance Dispute (Request) with the clerk of superior court in a county in which the action may be brought. The Request shall be on a form prescribed by the Administrative Office of the Courts and be available through the clerk of superior court. The party filing the Request shall mail a copy of the Request by certified mail, return receipt requested, to each party to the dispute.

B. The clerk of superior court shall accept the Request and shall file it in a miscellaneous file under the name of the requesting party.

## Rule 2. Exemption from G.S. 7A-38.1.

A dispute mediated pursuant to G.S. 7A-38.3, shall be exempt from an order referring the dispute to a mediated settlement conference entered pursuant to G.S. 7A-38.1.

## Rule 3. Selection of mediator.

A. *Time period for selection.* The parties to the dispute shall have 21 days from the date of the filing of the Request to select a mediator to conduct their mediation and to file Notice of Selection of Certified Mediator by Agreement.

B. *Selection of certified mediator by agreement.* The Clerk shall provide each party to the dispute with a list of certified mediators who have expressed a willingness to mediate farm nuisance disputes in the judicial district encompassing the county in which the request was filed. If the parties are able to agree on a mediator from that list to conduct their mediation, the party who filed the Request shall notify the clerk by filing with the clerk a Notice of Selection of Certified Mediator by Agreement. Such notice shall state the name, address and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The notice shall be on a form prepared and distributed by the

Administrative Office of the Courts and available through the clerk in the county in which the Request was filed.

C. *Nomination of non-certified mediator by agreement.* The parties may by agreement select a mediator who is not certified and whose name does not appear on the list of certified mediators available through the clerk but who, in the opinion of the parties, is otherwise qualified by training or experience to mediate the dispute. If the parties agree on a non-certified mediator, the party who filed the Request shall file with the clerk a Nomination of Non-Certified Mediator. Such Nomination shall state the name, address, and telephone number of the non-certified mediator selected; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties to the dispute have agreed upon the selection and rate of compensation.

The senior resident superior court judge shall rule on the said nomination without a hearing, shall approve or disapprove the parties' nomination and shall notify the parties of his or her decision. The nomination and the court's approval or disapproval shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk of superior court in the county where the Request was filed.

D. *Court appointment of mediator.* If the parties to the dispute cannot agree on selection of a mediator, the party who filed the Request shall file with the clerk a Motion for Court Appointment of Mediator and the senior resident superior court judge shall appoint the mediator. The Motion shall be filed with the clerk within 21 days of the date of the filing of the Request. The motion shall be on a form prepared and distributed by the Administrative Office of the Courts. The motion shall state whether any party prefers a certified attorney mediator, and if so, the senior resident superior court judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified, non-attorney mediator, and if so, the senior resident judge shall appoint a certified non-attorney mediator if one is on the list. If no preference is expressed, the senior resident superior court judge may appoint a certified attorney mediator or a certified non-attorney mediator.

E. *Mediator information directory.* To assist parties in learning more about the qualifications and experience of certified mediators, the clerk of superior court in the county in which the Request was filed shall make available to the disputing parties a central directory of information on all certified mediators who wish to mediate cases in that county, including those who wish to mediate prelitigation farm nuisance disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.

**Rule 4. The prelitigation farm mediation.**

A. *When mediation is to be completed.* The mediation shall be completed within 60 days of the Notice of Selection of Certified Mediator by Agreement or the date of the order appointing a mediator to conduct the mediation.

B. *Extensions.* A party may file a motion with the clerk seeking to extend the 60 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within 60 days of the mediator's appointment. The senior resident superior court judge may grant the motion by entering a written order establishing a new date for completion of the mediation.

C. *Where the conference is to be held.* Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time and location of the mediation to all parties named in the Request or their attorneys.

D. *Recesses.* The mediator may recess the mediation at any time and may set a time for reconvening, except that such time shall fall within a sixty day period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation session.

E. *Duties of parties, attorneys and other participants.* Rule 4 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

F. *Sanctions for failure to attend.* Rule 5 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

**Rule 5. Authority and duties of the mediator.**

A. *Authority of mediator.*

(1) *Control of mediation.* The mediator shall at all times be in control of the mediation and the procedures to be followed.

(2) *Private consultation.* The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) *Scheduling the conference.* The mediator shall make a good faith effort to schedule the conference at a time that is convenient for the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. *Duties of mediator.*

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of mediation;

(d) The fact that the mediation is not a trial, the mediator is not a judge and that the parties may pursue their dispute in court if mediation is not successful and they so choose.

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether or under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(l);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) *Disclosure.* The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) *Declaring impasse.* It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.

(4) *Scheduling and holding the conference.* It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 4 above. Rule 4 shall be strictly observed by the mediator unless an extension has been granted in writing by the senior resident superior court judge.

**Rule 6. Compensation of the mediator.**

A. *By agreement.* When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator, except that no administrative fees or fees for services shall be assessed any

party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

B. *By court order.* When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $125.00 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $125.00, except that no administrative fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

C. *Indigent cases.* No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their cases, subsequent to the trial of the action. In ruling upon such motions, the judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. *Postponement Fee.* As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing attorney. If a mediation is postponed within seven business (7) days of the scheduled date, the fee shall be $125. If the settlement conference is postponed within three (3) business days of the scheduled date, the fee shall be $250. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 6.B.

E. *Payment of compensation by parties.* Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediation.

F. *Sanctions for failure to pay mediator's fee.* Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge. (Amended effective July 15, 1996; Amended effective September 1, 2000.)

**DRC Comments to Rule 6**

**DRC Comment to Rule 6.B.**

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

**DRC Comment to Rule 6.D.**

Though Rule 6.D. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a post-

ponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavailable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

**DRC Comment to Rule 6.E.**

If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

**DRC Comment to Rule 6.F.**

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. MSC Rule 6.E. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 6.B. (hourly fee and administrative fee) and 6.D. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 6 but agreed to among the parties, for example, payment for travel time or mileage.

## Rule 7. Waiver of mediation.

All parties to a farm nuisance dispute may waive mediation by informing the mediator of their waiver in writing. The Waiver of Prelitigation Mediation in Farm Nuisance Dispute shall be on form prescribed by the Administrative Office of the Courts and available through the clerk. The party who requested mediation shall file the waiver with the clerk and mail a copy to the mediator and all parties named in the Request.

**Editor's note.** — It appears that the word "form" in the second sentence should either read "forms" or should read "a form" or "the form".

## Rule 8. Mediator's certification that mediation concluded.

A. *Contents of certification.* Following the conclusion of mediation or the receipt of a waiver of mediation signed by all parties to the farm nuisance dispute, the mediator shall prepare a Mediator's Certification in Prelitigation Farm Nuisance Dispute on a form prescribed by the Administrative Office of the Courts. If a mediation was held, the certification shall state the date on which the mediation was concluded and report the general results. If a mediation was not held, the certification shall state why the mediation was not held and identify any parties named in the Request who failed, without good cause, to attend or participate in mediation or shall state that all parties waived mediation in writing pursuant to Rule 7 above.

B. *Deadline for filing mediator's certification.* The mediator shall file the completed certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation. The mediator shall serve a copy of the certification on each of the parties named in the request.

## Rule 9. Certification and decertification of mediators of prelitigation farm nuisance disputes.

Mediators certified to conduct prelitigation mediation of farm disputes shall be subject to all rules and regulations regarding certification, conduct, discipline and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as

adopted by the Dispute Resolution Commission and applicable to mediators of farm nuisance disputes.

**Rule 10. Certification of mediation training programs.**

The Dispute Resolution Commission may specify a curriculum for a farm mediation training program and may set qualifications for trainers.

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# RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING THE YEAR 2000 PRELITIGATION MEDIATION PROGRAM

Effective January 1, 2000.


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1. Submission of dispute to Prelitigation Year 2000 Mediation.
2. Selection of mediator.
3. The Prelitigation Year 2000 Mediation.
4. Authority and duties of the mediator.
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7. Affirmative defense.
8. Mediator's certification that mediation concluded.
9. Certification and decertification of mediators of Year 2000 disputes.
10. Certification of mediation training programs.
11. Responsibility for enforcement.

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## Rule 1. Submission of dispute to Prelitigation Year 2000 Mediation.

A. A person with a claim for damages allegedly resulting from a Year 2000 problem may initiate mediation by filing a Request for Prelitigation Mediation of Year 2000 Dispute (Request) with the clerk of superior court in a county in which the action may be brought. The Request shall be on a form prescribed by the Administrative Office of the Courts and be available through the clerk of superior court. The party filing the Request shall mail a copy of the Request by certified mail, return receipt requested, to each party to the dispute.

B. The clerk of superior court shall accept the Request and shall file it in the miscellaneous file under the name of the requesting party.

**Cross References.** — For section establishing a program to provide for mediation of year 2000 disputes, and providing for the adoption of rules in its implementation, see § 66-298.

## Rule 2. Selection of mediator.

A. *Time period for selection.* The parties to the dispute shall have 21 days from the date of the filing of the Request to select a mediator to conduct their mediation and to file their Notice of Selection of Certified Mediator by Agreement.

B. *Selection of certified mediator by agreement.* The clerk shall provide each party to the dispute with a list of certified mediators who have expressed a willingness to mediate Year 2000 disputes in the judicial district encompassing the county in which the Request was filed. If the parties are able to agree on a certified mediator to conduct their mediation, the party who filed the Request shall notify the clerk by filing with the clerk a Notice of Selection of Certified Mediator by Agreement (Notice). Such Notice shall state the name, address, and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The notice shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk in the county in which the Request was filed.

C. *Nomination of non-certified mediator by agreement.* The parties may by agreement select a mediator who is not certified but who, in the opinion of the

parties, is otherwise qualified by training or experience to mediate the dispute. If the parties agree on a non-certified mediator, the party who filed the Request shall file with the clerk a Nomination of Non-Certified Mediator (Nomination) and shall simultaneously deliver a copy of the Nomination to the senior resident superior court judge. Such Nomination shall state the name, address, and telephone number of the non-certified mediator selected; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties to the dispute have agreed upon the selection and rate of compensation.

The senior resident superior court judge shall rule on the Nomination without a hearing, shall approve or disapprove the parties' nomination and shall notify the parties of his or her decision. The Nomination and the court's approval or disapproval shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk of superior court in the county where the Request was filed.

D. *Court appointment of mediator.* If the parties to the dispute cannot agree on selection of a mediator, the party who filed the Request shall file with clerk a Motion for Court Appointment of Mediator (Motion) and simultaneously deliver a copy to the senior resident superior court judge who shall appoint the mediator. The Motion shall be filed with the clerk within 21 days of the date of the filing of the Request. The Motion shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The Motion shall state whether any party prefers a certified attorney mediator, and if so, the senior resident superior court judge shall appoint a certified attorney mediator. The Motion may state that all parties prefer a certified, non-attorney mediator, and if so, the senior resident judge shall appoint a certified non-attorney mediator if one is on the list. If no preference is expressed, the senior resident superior court judge may appoint a certified attorney mediator or a certified non-attorney mediator. The Clerk shall notify the mediator and the parties of the appointment of the mediator.

E. *Mediator information directory.* To assist parties in learning more about the qualifications and experience of certified mediators, the clerk of superior court in the county in which the Request was filed shall make available to the disputing parties a central directory of information on all certified mediators who wish to mediate cases in that county, including those who wish to mediate prelitigation Year 2000 disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.

**Rule 3. The Prelitigation Year 2000 Mediation.**

A. *When mediation is to be completed.* The mediation shall be completed within 60 days of the Notice of Selection of Certified Mediator by Agreement or the date of the order appointing a mediator to conduct the mediation.

B. *Extensions.* A party may file a motion with the clerk seeking to extend the 60 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within 60 days of the mediator's appointment. The senior resident superior court judge may grant the motion by entering a written order establishing a new date for completion of the mediation.

C. *Where the Conference is to be held.* Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the Request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time, and location of the mediation to all parties named in the Request or their attorneys.

D. *Recesses.* The mediator may recess the mediation at any time and may set a time for reconvening, except that such time shall fall within a thirty day

period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation section.

E. *Duties of parties, attorneys and other participants.* Rule 4 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference to the extent it is consistent with prelitigation disputes.

If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded.

F. *Sanctions for Failure to Attend.* Rule 5 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

**COMMENT**

**Comment to Rule 3.E**

N.C. Gen. Stat. § 7A-38.1(l) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

## Rule 4. Authority and duties of the mediator.

A. *Authority of mediator.*

(1) *Control of mediation.* The mediator shall at all times be in control of the mediation and the procedures to be followed.

(2) *Private consultation.* The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

B. *Duties of mediator.*

(1) The mediator shall define and describe the following at the beginning of the mediation;

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of mediation;

(d) That the mediation is not a trial, the mediator is not a judge and the parties may pursue their dispute in court if mediation is not successful and they so choose.

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. § 7A-38.1(*l*);

(h) The duties and responsibilites of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) *Disclosure.* The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice, or partiality.

(3) *Declaring Impasse.* It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.

(4) *Scheduling and Holding the Conference.* It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 3 above. Rule 3 shall be strictly observed by the mediator unless an extension has been granted in writing by the senior resident superior court judge.

(5) *Certification.* The mediator has a duty to timely file a Certification as required by Rule 8.

**Rule 5. Compensation of the mediator.**

A. *By agreement.* When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator, except that no administrative fees, fees for services or other fees shall be assessed any party if all parties waive mediation in writing pursuant to Rule 6 at least seven (7) business days prior to the occurrence of an initial mediation session or a party with an affirmative defense refuses in writing to participate in mediation pursuant to Rule 7 at least seven (7) business day prior to the occurrence of an initial mediation session.

B. *By court order.* When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $125, except that no administrative fees, fees for services or other fees shall be assessed any party if all parties waive mediation in writing pursuant to Rule 6 at least seven (7) business days prior to the occurrence of an initial mediation session or a party with an affirmative defense refuses in writing to participate in mediation pursuant to Rule 7 at least seven (7) business day prior to the occurrence of an initial mediation session.

C. *Indigent cases.* No party found to be indigent by the court for the purposes of there rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their dispute, subsequent to the trial of the action. In ruling on such motions, the Judge shall apply the criteria enumerated in G.S. § 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

D. *Payment of compensation by parties.* Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediation.

E. *Postponement fees.* As used herein, the term "postponement" shall mean rescheduling or not proceeding with a mediated settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing, attorney/party. If a mediation is postponed within seven (7) business days of the scheduled date, the fee shall be $125. If the settlement conference is postponed within three (3) business days of the scheduled date, the shall be $250, except that no postponement fees shall be assessed any party if all parties waive mediation in writing pursuant to Rule 6 at least seven (7) business days prior to the occurrence of an initial mediation session or a party with an affirmative defense refuses in writing to participate in mediation pursuant to Rule 7 at least seven (7) business days prior to the

occurrence of an initial mediation session. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 5.B.

F. *Sanctions for failure to pay mediator's fee.* Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent statues to promptly move the senior resident superior court judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and findings and the imposition of any and all lawful sanctions by a resident or presiding superior court judge.

**Rule 6. Waiver of mediation.**

All parties to a Year 2000 dispute may waive mediation by informing the mediator of their waiver in writing. The Waiver of Prelitigation Mediation (Waiver) shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The disputant who requested mediation shall file the Waiver with the clerk and mail a copy to the mediator and all parties named in the Request. No costs shall be assessed any party if all parties waive mediation at least seven (7) business days prior to the occurrence of an initial mediation session.

**Rule 7. Affirmative defense.**

If a party to the dispute is entitled to an affirmative defense pursuant to G.S. § 1-539.26, that party may refuse to participate in the mediation. A party refusing mediation shall advise the mediator in writing of his or her refusal. The Refusal of Prelitigation Mediation (Refusal) shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The party refusing to participate shall file the Refusal with the clerk and mail a copy to the mediator and to all parties. No costs shall be assessed any party if a party with an affirmative defense advises the mediator in writing of his or her refusal to participate in mediation at least seven (7) business days prior to the occurrence of an initial mediation session.

**Rule 8. Mediator's certification that mediation concluded.**

A. *Contents of certification.* Following the conclusion of mediation, the receipt of a waiver of mediation signed by all parties to the Year 2000 dispute, or the receipt of a refusal of a party with an affirmative defense under G.S. § 1-539.26 to participate in mediation, the mediator shall prepare a Mediator's Certification in Prelitigation Year 2000 Dispute (Certification) on a form prescribed by the Administrative Office of the Courts and available through the clerk. If a mediation were held, the Certification shall state the date on which the mediation was concluded and report the general results. If a mediation were not held, the Certification shall state that all parties waived mediation in writing pursuant to Rule 7 above, that a party with an affirmative defense under G.S. 1-539.26 refused to participate with good cause, or that the mediation was not held for other, specified reasons. The mediator shall identify any parties named in the Request who failed, without good cause, to attend or participate in mediation.

B. *Deadline for filing mediator's certification.* The mediator shall file the completed Certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation or a refusal to participate. The mediator shall serve a copy of the Certification on each of the parties named in the request.

**Rule 9. Certification and decertification of mediators of Year 2000 disputes.**

Mediators certified to conduct prelitigation mediation of Year 2000 disputes shall be subject to all rules and regulations regarding certification, conduct, discipline, and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators of Year 2000 disputes.

**Rule 10. Certification of mediation training programs.**

The Dispute Resolution Commission may specify a curriculum for a Year 2000 mediation training program and may set qualifications for trainers.

**Rule 11. Responsibility for enforcement.**

The Senior Resident Superior Court Judge or his/her designee shall be responsible for enforcing these rules and shall enter appropriate court orders as necessary to enforce these rules.

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# NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Adopted June 13, 1975,
with amendments received through October 18, 2001.

These rules were promulgated by the Court under the rule-making authority conferred by Article IV, § 13(2) of the Constitution of North Carolina. They are effective with respect to all appeals taken from orders and judgments of the Superior Courts, the District Courts, the North Carolina Industrial Commission, the North Carolina Utilities Commission and the Commissioner of Insurance of North Carolina in which notice of appeal was given on and after July 1, 1975. As to such appeals, these rules supersede the Rules of Practice in the Supreme Court of North Carolina, 254 N.C. 783 (1961), as amended; the Supplementary Rules of the Supreme Court, 271 N.C. 744 (1967), as amended; and the Rules of Practice in the Court of Appeals of North Carolina, 1 N.C. App. 632 (1968), as amended. With respect to all appeals in which notice of appeal was given prior to July 1, 1975, the rules of court and statutes then controlling appellate procedure are continued in force as the Rules of Practice of the Courts of the Appellate Division until final disposition of the appeals.

An Appendix of Tables and Forms prepared by the Drafting Committee, as revised, is published with the rules for its possible helpfulness to the profession in the early stages of experience with these rules. Although authorized to be published for this purpose, it is not an authoritative source on parity with the rules.


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**Editor's note.** — By order dated June 30, 1988, the Supreme Court directed that effective September 1, 1988, the Drafting Committee Notes and Commentary which had been appended to each of the Rules of Appellate Procedure should be deleted, and that in their stead should be annotations containing the date of each rule's adoption and any subsequent dates of amendment, indicating which of the rule's paragraphs was amended and the effective date thereof.

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# ARTICLE I. APPLICABILITY OF RULES

## Rule 1. Scope of rules: Trial tribunal defined.

(a) *Scope of rules.* These rules govern procedure in all appeals from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies, boards, and commissions to the appellate division; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.

(b) *Rules do not affect jurisdiction.* These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.

(c) *Definition of trial tribunal.* As used in these rules, the term "trial tribunal" includes the superior courts, the district courts, and any administrative agencies, boards, or commissions from which appeals lie directly to the appellate division. (Amended February 1, 1985.)

**Editor's note.** — For North Carolina court system website, see www.aoc.state.nc.us/.

### CASE NOTES

I. In General.
II. Decisions Under Prior Law.

#### I. IN GENERAL.

**Mandatory.** — The North Carolina Rules of Appellate Procedure are mandatory, and for violation of the rules an appeal is subject to dismissal. State v. Gillespie, 31 N.C. App. 520, 230 S.E.2d 154 (1976), cert. denied, 291 N.C. 713, 232 S.E.2d 205 (1977); Duke Power Co. v. Flinchem, 59 N.C. App. 349, 296 S.E.2d 804 (1982); Williams v. East Coast Sales, Inc., 59 N.C. App. 700, 298 S.E.2d 80 (1982); Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984); In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985), aff'd, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

The North Carolina Rules of Appellate Procedure are mandatory. Ledwell v. County of Randolph, 31 N.C. App. 522, 229 S.E.2d 836 (1976); State v. Motsinger, 31 N.C. App. 594, 230 S.E.2d 205 (1976), cert. denied, 291 N.C. 714, 232 S.E.2d 202 (1977); In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976); State v. Lesley,

33 N.C. App. 237, 234 S.E.2d 476 (1977); White v. Lawrence, 33 N.C. App. 631, 236 S.E.2d 30 (1977); State v. Puckett, 54 N.C. App. 576, 284 S.E.2d 326 (1981).

The Rules of Appellate Procedure are mandatory and violations thereof subject an appeal to dismissal. Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997), rev'd on other grounds, 347 N.C. 672, 500 S.E.2d 88 (1998).

The rules of this court, governing appeals, are mandatory and not directory. They may not be disregarded or set at naught (1) by act of the legislature, (2) by order of the judge of the superior court, (3) by consent of litigants or counsel. The court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly. State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982).

**Quoted** in Byrd v. Alexander, 32 N.C. App. 782, 233 S.E.2d 654 (1977); State v. Johnson, 38 N.C. App. 111, 247 S.E.2d 286 (1978); State v. Oxendine, 43 N.C. App. 391, 258 S.E.2d 810 (1979); Winston-Salem Joint Venture v. City of Winston-Salem, 65 N.C. App. 532, 310 S.E.2d 58 (1983).

**Cited** in Indian Trace Co. v. Sanders, 33 N.C. App. 386, 235 S.E.2d 91 (1977); O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979); Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998).

### II. DECISIONS UNDER PRIOR LAW.

***Editor's note.*** *— The cases cited below were decided under former Rules 1 and 4, Rules of Practice in the Supreme Court of North Carolina.*

**The rules of the Supreme Court are mandatory, not directory.** Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922); Washington County v. Norfolk S. Land Co., 222 N.C. 637, 24 S.E.2d 338 (1943); Warshaw v. Warshaw, 236 N.C. 754, 73 S.E.2d 900 (1952); Balint v. Grayson, 256 N.C. 490, 124 S.E.2d 364 (1962); Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); In re Will of Adams, 268 N.C. 565, 151 S.E.2d 59 (1966).

The rules of practice in the Supreme Court are mandatory and will be enforced. Williams v. Boulerice, 269 N.C. 499, 153 S.E.2d 95 (1967); State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

The rules of the Supreme Court have been dictated by experience and stem from a desire to expedite business. They are mandatory and will be enforced. State v. Blackwell, 276 N.C. 714, 174 S.E.2d 534, cert. denied, 400 U.S. 946, 91 S. Ct. 253, 27 L. Ed. 2d 252 (1970).

The impression seems to prevail to some extent that the rules of practice prescribed by the Supreme Court are merely directory — that they may be ignored, disregarded, and suspended almost as of course. This is a serious mistake. The Supreme Court has ample authority to make them. They are deemed essential to the protection of the rights of litigants and the due administration of justice. They have force, and the Supreme Court will certainly see that they have effect and are duly observed whenever they properly apply. Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922).

**Exclusive Power to Make Rules.** — The Supreme Court is given, by N.C. Const., Art. IV, § 13(2), exclusive power to make its own rules of practice, without legislative authority to interfere, and in case of conflict the rules made by the Supreme Court will be observed. Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922).

The General Assembly can enact no rules of practice and procedure for the Supreme Court. Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922).

**Dismissal of Appeal for Noncompliance with Rules.** — Ordinarily motions to dismiss appeals will be allowed, upon a failure to comply with the rules of the Supreme Court, without discussing the merits of the case. Davis v. Wall, 142 N.C. 450, 55 S.E. 350 (1906).

## Rule 2. Suspension of rules.

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

### CASE NOTES

**The Rules of Appellate Procedure are mandatory** and failure to follow the rules subjects an appeal to dismissal. Wiseman v. Wiseman, 68 N.C. App. 252, 314 S.E.2d 566 (1984).

**Consideration of Constitutional Questions Not Properly Raised Below.** — While the Supreme Court will generally refrain from deciding constitutional questions which are not raised or passed upon in the trial court or

properly presented in the Court of Appeals, the court may pass upon constitutional questions not properly raised below in the exercise of its supervisory jurisdiction. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

Although defendant's conditional cross-appeal had not been properly preserved for appellate review, in the interests of judicial economy the Supreme Court may elect pursuant to this rule to consider the merits of defendant's arguments. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

**But the Court May Suspend Requirements Pursuant to This Section.** — The court elected to suspend the requirement for the clerk's date stamp, pursuant to its discretionary authority accorded by N.C. R. App. P., Rule 2 where neither party objected to the absence of the stamp. State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875 (2000).

**Residual Power to Consider Important Issues.** — On rare occasions, when issues of importance which are frequently presented to state agencies and the courts require a decision in the public interest, the Supreme Court will exercise its inherent residual power or its authority under this rule and address those issues, even though they are not properly raised on appeal. This residual power to suspend or vary operation of the court's published rules does not depend on express reservation by the court in its body of rules, but is included in the rules as a reminder to counsel that the power exists and may be drawn upon where the justice of doing so or the injustice of failing to do so appears manifest to the court. Blumenthal v. Lynch, 315 N.C. 571, 340 S.E.2d 358 (1986).

This rule relates to the residual power of appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice that appears manifest to the court and only in such instances. Steingress v. Steingress, 350 N.C. 64, 511 S.E.2d 298 (1999).

**Discretion of Appellate Court.** — Although defendant did not properly preserve for appeal either issue on which he relied, the Court of Appeals may hear appeals in its discretion under this rule. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

Although defendant's assignments of error set out in the record on appeal did not conform to Appellate Rule 10(c), pursuant to the court's discretionary power in this Rule, they elected to review the merits of defendants' appeal. Fletcher v. Dana Corp., 119 N.C. App. 491, 459 S.E.2d 31 (1995), cert. denied, 342 N.C. 191, 463 S.E.2d 235 (1995).

**Section Used to Extend Provisions of N.C.R.A.P., Rule 38.** — The court used this provision to vary the requirements of N.C.R.A.P., Rule 38 so as to allow an appeal by the decedent's attorney where the plaintiff died before she was entitled to an appeal. Brown v. Brown, 353 N.C. 220, 539 S.E.2d 621 (2000).

**Lack of Jurisdiction.** — Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2. Bromhal v. Stott, 116 N.C. App. 250, 447 S.E.2d 481 (1994), cert. denied, 339 N.C. 609, 454 S.E.2d 246, aff'd, 341 N.C. 702, 462 S.E.2d 219 (1995).

**The court could not suspend the rules** pursuant to this section in order to accommodate the Attorney General's petition challenging the grant of class action attorneys' fees. Bailey v. North Carolina Dep't of Revenue, 353 N.C. 142, 540 S.E.2d 313 (2000).

**Consideration of Issue Not Raised in Dissent.** — Under § 7A-30(2), only the issue raised in the dissent is properly before the Supreme Court for review. N.C.R.A.P., Rule 16 defines the permissible scope of review in such cases. Nevertheless, additional issues which arise frequently in the administration of estates and must often be determined by the Department of Revenue would be considered under the court's residual power or authority under this rule. Blumenthal v. Lynch, 315 N.C. 571, 340 S.E.2d 358 (1986).

**Consideration of Matter Court's Prerogative.** — Although defendant made no assignment of error regarding whether the trial court should have awarded attorney's fees but sought to address that question summarily in his brief, the court of appeals choose to deal with the question in accordance with its prerogative under this rule. Forsyth Mun. ABC Bd. v. Folds, 117 N.C. App. 232, 450 S.E.2d 498 (1994).

**McKoy Errors in Sentencing Under § 15A-2000.** — At least for all trials conducted after State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), and before Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), the Supreme Court will decline to require that a McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), error be reviewed under the plain error standard when the defendant failed to object at trial to the error, and will instead apply this rule. State v. Sanderson, 327 N.C. 397, 394 S.E.2d 803 (1990).

**Erroneous Assumption by Trial Court and Appellant.** — Where plaintiff's contract claim was dismissed because the trial court erroneously assumed, as did plaintiff, that plaintiff was barred by the statute of frauds from recovering on that claim, but plaintiff failed to properly preserve this error for appellate review, the supreme court would consider the issue pursuant to this rule. Potter v. Homestead Preservation Ass'n, 330 N.C. 569, 412 S.E.2d 1 (1992).

**Although the appellant failed to identify**

**various exceptions** upon which its assignments of errors were based, as required by N.C.R.A.P., Rule 28(b)(5), the court deemed it appropriate, pursuant to this rule, to dispose of the appeal on the merits. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Although defendant did not identify the record page on which each exception appeared as required under N.C.R.A.P., Rules 10(c) and 28(b)(5), these omissions were not so egregious as to invoke dismissal. Symons Corp. v. Insurance Co. of N. Am., 94 N.C. App. 541, 380 S.E.2d 550 (1989).

**Although defendant failed to include the exact words "plain error" in his brief,** he succeeded in presenting and arguing the issue fully and in establishing conclusively fundamental error meeting the standard of plain error; therefore, the court considered defendant's contention under a plain error analysis. State v. Gregory, 342 N.C. 580, 467 S.E.2d 28 (1996).

**The Court of Appeals would review the merits** of the state's appeal, even though it failed to set forth the legal basis on which the trial court allegedly erred in dismissing criminal charges, as the assignment informed the defendants of the issues to be raised and thus allowed them to protect their interests in assessing the sufficiency of the proposed record on appeal. State v. Baggett, 133 N.C. App. 47, 514 S.E.2d 536 (1999).

**Acceptance of Brief in Spite of Purported Settlement.** — Where in spite of the fact that appellee and estate purported to have settled their differences, and in spite of the fact that appellee was no longer represented by attorneys, such attorneys filed a brief opposing appellant, titled "Appellee's Brief," appellate court would use this rule to treat this brief as an amicus brief because of the extraordinary procedural posture of the case. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. denied, 331 N.C. 749, 417 S.E.2d 236 (1992).

**Review in Spite of Improper Hybrid Appeal.** — Where defendant's attorney improperly appealed by presenting argument on a single assignment of error and also requested that the court conduct a "full examination of the record on appeal for possible prejudicial error," the court exercised its discretion and elected to consider defendant's pro se brief pursuant to this section. State v. Grady, 136 N.C. App. 394, 524 S.E.2d 75 (2000).

**Where plaintiff in workers' compensation case, proceeding in forma pauperis, failed to present any assignments of error** within the record, and neither the exceptions nor assignments of error which plaintiff relied on were set forth at the conclusion of the record on appeal, the Court of Appeals, in order to prevent any manifest injustice to plaintiff, would nonetheless review the merits of his appeal. Swindell v. Davis Boat Works, Inc., 78 N.C. App. 393, 337 S.E.2d 592 (1985), appeal dismissed and cert. denied, 316 N.C. 385, 342 S.E.2d 908 (1986).

**Consideration of Judgment as to Attorneys' Fees Despite Failure to Present and Argue Issue.** — Plaintiff's failure to present and argue in its brief to the Court of Appeals the propriety of the trial court's judgment as to attorney fees precluded plaintiff from obtaining relief on this point in the Court of Appeals as a matter of right; however, the Court of Appeals, in the exercise of its general supervisory powers under § 7A-32(c) or pursuant to this rule, could consider on its own initiative the question of the attorneys' fees award and give relief as a matter of appellate grace. Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

**The trial court's failure to instruct the jury that it could not use the same evidence** to support more than one aggravating circumstance did not rise to the level of plain error. State v. Wilkinson, 344 N.C. 198, 474 S.E.2d 375 (1996).

**Where denial of Rule 60(b) motion was in the nature of an interlocutory order** because plaintiff's voluntary dismissal resulted in there being no action pending, and defendants would not suffer the loss of a substantial right absent an appeal, in the court's discretion pursuant to Rules 2 and 21 the appeal was treated as a writ of certiorari. Troy v. Tucker, 126 N.C. App. 213, 484 S.E.2d 98 (1997).

**Extension of Time to Serve Proposed Record on Appeal.** — Suspension of the Rules of Appellate Procedure to allow plaintiff's appeal was not warranted, where the plaintiffs failed to serve their proposed record on appeal until 44 days after an extension granted by the trial court, and such service also was 36 days after the Court of Appeals had denied plaintiffs' motion to extend the time for service. Webb v. McKeel, 132 N.C. App. 816, 513 S.E.2d 596 (1999).

**Applied** in Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978); In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979); State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Brown v. Boney, 41 N.C. App. 636, 255 S.E.2d 784 (1979); Econo-Travel Motor Hotel Corp. v. Foreman's, Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980); State v. Jones, 300 N.C. 363, 266 S.E.2d 586 (1980); State v. Cohen, 301 N.C. 220, 270 S.E.2d 416 (1980); Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980); State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980); Oroweat Employees Credit Union v.

Stroupe, 48 N.C. App. 338, 269 S.E.2d 211 (1980); State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980); State v. Hunter, 48 N.C. App. 689, 269 S.E.2d 736 (1980); State v. Stafford, 48 N.C. App. 740, 269 S.E.2d 739 (1980); Pacific Southbay Indus., Inc. v. Sure-Fire Distrib., Inc., 49 N.C. App. 172, 270 S.E.2d 515 (1980); Harper v. Harper, 50 N.C. App. 394, 273 S.E.2d 731 (1981); Peoples Serv. Drug Stores, Inc. v. Mayfair, 50 N.C. App. 442, 274 S.E.2d 365 (1981); State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981); State v. Poplin, 304 N.C. 185, 282 S.E.2d 420 (1981); State v. Booker, 306 N.C. 302, 293 S.E.2d 78 (1982); State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982); State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982); State v. Herbin, 64 N.C. App. 711, 308 S.E.2d 338 (1983); State v. Norfleet, 65 N.C. App. 355, 309 S.E.2d 260 (1983); Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984); Wachovia Bank & Trust Co. v. Guthrie, 67 N.C. App. 622, 313 S.E.2d 603 (1984); In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984); Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); State v. Woodruff, 70 N.C. App. 561, 321 S.E.2d 1 (1984); State v. Sanders, 312 N.C. 318, 321 S.E.2d 836 (1984); State v. Albert, 312 N.C. 567, 324 S.E.2d 233 (1985); State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985); In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985); Sanyo Elec., Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738 (1985); Wilkins v. Green, 76 N.C. App. 340, 332 S.E.2d 507 (1985); Sessoms v. Sessoms, 76 N.C. App. 338, 332 S.E.2d 511 (1985); In re Parker, 76 N.C. App. 447, 333 S.E.2d 749 (1985); N.C. Coastal Motor Line v. Everette Truck Line, 77 N.C. App. 149, 334 S.E.2d 499 (1985); State v. O'Neal, 77 N.C. App. 600, 335 S.E.2d 920 (1985); State v. Hosey, 79 N.C. App. 196, 339 S.E.2d 414 (1986); Bailey v. LeBeau, 79 N.C. App. 345, 339 S.E.2d 460 (1986); State v. Hamlet, 316 N.C. 41, 340 S.E.2d 418 (1986); Carefree Carolina Communities, Inc. v. Cilley, 79 N.C. App. 742, 340 S.E.2d 529 (1986); State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985); State v. Hunter, 315 N.C. 371, 338 S.E.2d 99 (1986); In re Johnson, 315 N.C. 388, 338 S.E.2d 104 (1986); Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986); State v. White, 82 N.C. App. 358, 346 S.E.2d 243 (1986); State v. Williams, 317 N.C. 474, 346 S.E.2d 405 (1986); Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986); Little v. City of Locust, 83 N.C. App. 224, 349 S.E.2d 627 (1986); State v. Callahan, 83 N.C. App. 323, 350 S.E.2d 128 (1986); State v. Hooper, 318 N.C. 680, 351 S.E.2d 286 (1987); State v. Reese, 319 N.C. 110, 353 S.E.2d 352 (1987); Lawton v. County of Durham, 85 N.C. App. 589, 355 S.E.2d 158 (1987); State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250 (1987); State v. Dudley, 319 N.C. 656, 356 S.E.2d 361 (1987); State v. Freeman, 319 N.C. 609, 356 S.E.2d 765 (1987); Carter v. North Carolina State Bd. of Registration, 86 N.C. App. 308, 357 S.E.2d 705 (1987); State v. Brown, 320 N.C. 179, 358 S.E.2d 1 (1987); Phelps v. Duke Power Co., 86 N.C. App. 455, 358 S.E.2d 89 (1987); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987); Estes v. North Carolina State Univ., 89 N.C. App. 55, 365 S.E.2d 160 (1988); Clark v. Inn West, 89 N.C. App. 275, 365 S.E.2d 682 (1988); Taylor v. Foy, 91 N.C. App. 82, 370 S.E.2d 442 (1988); Truesdale v. University of N.C., 91 N.C. App. 186, 371 S.E.2d 503 (1988); In re Teague, 91 N.C. App. 242, 371 S.E.2d 510 (1988); Kimmel v. Brett, 92 N.C. App. 331, 374 S.E.2d 435 (1988); State v. McQueen, 324 N.C. 118, 377 S.E.2d 38 (1989); Gray v. Hoover, 94 N.C. App. 724, 381 S.E.2d 472 (1989); Tate v. Action Moving & Storage, Inc., 95 N.C. App. 541, 383 S.E.2d 229 (1989); State v. Morgan, 95 N.C. App. 639, 383 S.E.2d 452 (1989); State ex rel. Thornburg v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., 96 N.C. App. 84, 384 S.E.2d 585 (1989); State v. Richardson, 96 N.C. App. 270, 385 S.E.2d 194 (1989); In re Barnes, 97 N.C. App. 325, 388 S.E.2d 237 (1990); State v. Sanders, 327 N.C. 319, 395 S.E.2d 412 (1990); Liberty Fin. Co. v. North Augusta Computer Store, Inc., 100 N.C. App. 279, 395 S.E.2d 709 (1990); State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990); Blankley v. Martin, 101 N.C. App. 175, 398 S.E.2d 606 (1990); State v. Foster, 101 N.C. App. 153, 398 S.E.2d 664 (1990); Gibbons v. CIT Group/Sales Fin., Inc., 101 N.C. App. 502, 400 S.E.2d 104 (1991); State v. Piche, 102 N.C. App. 630, 403 S.E.2d 559 (1991); Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176 (1991); State v. Turner, 103 N.C. App. 331, 406 S.E.2d 147 (1991); In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158 (1992); Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 419 S.E.2d 195 (1992); State v. Ainsworth, 109 N.C. App. 136, 426 S.E.2d 410 (1993); Storey v. Hailey, 114 N.C. App. 173, 441 S.E.2d 602 (1994); State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994); Barbee v. Atlantic Marine Sales & Serv., Inc., 115 N.C. App. 641, 446 S.E.2d 117 (1994); State v. King, 342 N.C. 357, 464 S.E.2d 288 (1995); State v. Rhome, 120 N.C. App. 278, 462 S.E.2d 656 (1995); State v. Myers, 123 N.C. App. 189, 472 S.E.2d 598 (1996); King v. Yeargin Constr. Co., 124 N.C. App. 396, 476 S.E.2d 898 (1996); Crescent Elec. Membership Corp. v. Duke Power Co., 126 N.C. App. 344, 485 S.E.2d 312 (1997), cert. denied, 346 N.C. 545, 488 S.E.2d 798 (1997); State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999); Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999); Hixson v. Krebs, 136 N.C. App. 183, 523 S.E.2d 684 (1999); State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63 (1999); State v. Lancaster, 137 N.C. App. 37,

527 S.E.2d 61 (2000); State v. Gray, 137 N.C. App. 345, 528 S.E.2d 46 (2000); Long v. Harris, 137 N.C. App. 461, 528 S.E.2d 633 (2000); State v. Miller, 137 N.C. App. 450, 528 S.E.2d 626 (2000); State v. Lemons, 352 N.C. 87, 530 S.E.2d 542 (2000), cert. denied, 531 U.S. 1091, 121 S. Ct. 813, 148 L. Ed. 2d 698 (2001); Poor v. Hill, 138 N.C. App. 19, 530 S.E.2d 838 (2000); Lynn v. Burnette, 138 N.C. App. 435, 531 S.E.2d 275 (2000); State v. Montgomery, 138 N.C. App. 521, 530 S.E.2d 66 (2000); State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000); Naddeo v. Allstate Ins. Co., 139 N.C. App. 311, 533 S.E.2d 501 (2000); Fickley v. Greystone Enters., 140 N.C. App. 258, 536 S.E.2d 331 (2000).

**Quoted** in Caudle v. Ray, 50 N.C. App. 641, 274 S.E.2d 880 (1981); Herring v. Branch Banking & Trust Co., 108 N.C. App. 780, 424 S.E.2d 925 (1993); Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997); Seigel v. Patel, 132 N.C. App. 783, 513 S.E.2d 602 (1999); Taylor v. City of Lenoir, 140 N.C. App. 337, 542 S.E.2d 222 (2001).

**Stated** in Delp v. Delp, 53 N.C. App. 72, 280 S.E.2d 27 (1981); State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751 (1981); Harrington Mfg. Co. v. Logan Tontz Co., 53 N.C. App. 625, 281 S.E.2d 423 (1981); In re Will of Maynard, 64 N.C. App. 211, 307 S.E.2d 416 (1983); Atlantic Veneer Corp. v. Robbins, 133 N.C. App. 594, 516 S.E.2d 169 (1999); Robinson, Bradshaw & Hinson, P.A. v. Smith, 139 N.C. App. 1, 532 S.E.2d 815 (2000); State v. Youngs, 141 N.C. App. 220, 540 S.E.2d 794 (2000); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc., 142 N.C. App. 127, 542 S.E.2d 247 (2001); State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694 (2001); State v. Hardison, 143 N.C. App. 114, 545 S.E.2d 233 (2001); Thigpen v. Ngo, 143 N.C. App. 223, — S.E.2d —, 2001 N.C. App. LEXIS 274 (2001).

**Cited** in Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976); City of Hickory v. Catawba Valley Mach. Co., 38 N.C. App. 387, 248 S.E.2d 71 (1978); State v. Williams, 300 N.C. 190, 265 S.E.2d 215 (1980); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); State v. Hargrove, 60 N.C. App. 174, 298 S.E.2d 402 (1982); State v. Taylor, 64 N.C. App. 165, 307 S.E.2d 173 (1983); State v. Bartlett, 64 N.C. App. 388, 307 S.E.2d 178 (1983); Schell v. Coleman, 65 N.C. App. 91, 308 S.E.2d 662 (1983); Plymouth Fertilizer Co. v. Selby, 67 N.C. App. 681, 313 S.E.2d 885 (1984); Stanley v. Nationwide Mut. Ins. Co., 71 N.C. App. 266, 321 S.E.2d 920 (1984); State v. Reilly, 313 N.C. 499, 329 S.E.2d 381 (1985); Jackson v. Housing Auth., 316 N.C. 259, 341 S.E.2d 523 (1986); Ellis v. Williams, 319 N.C. 413, 355 S.E.2d 479 (1987); State v. Reid, 322 N.C. 309, 367 S.E.2d 672 (1988); Travelers Indem. Co. v. Marshburn, 91 N.C. App. 271, 371 S.E.2d 310 (1988); State v. Summers, 92 N.C. App. 453, 374 S.E.2d 631 (1988); State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988); Hailey v. Allgood Constr. Co., 95 N.C. App. 630, 383 S.E.2d 220 (1989); Koufman v. Koufman, 97 N.C. App. 227, 388 S.E.2d 207 (1990); State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990); In re North Carolina Hazardous Waste Mgt. Comm'n, 327 N.C. 632, 397 S.E.2d 76 (1990); State v. Morgan, 329 N.C. 654, 406 S.E.2d 833 (1991); State v. Monroe, 330 N.C. 433, 410 S.E.2d 913 (1991); State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245 (1992); District Bd. of Metro. Sewerage Dist. v. Blue Ridge Plating Co., 110 N.C. App. 386, 430 S.E.2d 282 (1993); Bryant v. Thalhimer Bros., 113 N.C. App. 1, 437 S.E.2d 519 (1993); Barbee v. Atlantic Marine Sales & Serv., Inc., 113 N.C. App. 80, 437 S.E.2d 682 (1993); Adams v. Jones, 114 N.C. App. 256, 441 S.E.2d 699 (1994); Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994); State v. Blue, 115 N.C. App. 108, 443 S.E.2d 748 (1994); Smith v. Smith, 336 N.C. 575, 444 S.E.2d 420 (1994); Phelps v. Phelps, 337 N.C. 344, 446 S.E.2d 17 (1994); Whitfield v. Todd, 116 N.C. App. 335, 447 S.E.2d 796 (1994); State v. Morgan, 118 N.C. App. 461, 455 S.E.2d 490 (1995); Ritter v. Department of Human Resources, 118 N.C. App. 564, 455 S.E.2d 901 (1995); Padilla v. Lusth, 118 N.C. App. 709, 457 S.E.2d 319 (1995); McGee v. McGee, 118 N.C. App. 19, 453 S.E.2d 531 (1995); Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996); Adams v. Kelly Springfield Tire Co., 123 N.C. App. 681, 474 S.E.2d 793 (1996); Edwards v. Hardy, 126 N.C. App. 69, 483 S.E.2d 724 (1997); Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997); Liberty Mut. Ins. Co. v. Ditillo, 125 N.C. App. 701, 482 S.E.2d 743 (1997), rev'd in part, 348 N.C. 247, 499 S.E.2d 764 (1998); Strader v. Sunstates Corp., 129 N.C. App. 562, 500 S.E.2d 752 (1998), cert. denied, 349 N.C. 240, 514 S.E.2d 274 (1998); PHC, Inc. v. North Carolina Farm Bureau Mut. Ins. Co., 129 N.C. App. 801, 501 S.E.2d 701 (1998), cert. denied, 348 N.C. 694, 511 S.E.2d 648 (1998); Barber v. Constien, 130 N.C. App. 380, 502 S.E.2d 912 (1998); Scott v. United Carolina Bank, 130 N.C. App. 426, 503 S.E.2d 149 (1998); Holland Group, Inc. v. North Carolina Dep't of Admin., 130 N.C. App. 721, 504 S.E.2d 300 (1998); State v. Allred, 131 N.C. App. 11, 505 S.E.2d 153 (1998); Branch Banking & Trust Co. v. Tucker, 131 N.C. App. 132, 505 S.E.2d 179 (1998); Darryl Burke Chevrolet, Inc. v. Aikens, 131 N.C. App. 31, 505 S.E.2d 581 (1998), aff'd, 350 N.C. 83, 511 S.E.2d 639 (1999); Terrell v. Lawyers Mut. Liab. Ins., 131 N.C. App. 655, 507 S.E.2d 923 (1998); State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998); State v. Hill, 132 N.C. App. 209, 510 S.E.2d 413 (1999); State v. Williams, 350 N.C. 1, 510 S.E.2d 626 (1999), cert. denied 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999);

Barnard v. Rowland, 132 N.C. App. 416, 512 S.E.2d 458 (1999); Dillingham v. North Carolina Dep't of Human Resources, 132 N.C. App. 704, 513 S.E.2d 823 (1999); Vogl v. LVD Corp., 132 N.C. App. 797, 514 S.E.2d 113 (1999); State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000); State v. Godley, 140 N.C. App. 15, 535 S.E.2d 566 (2000), cert. denied, — U.S. —, 121 S. Ct. 1499, 149 L. Ed. 2d 384 (2001); State v. Peoples, 141 N.C. App. 115, 539 S.E.2d 25 (2000); Sims v. Charmes/Arby's Roast Beef, 142 N.C. App. 154, 542 S.E.2d 277 (2001); Clark v. Sanger Clinic, P.A., 142 N.C. App. 350, 542 S.E.2d 668 (2001), cert. denied, 353 N.C. 450, — S.E.2d — (2001); Zenobile v. McKecuen, — N.C. App. —, 548 S.E.2d 756, 2001 N.C. App. LEXIS 328 (2001); Groves v. Community Hous. Corp. of Haywood County, — N.C. App. —, 548 S.E.2d 535, 2001 N.C. App. LEXIS 345 (2001).

# ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

## Rule 3. Appeal in civil cases — How and when taken.

(a) *Filing the notice of appeal.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(b) *Special provisions.* Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes section noted:

(1) Termination of parental rights, G.S. 7A-289.34.

(2) Juvenile matters, G.S. 7A-666.

(c) *Time for taking appeal.* In civil actions and special proceedings, a party must file and serve a notice of appeal:

(1) within 30 days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or

(2) within 30 days after service upon the party of a copy of the judgment if service was not made within that three-day period; provided that

(3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the 30-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each praty from the date of entry of the order or its untimely service upon the party, as provided in subsections (1) and (2) of this subdivision (c).

In computing the time for filing a notice of appeal, the provision for additional time after service by mail of N.C.R. App. 27(b) and N.C.R. Civ. P. 6(e) shall not apply.

If timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) *Content of notice of appeal.* The notice of appeal required to be filed and served by subdivision (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(e) *Service of notice of appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules. (Adopted June 13, 1975; Amended April 14, 1976; December 8, 1988 — 3(a), (b), (c), (d) — effective for all judgments of the trial division entered on or after July 1, 1989; June 8, 1989 — 3(b) — effective for all judgments of the trial tribunal entered on or after July 1, 1989; Amended July 28, 1994 — 3(c) — effective October 1, 1994; March 6, 1997; Amended October 18, 2001.)

**Legal Periodicals.** — For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

## CASE NOTES

I. In General.
II. Decisions Under Prior Law.

### I. IN GENERAL.

**Construction with Other Rules.** — Construing Rule 3, 27(c) and 21(a)(1) together, the court concluded that Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner. Anderson v. Hollifield, 345 N.C. 480, 480 S.E.2d 661 (1997).

**Subsection (a) is almost identical to § 1-279(a).** Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

**This rule is jurisdictional,** and if the requirements of this rule are not complied with, the appeal must be dismissed. Currin-Dillehay Bldg. Supply, Inc. v. Frazier, 100 N.C. App. 188, 394 S.E.2d 683, appeal dismissed and cert. denied, 327 N.C. 633, 399 S.E.2d 326 (1990).

This rule, except as qualified by statute, is jurisdictional and cannot be waived. Johnson & Laughlin, Inc. v. Hostetler, 101 N.C. App. 543, 400 S.E.2d 80 (1991); Foreman v. Sholl, 113 N.C. App. 282, 439 S.E.2d 169 (1994), appeal dismissed, 339 N.C. 593, 453 S.E.2d 162 (1995).

The provisions of this Rule are jurisdictional, and failure to follow the requirements require dismissal of an appeal. Abels v. Renfro Corp., 126 N.C. App. 800, 486 S.E.2d 735 (1997).

Oral notice of appeal to the trial court is insufficient to confer jurisdiction on the Court of Appeals, since the requirements of this rule are jurisdictional. Melvin v. St. Louis, 132 N.C. App. 42, 510 S.E.2d 177 (1999), cert. denied, 350 N.C. 309, 534 S.E.2d 594 (1999).

**The provisions of § 1-279 and this rule are jurisdictional,** and unless these statutes are complied with, the appellate court acquires no jurisdiction of the appeal and it must be dismissed. Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976); First Union Nat'l Bank v. King, 63 N.C. App. 757, 306 S.E.2d 508 (1983); Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990).

The requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements of both § 1-279 and this rule and N.C.R.A.P., Rule 26 are met, the appeal must be dismissed. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979), cert. denied, 299 N.C. 122, 262 S.E.2d 6 (1980).

Failure to give timely notice of appeal in compliance with § 1-279 and this rule, is jurisdictional, and an untimely attempt to appeal must be dismissed. Booth v. Utica Mut. Ins. Co., 308 N.C. 187, 301 S.E.2d 98 (1983); Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985); L. Harvey & Son Co. v. Shivar, 83 N.C. App. 673, 351 S.E.2d 335 (1987).

**Section 1-279 and this rule require both filing and service of notice of appeal within 10 (now 30) days** after entry of judgment. Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

Where the appeal is taken more than 10 (now 30) days after the "entry" of judgment and the time within which the appeal can be taken is not otherwise tolled as provided in this rule and in § 1-279, the appellate court obtains no jurisdiction in the matter and the appeal must be dismissed. Cochrane v. Sea Gate, Inc., 42 N.C. App. 375, 256 S.E.2d 504 (1979).

**This rule affords no avenue of appeal to either entities or persons who are nonparties** to a civil action. Bailey v. North Carolina Dep't of Revenue, 353 N.C. 142, 540 S.E.2d 313 (2000).

**The Court of Appeals is without authority to entertain appeal of a case which lacks entry of judgment.** Abels v. Renfro Corp., 126 N.C. App. 800, 486 S.E.2d 735 (1997).

**Announcing of the court's decision in open court constitutes "entry"** for purposes of determining when notice of appeal must be filed, even if the formal written order is not written until a later date, since § 1A-1, Rule 58, provides that the rendering of judgment in open court constitutes entry of judgment for purposes of those rules. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), appeal dismissed, 459 U.S. 1139, 103 S. Ct. 776, 74 L. Ed. 2d 987 (1983).

For purposes of determining when notice of appeal must be given, the court's announcement of its decision in open court constitutes entry of judgment even if a formal written order is not filed until a later date. Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984).

Rendition of judgment occurs when the court announces its decision in open court. Darcy v. Osborne, 101 N.C. App. 546, 400 S.E.2d 95 (1991).

**Announcement of judgment in open court merely constitutes "rendering" of**

**judgment, not entry of judgment.** Abels v. Renfro Corp., 126 N.C. App. 800, 486 S.E.2d 735 (1997).

**Notation as Entry of Judgment.** — Where judgment was rendered in open court, and nothing in the record suggested that it was necessary for the trial judge to direct notations in the minutes or that the case was governed by paragraph two of § 1A-1, Rule 58, where the jury verdict clearly awarded a sum certain for $50,000.00, providing the parties with oral notice of judgment, and where the clerk made the notation "jury verdict" in the official minutes of court at such time, such notation did not constitute entry of judgment. Use of the word "such" in Rule 58 imports the recording of sufficient detail regarding the judgment to give notice of its essential character and content. Reed v. Abrahamson, 331 N.C. 249, 415 S.E.2d 549 (1992).

**Stipulation Did Not Supplant Subsection (d) Requirements.** — Parties' stipulation to a notice of appeal could not supplant subsection (d) requirements to confer jurisdiction on the reviewing court. Von Ramm v. Von Ramm, 99 N.C. App. 153, 392 S.E.2d 422 (1990).

**Extension Did Not Apply.** — The 10-day extension provided by this rule did not apply, where plaintiff filed her motion for appeal of the denial of her motion for sanctions within 10 days of the defendant's appeal of the denial of his motion for sanctions, but more than 30 days after denial of her motion, since the two motions were independent of each other. Rice v. Danas, Inc., 132 N.C. App. 736, 514 S.E.2d 97 (1999).

**Subsection (d) Requirements Fairly Inferred.** — Notices of appeal would be considered to be appeals from the original order of the Utilities Commission, even though joint appellants' notices stated that they were appealing from denial of their petition for reconsideration, a non-appealable order, where it could be fairly inferred that they intended to appeal from the original orders and the appellee was not misled. State ex rel. Utilities Comm'n v. MCI Telecommunications Corp., 132 N.C. App. 625, 514 S.E.2d 276 (1999).

**Extended Response Time Only for Other Parties to Same Appeal.** — This rule merely contemplates an additional, extended time period for a response only from other parties to that same appeal. Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990).

**Where Oral Motions Considered, Plaintiffs Not Entitled to Make Later Written Motions to Toll Period for Filing Appeal.** — Plaintiffs who entered their written notice of appeal within 10 days after the entry of a June 6 order denying their April 22 written motions for judgment notwithstanding the verdict and for a new trial were not entitled to make these written motions or to a hearing on these motions, because they had previously made oral motions for judgment notwithstanding the verdict and for a new trial in open court on April 14, 1988, and were afforded an opportunity to be heard, which they declined. Their § 1A-1, Rule 50(b) and Rule 59 motions having been denied in open court at that time, plaintiffs were not entitled to file written motions requesting the same relief and thereby toll the period for filing written notice of appeal. Since their June 13, 1988 written notice of appeal was not filed within 10 days of entry of judgment, which by the terms of the judgment was April 14, 1988, their appeal was untimely. Middleton v. Middleton, 98 N.C. App. 217, 390 S.E.2d 453, cert. denied, 327 N.C. 637, 399 S.E.2d 123 (1990).

**Withdrawal of § 1A-1, Rule 59 motion did not entitle defendants to 10 days from their withdrawal** to file notice of appeal from judgment; to hold otherwise would thwart the tolling provision of section (c) of this rule, and circumvent § 1A-1, Rule 58, i.e., to give all interested parties a definite fixed time of a judicial determination that they can point to as the time of entry of judgment. Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Motion under § 1A-1, Rule 59 to amend judgment, filed 10 days after judgment by defendant, tolled the time for filing and serving a cross-notice of appeal until entry of an order on the motion pursuant to section (c) of this rule. However, where defendants later withdrew their Rule 59 motion, the 10 (now 30) day time limit to give notice of appeal under section (c) was not tolled, because there was never a judicial determination on defendants' motion. Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

**Appeal may be taken by giving oral notice of appeal at trial,** but an appeal so taken is by its nature limited to the issues dealt with in the judgment announced and cannot apply to subsequent written orders determining other issues in the same case. Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984).

**An appellant must appeal from each part of the judgment or order** appealed from which appellant desires the appellate court to consider in order for the appellate court to be vested with jurisdiction to determine such matters. Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979).

**However, where defendants' § 1A-1, Rule 12(b)(6) defense was converted and merged automatically into their § 1A-1, Rule 56 motion,** plaintiff's failure to mention specifically in her notice of appeal that portion of the trial court's order sustaining defendant's defense under Rule 12(b)(6) did not deprive the Court of Appeals of jurisdiction to hear plain-

tiff's appeal. Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979).

**Failure to Appeal Underlying Judgment.** — Notice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for appellate review. Von Ramm v. Von Ramm, 99 N.C. App. 153, 392 S.E.2d 422 (1990).

**Subsection (c) of this rule tolls the time for giving notice of appeal** when a timely motion for new trial has been made. Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643, cert. denied, 322 N.C. 113, 367 S.E.2d 917 (1988).

Notice of appeal which covered only judgments dismissing appellants' complaints and enjoining them from violating an ordinance did not give the Court of Appeals jurisdiction to consider the denial of their motions to dismiss and to amend replies. Onslow County v. Moore, 129 N.C. App. 376, 499 S.E.2d 780 (1998).

**Filing a JNOV motion tolls running of the time for appeal of a judgment which has been entered.** Abels v. Renfro Corp., 126 N.C. App. 800, 486 S.E.2d 735 (1997).

**Only a "party aggrieved" may appeal** from an order or judgment of the trial division. An aggrieved party is one whose rights have been directly and injuriously affected by the action of the court. Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

**"Aggrieved Party" Entitled to Appeal; Nonmovant Status Irrelevant.** — Where the jury announced its verdict in open court, it "rendered judgment" according to subsection (a) of this rule and § 1A-1, Rule 58, and oral notice of appeal was a proper procedure. As a party against whom the jury rendered the verdict, plaintiff was an "aggrieved party" who was entitled by law to orally appeal from the judgment, and its nonmovant status was irrelevant. Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 98 N.C. App. 543, 392 S.E.2d 128, cert. denied, 327 N.C. 144, 393 S.E.2d 909 (1990).

**Letter to Clerk Not Written Notice of Appeal.** — In an action challenging a divorce judgment where the defendant wrote a letter to the clerk of the court explaining her reasons for not attending the divorce proceedings and requesting that the judgment decreeing the divorce be set aside, the letter was not a written notice of appeal of a divorce judgment showing that the defendant sought a review by the Court of Appeals but was a § 1A-1, Rule 59 motion for a new trial, and the trial court had no authority to cause an appeal to be entered for the defendant absent her request. Williford v. Williford, 51 N.C. App. 150, 275 S.E.2d 216 (1981).

**Improper Appeal Criticized, But Acceptable Where Actual Notice Was Had.** — While notice of appeal of a judgment rendered out of session was required by section (b) of this rule to be filed with the clerk and served on the other parties, steps taken by appellant in an attempt to perfect its appeal were minimally acceptable where the respondents were in fact put on actual notice of applicant's intent to appeal from any adverse decision where applicant stated in open court that it would appeal if it lost, and the applicant in open court requested that the proposed judgment to be submitted by respondents contain appeal entries so that applicant's notice of appeal would be perfected if the court should sign the proposed judgment; this procedure should not be repeated, however, as this rule clearly states the proper procedures to be strictly followed. In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

**When Time Begins to Run.** — The rendering of judgment establishes the point from which a party may appeal under this rule, and the entry of judgment marks the beginning of the period during which a party must file written notice of appeal. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

**Though clerk's notation in minutes of court is ordinarily date from which time for notice of appeal under subsection (c) of this rule runs,** where the trial judge directed that the date of entry of the court's written order and not the earlier date of the hearing was the date of entry for purposes of appeal, the clerk should not have noted an entry of judgment on the date of the hearing. Kahan v. Longiotti, 45 N.C. App. 367, 263 S.E.2d 345 (1980), overruled on other grounds, Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982).

**When Notice of Appeal Is Timely.** — Notice of appeal is timely if filed after judgment is rendered in court, and before the expiration of the 30-day period after judgment is entered. The date of rendition and the date of entry are therefore critical to a determination of whether an appeal is timely. Darcy v. Osborne, 101 N.C. App. 546, 400 S.E.2d 95 (1991).

**Notice of appeal must be served on the opposing party either before the notice is filed or on the same day** the notice is filed. Shaw v. Hudson, 49 N.C. App. 457, 271 S.E.2d 560 (1980).

**In calculating whether notice of appeal is timely given,** the 10th (now 30th) day is not considered if it is a Saturday, Sunday, or legal holiday. In such case, the 10 (now 30) day period runs at the end of the next day that is not a Saturday, Sunday, or legal holiday. Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984).

**Notice Held Timely.** — Notice of appeal filed on July 5, 1983, was timely, where the 10th day fell on Sunday, July 3, 1983, and the

next day, July 4, 1983, was a legal holiday. Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984).

**Tolling of Time for Appeal.** — In order for the exception to the 30-day requirement under this rule to have any effect, when a party makes a motion enumerated in the rule, the opposing party's time for appeal is tolled. If the motion is withdrawn, the opposing party has 30 days from the withdrawal to file an appeal. Landingham Plumbing & Heating of N.C., Inc. v. Funnell, 102 N.C. App. 814, 403 S.E.2d 604 (1991).

**Time for Filing not Tolled by Motion for Attorney Fees.** — The defendant's motion for attorney fees, which was filed several days after judgment on the verdict, was a separate proceeding that did not toll the time in which the plaintiff had to give notice of appeal, and thus, plaintiff's appeal was untimely, where it was filed more than a year after entry of judgment. Rice v. Danas, Inc., 132 N.C. App. 736, 514 S.E.2d 97 (1999).

**Applicability of Tolling Provision to Second Motion Under § 1A-1-59.** — The plaintiff's appeal was timely filed under the tolling provision of this rule, where the plaintiff filed a timely second motion asserting four additional grounds for a new trial after the first motion was orally denied at the end of a medical malpractice trial, and the plaintiff's appeal was filed within 30 days of the date the court entered an order ruling on the second motion. Sherrod v. Nash Gen. Hosp., 348 N.C. 526, 500 S.E.2d 708 (1998).

**Tolling Provisions Not Applicable.** — Plaintiff who filed her motion for a new trial before the entry of the judgment was not entitled to benefit from the tolling provisions of this rule; plaintiff's oral motions were not relevant to the issue of whether her notice of appeal was timely filed. Stevens v. Guzman, 140 N.C. App. 780, 538 S.E.2d 590 (2000), cert. granted, 353 N.C. 397, 547 S.E.2d 437 (2001).

**Notice of Appeal Insufficient.** — Notice of appeal, even when liberally construed, was not sufficient to give the court jurisdiction to review order denying plaintiffs' Rule 59 motion and instead presented for review only the underlying judgment entered in accordance with the verdict. Chee v. Estes, 117 N.C. App. 450, 451 S.E.2d 349 (1994).

**Failure to Give Notice of Appeal.** — Where, in notice of appeal, defendant designated only the order denying the motion for JNOV, but did not give notice of appeal from the judgment itself, the notice of appeal failed to properly present the underlying judgment for the court's review. Boger v. Gatton, 123 N.C. App. 635, 473 S.E.2d 672 (1996).

**Motion to Appeal in Forma Pauperis.** — The late filing of appeal entries had no bearing on the question of the requirement that a motion to appeal in forma pauperis be made within 10 (now 30) days after the expiration of the session at which judgment is rendered; appeal entries are simply a convenient means of providing a record entry of the fact that an appeal has been taken, and do not constitute the taking of the appeal itself. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985).

**Review of Intermediate Order.** — On appeal of resale of land being foreclosed, Court of Appeals was not barred from considering validity of order withdrawing an upset bid and directing a resale of the foreclosed property, merely because the appellants did not appeal from it within the time required by this rule, as § 1-278 permits the Court, incident to an appeal from a final judgment or order, to review intermediate orders "involving the merits and necessarily affecting the judgment," and the order striking the upset bid and requiring a resale was such an order. In re Allan & Warmbold Constr. Co., 88 N.C. App. 693, 364 S.E.2d 723, cert. denied, 322 N.C. 480, 370 S.E.2d 222 (1988).

**Applied** in Arnold v. Varnum, 34 N.C. App. 22, 237 S.E.2d 272 (1977); Harrington v. Harrington, 38 N.C. App. 610, 248 S.E.2d 460 (1978); F. Indus., Inc. v. Cox, 45 N.C. App. 595, 263 S.E.2d 791 (1980); Hamlin v. Austin, 49 N.C. App. 196, 270 S.E.2d 558 (1980); Ramsey v. Rudd, 49 N.C. App. 670, 272 S.E.2d 162 (1980); Byrd v. Byrd, 51 N.C. App. 707, 277 S.E.2d 472 (1981); North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983); Henderson v. Provident Life & Accident Ins. Co., 62 N.C. App. 476, 303 S.E.2d 211 (1983); Gates v. Gates, 69 N.C. App. 421, 317 S.E.2d 402 (1984); Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984); Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986); McLaurin v. Winston-Salem Southbound Ry., 87 N.C. App. 413, 361 S.E.2d 95 (1987); Kirby Bldg. Sys. v. McNiel, 327 N.C. 234, 393 S.E.2d 827 (1990); Bunting v. Bunting, 100 N.C. App. 294, 395 S.E.2d 713 (1990); Pate v. Eastern Insulation Serv. of New Bern, Inc., 101 N.C. App. 415, 399 S.E.2d 338 (1991); Long v. Long, 102 N.C. App. 18, 401 S.E.2d 401 (1991); Crowell Constructors, Inc. v. State ex rel. Cobey, 328 N.C. 563, 402 S.E.2d 407 (1991); Gum v. Gum, 107 N.C. App. 734, 421 S.E.2d 788 (1992); Brewer v. Spivey, 108 N.C. App. 174, 423 S.E.2d 95 (1992); Union Grove Milling & Mfg. Co. v. Faw, 109 N.C. App. 248, 426 S.E.2d 476 (1993); Beaver v. Hampton, 333 N.C. 455, 427 S.E.2d 317 (1993); Farm Credit Bank v. Van Dorp, 110 N.C. App. 759, 431 S.E.2d 222 (1993); Potts v. Tutterow, 114 N.C. App. 360, 442 S.E.2d 90 (1994); Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999); Gaunt v. Pittaway, 135 N.C. App. 442, 520 S.E.2d 603 (1999); Southern Furn. Hdwe., Inc. v. Branch Banking & Trust Co., 136 N.C. App.

695, 526 S.E.2d 197 (2000); Scarvey v. First Fed. Sav. & Loan Ass'n., — N.C. App. —, — S.E.2d —, 2001 N.C. App. LEXIS 790 (Sept. 4, 2001).

**Quoted** in Ives v. Real-Venture, Inc., 97 N.C. App. 391, 388 S.E.2d 573 (1990); Herring v. Branch Banking & Trust Co., 108 N.C. App. 780, 424 S.E.2d 925 (1993); Guilford County Dep't of Emergency Servs. v. Seaboard Chem. Corp., 114 N.C. App. 1, 441 S.E.2d 177 (1994); Gaunt v. Pittaway, 139 N.C. App. 778, 534 S.E.2d 660 (2000), cert denied, 353 N.C. 371, 547 S.E.2d 810 (2001).

**Stated** in Cox v. Cox, 133 N.C. App. 221, 515 S.E.2d 61 (1999).

**Cited** in In re Williamson, 32 N.C. App. 616, 233 S.E.2d 677 (1977); Parrish v. Cole, 38 N.C. App. 691, 248 S.E.2d 878 (1978); Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); Scallon v. Hooper, 58 N.C. App. 551, 293 S.E.2d 843 (1982); Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985); Prevatte v. Prevatte, 74 N.C. App. 582, 329 S.E.2d 413 (1985); Brown v. Brown, 91 N.C. App. 335, 371 S.E.2d 752 (1988); State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988); York ex rel. York v. Northern Hosp. Dist., 96 N.C. App. 456, 386 S.E.2d 99 (1989); First Am. Bank v. Carley Capital Group, 99 N.C. App. 667, 394 S.E.2d 237 (1990); Custom Molders, Inc. v. Roper Corp., 101 N.C. App. 606, 401 S.E.2d 96 (1991); Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992); Bromhal v. Stott, 116 N.C. App. 250, 447 S.E.2d 481 (1994); Crowell Constructors, Inc. v. State, 342 N.C. 838, 467 S.E.2d 675 (1996); State v. Woods, 345 N.C. 294, 480 S.E.2d 647 (1997), cert. denied, 522 U.S. 875, 118 S. Ct. 194, 139 L. Ed. 2d 132 (1997); Sherrod v. Nash Gen. Hosp., 126 N.C. App. 755, 487 S.E.2d 151 (1997), rev'd on other grounds, 348 N.C. 526, 500 S.E.2d 708 (1998); Fenz ex rel. Gladden v. Davis, 128 N.C. App. 621, 495 S.E.2d 748 (1998); Onslow County v. Moore, 129 N.C. App. 376, 499 S.E.2d 780 (1998); Watson v. Dixon, 130 N.C. App. 47, 502 S.E.2d 15 (1998); Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998); Albrecht v. Dorsett, 131 N.C. App. 502, 508 S.E.2d 319 (1998); Charles Vernon Floyd, Jr. & Sons v. Cape Fear Farm Credit, 350 N.C. 47, 510 S.E.2d 156 (1999); Stem v. Richardson, 350 N.C. 76, 511 S.E.2d 1 (1999); Hyde v. Chesney Glen Homeowners Ass'n, Inc., 137 N.C. App. 605, 529 S.E.2d 499 (2000); Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637, 535 S.E.2d 55 (2000); In re Brown, 141 N.C. App. 550, 539 S.E.2d 366 (2000); City of Charlotte v. Noles, 143 N.C. App. 181, 544 S.E.2d 585 (2001); Merrick v. Peterson, — N.C. App. —, 548 S.E.2d 171, 2001 N.C. App. LEXIS 342 (2001).

## II. DECISIONS UNDER PRIOR LAW.

***Editor's note.*** — *The cases cited below were decided under former Rule 5, Rules of Practice in the Supreme Court of North Carolina.*

**Docketing Rules Mandatory.** — The rule of the Supreme Court requiring the docketing of the appeal within a certain time is mandatory. State v. Farmer, 188 N.C. 243, 124 S.E. 562 (1924); State ex rel. Mills v. National Sur. Co., 192 N.C. 52, 133 S.E. 172 (1926); Pruitt v. Wood, 199 N.C. 788, 156 S.E. 126 (1930).

The rules of the Supreme Court regulating appeals are mandatory. And must be equally observed, or the case will be dismissed. Womble v. Moncure Mill & Gin Co., 194 N.C. 577, 140 S.E. 230 (1927); Covington v. Hanes Hosiery Mills Co., 195 N.C. 478, 142 S.E. 705 (1928); Pentuff v. Park, 195 N.C. 609, 143 S.E. 139 (1928).

The rules may not be disregarded by the legislature, the judge of a superior court, or by litigants or counsel. The Supreme Court has found it necessary to enforce them uniformly. Pentuff v. Park, 195 N.C. 609, 143 S.E. 139 (1928); State v. Walker, 245 N.C. 658, 97 S.E.2d 219 (1957), cert. denied, 356 U.S. 946, 78 S. Ct. 793, 2 L. Ed. 2d 821 (1958).

This rule regulating the time within which appeals must be docketed in the Supreme Court is mandatory and cannot be abrogated by consent or otherwise. Jones v. Jones, 232 N.C. 518, 61 S.E.2d 335 (1950).

When case is not docketed within time prescribed by this rule and no application for writ of certiorari is made, appeal will be dismissed, the rules of practice in the Supreme Court being mandatory and not directory. State v. Presnell, 226 N.C. 160, 36 S.E.2d 927 (1946).

**And Dismissal Results Where Agreement of Parties Prohibits Compliance Therewith.** — Where the parties agree upon an extension of time for service of case on appeal that will not permit the docketing of the appeal in the Supreme Court in time to be heard according to the procedure in such instances, they knowingly put it beyond their power to comply with the mandatory provisions of this rule, and the case will be dismissed in the Supreme Court when these requirements have not been complied with by the appellant. Pruitt v. Wood, 199 N.C. 788, 156 S.E. 126 (1930).

**This rule may not be varied,** under agreement with the solicitor or opposing counsel to extend time to the appellant later than that allowed; and when these requirements for any reason cannot be complied with, the appellant must docket the record proper in the Supreme Court, and apply to the court for a certiorari. State v. Trull, 169 N.C. 363, 85 S.E. 133 (1915).

**Legislature Cannot Change Rule.** — The power of the legislature to permit an extension

of the time for settling the case on appeal does not permit it to impinge upon the rule of the Supreme Court requiring the docketing thereof within a prescribed time. State v. Butner, 185 N.C. 731, 117 S.E. 163 (1923).

**Nor Can Rule Be Changed by Parties or Trial Judge.** — The rules of the Supreme Court regulating the time of docketing appeals are uniformly enforced by the court, without authority to the judges or parties to the action to change them by agreement or otherwise. Rose v. Rocky Mount, 184 N.C. 609, 113 S.E. 506 (1922); Finch v. Commissioners of Nash County, 190 N.C. 154, 129 S.E. 195 (1925); Stone v. Ledbetter, 191 N.C. 777, 133 S.E. 162 (1926).

**Failure to Docket.** — The motion for a certiorari in the Supreme Court by appellant who has failed to docket his case in time under the requirements of this rule may be allowed, in the discretion of the court, upon the docketing of the record proper and the showing as required for merit and want of laches. State v. Taylor, 194 N.C. 738, 140 S.E. 728 (1927).

**Failure to Docket Entire Record.** — Though the court, without appellant's fault, fails to settle the case, appellant must within the time allowed by this rule docket all of the record proper, or so much thereof as he can obtain, and file an affidavit as to why the entire record cannot be docketed; otherwise the appeal will be dismissed. Caudle v. Morris, 158 N.C. 594, 74 S.E. 98, modified and aff'd, 160 N.C. 168, 76 S.E. 17 (1912).

**Extension of Time Granted for Settling Case on Appeal.** — When by consent of the appellant, or by order of the judge, such a long extension of time is granted for settling a case on appeal as to put it beyond the power of appellant to have the case ready for hearing, as required by the rules, the appellant runs the risk of losing his right of appeal. In such instances, unless the appellant gets his appeal docketed in time, as required by the rules of the court, notwithstanding the time allowed, or dockets the record proper and moves for a writ of certiorari, the right of appeal will be lost. State v. Walker, 245 N.C. 658, 97 S.E.2d 219 (1957), cert. denied, 356 U.S. 946, 78 S. Ct. 793, 2 L. Ed. 2d 821 (1958).

**Neglect of Counsel.** — The negligence of counsel sending up, docketing, and printing the transcript is that of the client. Truelove v. Norris, 152 N.C. 755, 67 S.E. 487 (1910); Howard v. Speight, 180 N.C. 653, 104 S.E. 35 (1920). See also Carroll v. Victory Mfg. Co., 180 N.C. 660, 104 S.E. 528, aff'd, 180 N.C. 366, 104 S.E. 895 (1920); Kerr v. Drake, 182 N.C. 764, 108 S.E. 393 (1921).

**Agreements of Counsel.** — The requirement of this rule will be enforced uniformly regardless of an agreement to the contrary that the attorneys for the parties may have made in any particular case. State v. Farmer, 188 N.C. 243, 124 S.E. 562 (1924).

**Pending Negotiations for Compromise of Action.** — The fact that, on an appeal, negotiations for compromise were pending, is no excuse for failure to docket the appeal. British & Am. Mtg. Co. v. Long, 116 N.C. 77, 20 S.E. 964 (1895).

**Filing of Original Papers by Appellant.** — Where the appellant fails to file a transcript of the record, but attempts to file the original papers from the trial court, his motion for reinstatement after dismissal of appeal will be denied for laches. Lindsey v. Supreme Lodge of Knights of Honor, 172 N.C. 818, 90 S.E. 1013 (1916).

**Transcript Mailed in Reasonable Time.** — Where the transcript of a record is deposited in the post office in ample time to reach the Supreme Court within the time required by this rule, but by some delay in the mails does not reach its destination until after the time has expired, the excuse is reasonable, and the appeal will not be dismissed. Walker v. Scott, 104 N.C. 481, 10 S.E. 523 (1889).

**Fees Must Be Paid Before Transcript Docketed.** — The clerk of the Supreme Court is not required to docket a transcript of an appeal before appellant has paid him the required fee therefor. Dunn v. Clerk's Office, 176 N.C. 50, 96 S.E. 738 (1918). But see. West v. Reynolds, 94 N.C. 333 (1886). See § 6-33 and notes thereto.

**Failure to Pay Costs.** — Where a transcript is not sent up in time by reason of the appellant's failure, when notified, to pay costs of the transcript, as he is bound to do, the appellee may move to docket and dismiss the appeal. Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890).

**Delay of Clerk.** — Failure to docket the transcript on appeal within the time required by this rule cannot be excused by delay of the clerk, in which case appellant should docket the title of the case with affidavit as to the cause of delay. Carroll v. Victory Mfg. Co., 180 N.C. 660, 104 S.E. 528, aff'd, 180 N.C. 366, 104 S.E. 895 (1920).

It is no sufficient excuse for the appellant's failure to docket his appeal under this rule that the case was delayed in being settled and that the clerk was too busy with a term of court to make out the transcript. Hewitt v. Beck, 152 N.C. 757, 67 S.E. 586 (1910).

The mere fact that appellant tendered payment to the superior court clerk of his fees for transcript on appeal, and the clerk said he would send up the transcript without payment is no sufficient legal excuse for the failure to docket under this rule. Truelove v. Norris, 152 N.C. 755, 67 S.E. 487 (1910).

**Case Not Settled.** — It is no excuse for failure to docket the appeal that the case was

not settled by the judge until too late to docket the case at the proper term, it being appellant's duty to docket the record proper and ask for a writ of certiorari to perfect the transcript. Pittman v. Kimberly, 92 N.C. 562 (1885); State v. Telfair, 139 N.C. 555, 51 S.E. 911 (1905); Kerr v. Drake, 182 N.C. 764, 108 S.E. 393 (1921).

**Renewing of Withdrawn Appeal.** — A party to an action has a right to renew his appeal after having once withdrawn it, provided he does so within the time prescribed by the statutes and rules for perfecting appeals. State v. Chastain, 104 N.C. 900, 10 S.E. 519 (1889).

**Case Is Dismissed If Moot Question Presented.** — Where on appeal it appears that an election sought to be enjoined has already been held, the appeal presents only a moot question, and will be dismissed. Rousseau v. Bullis, 201 N.C. 12, 158 S.E. 553 (1931).

## Rule 4. Appeal in criminal cases — How and when taken.

(a) *Manner and time.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 14 days after entry of the judgment or order or within 14 days after a ruling on a motion for appropriate relief made during the fourteen-day period following entry of the judgment or order.

(b) *Content of notice of appeal.* The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) *Service of notice of appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

(d) *To which appellate court addressed.* An appeal of right from a judgment of a superior court by any person who has been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other criminal cases, appeal shall be filed in the Court of Appeals. (Adopted June 13, 1975; Amended October 4, 1978 — (a)(2) — effective January 1, 1979; July 13, 1982 — (d); September 3, 1987 — (d) — effective for all judgments of the trial division entered on or after July 24, 1987; December 8, 1988 — 4(a) — effective for all judgments of the trial tribunal entered on or after July 1, 1989; June 8, 1989 — 4(a) — December 8, 1988 amendment rescinded prior to effective date; Amended October 10, 1997; Amended October 18, 2001.)

**Editor's note.** — An amendment to Rule 4(a) adopted December 8, 1988, to become effective for judgments of the trial division entered on or after July 1, 1989, was rescinded by order of the Supreme Court dated June 8, 1989.

**Cross References.** — As to appeals in criminal actions generally, see § 15A-1441 et seq. and note thereto. As to the appeal bond, see § 1-285 et seq. As to costs on appeal generally, see § 6-33 et seq.

### CASE NOTES

I. In General.
II. Decisions Under Prior Law.

#### I. IN GENERAL.

**Basis for Appeal.** — Reliance upon a substantial rights analysis as the basis for appellate review appears contrary to the plain and unambiguous language of the statutes governing criminal appeals. State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875, appeal dismissed, 340 N.C. 572, 460 S.E.2d 328 (1995), aff'd, 342 N.C. 638, 466 S.E.2d 277 (1996).

**Requirement Where Appellate Review of Criminal Convictions Provided.** — While the State has no duty to provide for appellate review of criminal convictions, when it does, it

must assure indigent defendants an adequate opportunity to present their claims. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

**Applied** in Gaunt v. Pittaway, 135 N.C. App. 442, 520 S.E.2d 603 (1999).

**Quoted** in State v. McMillian, 101 N.C. App. 425, 399 S.E.2d 410 (1991); State v. Marr, 342 N.C. 607, 467 S.E.2d 236 (1996).

**Cited** in State v. Morris, 41 N.C. App. 164, 254 S.E.2d 241 (1979); State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983); State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); State v. Higson, 310 N.C. 418, 312 S.E.2d 437 (1984); State v. Payne, 311 N.C. 291, 316 S.E.2d 64 (1984); State v. Watson, 311 N.C. 252, 316 S.E.2d 293 (1984); State v. Thompson, 318 N.C. 395, 348 S.E.2d 798 (1986); State v. Parker, 319 N.C. 444, 355 S.E.2d 489 (1987); State v. Carver, 319 N.C. 665, 356 S.E.2d 349 (1987); State v. Taylor, 322 N.C. 280, 367 S.E.2d 664 (1988); State v. Blue, 115 N.C. App. 108, 443 S.E.2d 748 (1994); United States v. Howard, 115 F.3d 1151 (4th Cir. 1997).

### II. DECISIONS UNDER PRIOR LAW.

***Editor's note.*** *— The cases cited below were decided under former Rules 5 and 6, Rules of Practice in the Supreme Court of North Carolina.*

**Case Subject to Dismissal on Motion or by Court ex Mero Motu.** — The defendant not having docketed his case on appeal within the time prescribed by this rule, nor having docketed the record proper and moved for a writ of certiorari before the expiration of time allowed docketing criminal appeals, the case is subject to dismissal either upon motion of the Attorney General or ex mero motu by the court. State v. Walker, 245 N.C. 658, 97 S.E.2d 219 (1957), cert. denied, 356 U.S. 946, 78 S. Ct. 793, 2 L. Ed. 2d 821 (1958).

**Appeal Abandoned Where Defendant Breaks Jail.** — When the defendant in a criminal action appeals to the Supreme Court, but, pending appeal, breaks jail and flees the jurisdiction of the court, this is an abandonment of the appeal; and, upon motion of the Attorney General, the appeal will be dismissed, or case continued, or judgment affirmed, in the discretion of the court. State v. Keebler, 145 N.C. 560, 59 S.E. 872 (1907).

## Rule 5. Joinder of parties on appeal.

(a) *Appellants.* If two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, they may give a joint oral notice of appeal or file and serve a joint notice of appeal in accordance with Rules 3 and 4; or they may join in appeal after timely taking of separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties.

(b) *Appellees.* Two or more appellees whose interests are such as to make their joinder on appeal practicable may, by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, so join.

(c) *Procedure after joinder.* After joinder, the parties proceed as a single appellant or appellee. Filing and service of papers by and upon joint appellants or appellees is as provided by Rule 26(e).

### CASE NOTES

**Applied** in Board of Transp. v. Terminal Whse. Corp., 300 N.C. 700, 268 S.E.2d 180 (1980).

## Rule 6. Security for costs on appeal.

(a) *In regular course.* Except in pauper appeals an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of G.S. 1-285 and 1-286.

(b) *In forma pauperis appeals.* An appellant in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of G.S. 1-288.

(c) *Filed with record on appeal.* When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a cash deposit made in lieu of bond.

(d) *Dismissal for failure to file or defect in security.* For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision (c), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

(e) *No security for costs in criminal appeals.* Pursuant to G.S. 15A-1449, no security for costs is required upon appeal of criminal cases to the appellate division. (Adopted June 13, 1975; Amended November 27, 1984 — 6(e) — effective February 1, 1985; July 26, 1990 — 6(c) — effective October 1, 1990.)

CASE NOTES

**Secured Performance Bond Not Prerequisite to Appeal.** — An appeal must be dismissed when a party does not provide the appeal bond ordered by the trial judge. However, posting a "secured performance bond" is not a condition precedent to appeal under statute or appellate rules. Armstrong v. Armstrong, 85 N.C. App. 93, 354 S.E.2d 350 (1987), rev'd on other grounds, 322 N.C. 396, 368 S.E.2d 595 (1988).

**Cited** in Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

## Rule 7. Preparation of the transcript; Court reporter's duties.

(a) *Ordering the transcript.*

(1) *Civil cases.* Within 14 days after filing the notice of appeal the appellant shall arrange for the transcription of the proceedings or of such parts of the proceedings not already on file, as the appellant deems necessary, in accordance with these rules, and shall provide the following information in writing: a designation of the parts of the proceedings to be transcribed; the name and address of the court reporter or other neutral person designated to prepare the transcript; and, where portions of the proceedings have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal. The appellant shall file the written documentation of this transcript arrangement with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record, and upon the person designated to prepare the transcript. If the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall file with the record on appeal a transcript of all evidence relevant to such finding or conclusion. If an appellee deems a transcript of other parts of the proceedings to be necessary, the appellee, within 14 days after the service of the written documentation of the appellant, shall arrange for the transcription of any additional parts of the proceedings or such parts of the proceedings not already on file, in accordance with these rules. The appellee shall file with the clerk of the trial tribunal, and serve on all other parties of record, written documentation of the additional parts of the proceedings to be transcribed; and the name and address of the court reporter or other neutral person designated to prepare the transcript.

(2) *Criminal cases.* In criminal cases where there is no order establishing the indigency of the defendant for the appeal, the defendant shall arrange for the transcription of the proceedings as in civil cases.

Where there is an order establishing the indigency of the defendant, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order a transcript of the proceedings by serving the following documents upon either the court reporter(s) or neutral person designated to prepare the transcript: a copy of the appeal entries signed by the judge; a copy of the trial court's order establishing indigency for the appeal; and a statement setting out the number of copies of the transcript required and the name, address and telephone number of appellant's counsel. The clerk shall make an entry of record reflecting the date these documents were served upon the court reporter(s) or transcriptionist.

(b) *Production and delivery of transcript.*

(1) In civil cases: from the date the requesting party serves the written documentation of the transcript arrangement on the person designated to prepare the transcript, that person shall have 60 days to prepare and deliver the transcript.

In criminal cases where there is no order establishing the indigency of the defendant for the appeal: from the date the requesting party serves the written documentation of the transcript arrangement upon the person designated to prepare the transcript, that person shall have 60 days to produce and deliver the transcript in non-capital cases and 120 days to produce and deliver the transcript in capitally tried cases.

In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date the clerk of the trial court serves the order upon the person designated to prepare the transcript, that person shall have 60 days to procure and deliver the transcript in non-capital cases and 120 days to produce and deliver the transcript in capitally tried cases.

The transcript format shall comply with Appendix B of these Rules.

Except in capitally tried criminal cases which result in the imposition of a sentence of death, (t)he trial tribunal, in its discretion, and for good cause shown by the appellant may extend the time to produce the transcript for an additional 30 days. Any subsequent motions for additional time required to produce the transcript may only be made to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally tried cases resulting in the imposition of a sentence of death, shall be made directly to the Supreme Court by the appellant. Where the clerk's order of transcript is accompanied by the trial court's order establishing the indigency of the appellant and directing the transcript to be prepared at State expense, the time for production of the transcript commences seven days after the filing of the clerk's order of transcript.

(2) The court reporter, or person designated to prepare the transcript, shall deliver the completed transcript to the parties, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the parties' copies have been so delivered, and shall send a copy of such certification to the appellate court to which the appeal is taken. The appealing party shall retain custody of the original transcript and shall transmit the original transcript to the appellate court upon settlement of the record on appeal.

(3) The neutral person designated to prepare the transcript shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or be financially interested in the action unless the parties agree otherwise by stipulation. (Adopted June 13,

1975; Repealed July 1, 1978 (See note following Rule 17); Re-adopted December 8, 1988 — effective for all judgments of the trial tribunal entered on or after July 1, 1989; Amended June 8, 1989 — effective for all judgments of the trial tribunal entered on or after July 1, 1989; July 26, 1990 — 7(a)(1), (a)(2), and (b)(1) — effective October 1, 1990; November 21, 1997 — effective February 1, 1998; Amended April 14, 1999; Amended October 18, 2001.)

**Editor's note.** — A former version of Rule 7 was repealed by amendment effective July 1, 1978, adopted June 19, 1978.

The order repealing this rule provided:

"Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, 'In criminal cases no security for costs is required upon appeal to the appellate division.' Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

"The appellate courts, pursuant to Rules 12, 13, and 15, will continue to collect advance deposits fixed by the clerks to cover the costs of reproducing the record on appeal and briefs.

"Rather than renumber the Rules, the Court has determined to reserve Rule 7 for future use."

**Legal Periodicals.** — For note on the problems and potential pitfalls of Rule 7 of North Carolina Rules of Appellate Procedure, see 34 Wake Forest L. Rev. 1224 (1999).

## CASE NOTES

**Submission of Transcript to Court of Appeals.** — In the interests of judicial economy and a timely resolution of appeals and in the absence of a rule from the Supreme Court requiring a written transcript in cases that are appealed to the Court of Appeals, appellants are encouraged to submit, from the outset, a written transcript of the entire proceedings. Shillington v. K-Mart Corp., 102 N.C. App. 187, 402 S.E.2d 155 (1991).

**Submission of Videotapes.** — Videotapes, four in number, were submitted to the Court of Appeals as part of the record on appeal. No written transcript accompanied the briefs and record, except for selected excerpts of some of the testimony included as appendices in the parties' briefs. Although there may be many substantial benefits in videotaping trial proceedings under the rules to govern the use of video court reporting system during the test/evaluation period, done by order of the Supreme Court in conference on February 3, 1988, the use of videotapes for appellate review greatly frustrates effective review of the trial proceedings, especially in cases where questions of sufficiency of the evidence are determinative. Shillington v. K-Mart Corp., 102 N.C. App. 187, 402 S.E.2d 155 (1991).

**Delivery Within 60-Day Period.** — Rule 11(a) provides that the time in which the record of a case on appeal must be filed runs from the date of the court reporter's certification of delivery of the transcript and if the court reporter fails to certify that the transcript has been delivered within the 60-day period permitted by section (b) of this Rule, the 35-day period within which an appellant must serve the proposed record on appeal does not begin to run until the court reporter does certify delivery of the transcript; therefore, since the court reporter had not certified delivery of her portion of the transcript prior to the hearing on plaintiff's motion to dismiss the appeal, the defendant's 35-day period to serve the record on appeal never began to run. Lockert v. Lockert, 116 N.C. App. 73, 446 S.E.2d 606 (1994), cert. granted in part and denied in part, writ of supersedeas allowed, 338 N.C. 311, 450 S.E.2d 487 (1994).

Plaintiff's letter to the court reporter within the 10-day deadline set forth in this Rule constituted "substantial compliance" with the requirement of a contract between the litigant and the court reporter. Anuforo v. Dennie, 119 N.C. App. 359, 458 S.E.2d 523 (1995).

Court reporter's notation that plaintiff "ordered" transcript, coupled with her certification the transcript was "mailed," indicating, however erroneously, that the transcript was prepared and delivered within 60 days, constituted excusable neglect justifying relief from the trial court's order dismissing plaintiff's appeal for the failure of counsel to seek an extension of time for production of the transcript under

subdivision 7(b)(1). Anuforo v. Dennie, 119 N.C. App. 359, 458 S.E.2d 523 (1995).

**Substantial Compliance.** — Defendant's actions in conferring with the Clerk of Superior Court and the Administrative Office of the Courts, purchasing copies of audio tapes, employing a transcriptionist, and obtaining a transcript of proceeding within sixty days of the defendant's notice of appeal constituted "substantial compliance" with this Rule. Pollock v. Parnell, 126 N.C. App. 358, 484 S.E.2d 864 (1997).

**Statement of Grounds.** — The mere recitation of the rule number relied upon by the movant is not a statement of the grounds within the meaning of subdivision 7(b)(1) Smith v. Johnson, 125 N.C. App. 603, 481 S.E.2d 415 (1997), cert. denied, 346 N.C. 283, 487 S.E.2d 554 (1997).

**Basis of Motion Required.** — A motion, to satisfy the requirements of subdivision (b)(1), must supply information revealing the basis of the motion. Smith v. Johnson, 125 N.C. App. 603, 481 S.E.2d 415 (1997), cert. denied, 346 N.C. 283, 487 S.E.2d 554 (1997).

**Costs Assessed on Attorney.** — Because this rule was violated, in that a timely written request for the transcript was not made, the cost of appeal was assessed on upon plaintiffs' attorney personally, pursuant to Rule 35. Thompson v. Town of Warsaw, 120 N.C. App. 471, 462 S.E.2d 691 (1995).

**Motion to Extend Time.** — All motions made to extend time, except for motions to extend the time for service of the proposed record on appeal under N.C.R. App. P. 27(c)(1), and motions to extend the time to produce the transcript under subdivision (b)(1) of this rule, must be made to the court to which appeal has been taken. Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997), rev'd on other grounds, 347 N.C. 672, 500 S.E.2d 88 (1998).

**The defendant's motion to dismiss plaintiff's appeal was properly denied** where the court reporter failed to deliver a copy of the completed transcript until long after the expiration of the 60-day period allowed by this rule. However, the better practice is for appellant to request an extension of time from the appropriate court, setting forth the reasons for the reporter's delay in delivering the transcript and the probable date of delivery, an initial application for an extension of time being made to the trial court and subsequent motions for extensions of time to produce the transcript being made only to the appellate court to which appeal has been taken. Harvey v. Stokes, 137 N.C. App. 119, 527 S.E.2d 336 (2000).

**Dismissal for Failure to Comply.** — Where the trial court's purported extension of time to file the records on appeal was ineffective, and where the records on appeal were not filed within the times mandated by the Rules of Appellate Procedure, each parties' appeals were dismissed for failure to comply with the rules. Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997), rev'd on other grounds, 347 N.C. 672, 500 S.E.2d 88 (1998).

The defendant's appeal was dismissed, where he failed to supervise his appeal in an auto accident case and to request an extension of time, even though an extension became necessary for the court reporter's completion and delivery of the transcript within the time limits of this rule. Chamberlain v. Thames, 130 N.C. App. 324, 502 S.E.2d 631 (1998).

**Applied** in Ferguson v. Williams, 101 N.C. App. 265, 399 S.E.2d 389 (1991).

## Rule 8. Stay pending appeal.

(a) *Stay in civil cases.* When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23. In any appeal which is allowed by law to be taken from an agency to the appellate division, application for the writ of supersedeas may be made to the appellate court in the first instance. Application for the writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

(b) *Stay in criminal cases.* When a defendant has given notice of appeal, those portions of criminal sentences which impose fines or costs are automatically stayed pursuant to the provisions of G.S. 15A-1451. Stays of imprisonment or of the execution of death sentences must be pursued under G.S.

15A-536 or Appellate Rule 23, Writ of Supersedeas. (Amended February 1, 1985; July 1, 1997.)

CASE NOTES

**Cited** in In re Burgess, 57 N.C. App. 268, 291 S.E.2d 323 (1982).

## Rule 9. The record on appeal.

(a) *Function; Composition of record.* In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9.

(1) *Composition of the record in civil actions and special proceedings.* The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same;

d. copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

k. assignments of error set out in the manner provided in Rule 10; and

l. a statement, where appropriate, that the record of proceedings was made with an electronic recording device.

(2) *Composition of the record in appeals from superior court review of administrative boards and agencies.* The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all errors assigned;

f. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

g. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3); and

h. assignments of error to the actions of the superior court, set out in the manner provided in Rule 10.

(3) *Composition of the record in criminal actions.* The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally; of all orders establishing time limits relative to the perfecting of the appeal; of any order finding defendant indigent for the purposes of the appeal and assigning counsel; and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors assigned, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

j. assignments of error set out in the manner provided in Rule 10; and

k. a statement, where appropriate, that the record of proceedings was made with an electronic recording device.

(b) *Form of record; Amendments.* The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) *Order of arrangement.* The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) *Inclusion of unnecessary matter; Penalty.* It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter

not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) *Filing dates and signatures on papers.* Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) *Pagination; Counsel identified.* The pages of the record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R p____)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T p____)." At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

(5) *Additions and amendments to record on appeal.* On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the filing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal.

(c) *Presentation of testimonial evidence and other proceedings.* Testimonial evidence, voir dire, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). Where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal.

(1) *When testimonial evidence narrated — How set out in record.* Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(a) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) *Designation that verbatim transcript of proceedings in trial tribunal will be used.* Appellant may designate in the record that the testimonial evidence will be presented in the verbatim transcript of the evidence in the trial tribunal in lieu of narrating the evidence as permitted by Rule 9(c)(1). Appellant may also designate that the verbatim transcript will be used to present voir dire or other trial proceedings where those proceedings are the basis for one or more assignments of error and where a verbatim transcript of those proceedings has been made. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript which has been made, provided that when the verbatim transcript

is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned. When appellant has narrated the evidence and trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

(3) *Verbatim transcript of proceedings — Settlement, filing, copies, briefs.* Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the settled, verbatim transcript to be filed, contemporaneously with the record on appeal, with the clerk of the appellate court in which the appeal is docketed;

c. in criminal appeals, the district attorney, upon settlement of the record, shall forward one copy of the settled transcript to the Attorney General of North Carolina; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) *Presentation of discovery materials.* Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances where discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to questions raised on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(5) *Electronic Recordings.* When a narrative or transcript has been prepared from an electronic recording, the parties shall not file a copy of the electronic recording with the appellate division except at the direction or with the approval of the appellate court.

(d) *Models, diagrams, and exhibits of material.*

(1) *Exhibits.* Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(2) *Transmitting exhibits.* Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed in the appellate court; the original documentary exhibit need not be filed with the appellate court. When an original non-documentary exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the appellate court. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the records in the appellate court. Portions of the record on appeal in either appellate court which are not suitable for reproduction may be designated by the Clerk of the Supreme Court to be exhibits. Counsel may then be required to submit three additional copies of those designated materials.

(3) *Removal of exhibits from appellate court.* All models, diagrams, and exhibits of material placed in the custody of the Clerk of the appellate court must be taken away by the parties within 90 days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the Clerk. When this is not done, the Clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to him may seem best. (Adopted June 13, 1975; Amended June 10, 1981 — 9(c)(1) — applicable to all appeals docketed on or after October 1, 1981; January 12, 1982 — 9(c)(1) — applicable to all appeals docketed after March 15, 1982; November 27, 1984 — applicable to all appeals in which the notice of appeal is filed on or after February 1, 1985; December 8, 1988 — 9(a), (c) — effective for all judgments of the trial tribunal entered on or after July 1, 1989; June 8, 1989 — 9(a) — effective for all judgments of the trial tribunal entered on or after July 1, 1989; July 26, 1990 — 9(a)(3)h and 9(d)(2) — October 1, 1990; Amended March 6, 1997; November 21, 1997 — effective February 1, 1998; Amended October 18, 2001.)

**Cross References.** — As to power of trial judge to settle record on appeal, see § 1-283 and notes thereto. As to appeal bond generally, see § 1-285 et seq. As to costs on appeal generally, see § 6-33 et seq.

## CASE NOTES

I. In General.
II. Decisions Under Prior Law.
A. In General.
B. Assignment of Error.
C. Composition of Record.
D. Criminal Actions.
E. Evidence.

### I. IN GENERAL.

**The Rules of Appellate Procedure** are mandatory and failure to follow the rules subjects an appeal to dismissal. Wiseman v. Wiseman, 68 N.C. App. 252, 314 S.E.2d 566 (1984).

Where defendant's violations of N.C.R.A.P., Rules 9(b)(1) and (c)(1) and 28(b)(5) precluded the possibility of effective appellate review of the questions presented, its appeal would be dismissed. Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984).

**Compliance Universally Mandatory.** — Since appellate rules apply to everyone, the court would dismiss the appeal of pro se defendant who failed to comply with N.C.R.A.P., Rules 9(a)(1)(c), 9(a)(1)(k), 9(b)(3), 10(c)(1), 12(a), and 28(b)(5). Bledsoe v. County of Wilkes, 135 N.C. App. 124, 519 S.E.2d 316 (1999).

**But the Court May Suspend Requirements Pursuant to N.C.R.A.P., Rule 2.** — The court elected to suspend the requirement for the clerk's date stamp, pursuant to its discretionary authority accorded by N.C. R. App. P. Rule 2, where neither party objected to the absence of the stamp. State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875 (2000).

**An appellate court cannot assume or speculate that there was prejudicial error,** when none appears on the record before it. State v. Moore, 75 N.C. App. 543, 331 S.E.2d 251, cert. denied, 315 N.C. 188, 337 S.E.2d 862 (1985).

**The defendant appellant has the duty to see that the record on appeal is properly made up.** State v. McCain, 39 N.C. App. 213, 249 S.E.2d 812 (1978); Tucker v. General Tel. Co., 50 N.C. App. 112, 272 S.E.2d 911 (1980); West v. G.D. Reddick, Inc., 48 N.C. App. 135, 268 S.E.2d 235 (1980), rev'd on other grounds, 302 N.C. 201, 274 S.E.2d 221 (1981); State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981).

It is the appellant's duty and responsibility to see that the record is in proper form and complete. State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983).

**The defendants' numerous, flagrant violations of the Rules of Appellate Procedure warranted dismissal** of the appeal, where the defendants did not provide a listing of assignments of error, they included as appendices to their brief certain documents that were

excluded by an earlier order, they failed to include other required material, and they used incorrect point type and spacing. Duke Univ. v. Bishop, 131 N.C. App. 545, 507 S.E.2d 904 (1998).

**This rule contemplates** that all charging documents must be copied and presented verbatim in the record on appeal. Mere references to such documents in the trial transcript could not suffice for verbatim copies of the documents themselves, nor could such references substitute for such copies when the copies were missing from the record. State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993).

The appellant's failure to settle the record on appeal was sufficient reason to dismiss the appeal. Seigel v. Patel, 132 N.C. App. 783, 513 S.E.2d 602 (1999).

**Failure to Settle Record.** — Appeal would be dismissed where appellants failed to settle the record on appeal prior to filing with the Court of Appeals. Higgins v. Town of China Grove, 102 N.C. App. 570, 402 S.E.2d 885 (1991).

**Where the defendant failed to cooperate with the trial court to provide the appellate court with a reconstructed record** of the state's closing argument, which the trial court had failed to record, the appellate court was precluded from reviewing the defendant's argument that the state made improper remarks and referred to matters outside the trial record. State v. Moore, 75 N.C. App. 543, 331 S.E.2d 251, cert. denied, 315 N.C. 188, 337 S.E.2d 862 (1985).

**Where appellant failed to include portions of the record** dealing with whether a suit against an employee of the Board of Education should have been allowed to proceed despite the Board's governmental and official immunity defenses, the appellate court would not engage in speculation as to the employee's status, and affirmed the trial court's directed verdict for employee. Pharr v. Worley, 125 N.C. App. 136, 479 S.E.2d 32 (1996).

**Defendant's objection to trial court's finding of factors in aggravation was dismissed for failure to include Form AOC-CR-303,** Felony Judgment Findings of Factors in Aggravation and Mitigation of Punishment, in the record on appeal. State v. Weary, 124 N.C. App. 754, 479 S.E.2d 28 (1996).

**Matters discussed in the brief outside the record** ordinarily will not be considered since the record certified to the court imports verity and the court is bound by it. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Appellant's brief is not a part of the record on appeal. West v. G.D. Reddick, Inc., 48 N.C. App. 135, 268 S.E.2d 235 (1980), rev'd on other grounds, 302 N.C. 201, 274 S.E.2d 221 (1981).

**Objection When Ruling Made.** — Errors based on rulings made during the trial must ordinarily be called to the attention of the court by an objection taken when the ruling is made. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

**Waiver of Objections.** — Where plaintiffs failed to object at trial to the failure of defendant to state specific grounds for its motion for a directed verdict, plaintiffs could not raise such objection on appeal. Waters v. North Carolina Phosphate Corp., 50 N.C. App. 252, 273 S.E.2d 517, cert. denied, 302 N.C. 402, 279 S.E.2d 357 (1981).

**A judgment is a necessary part of the record on appeal** of a criminal action. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

The Appellate Court will dismiss an appeal if the judgment or order does not appear in the record on appeal. Abels v. Renfro Corp., 126 N.C. App. 800, 486 S.E.2d 735 (1997).

**Where the charge to the jury is not included in the record on appeal,** it is presumed that the jury was properly instructed as to the law arising upon the evidence as required by § 1-180 (now repealed). State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

**A reviewing court will not consider alleged errors in selected portions of a charge when** the entire charge is not before it. State v. Harrell, 50 N.C. App. 531, 274 S.E.2d 353 (1981); State v. Taylor, 61 N.C. App. 589, 300 S.E.2d 890 (1983).

**Where the appellant's narrative summary of the evidence was insufficient** to permit the appellate court to determine whether competent evidence supported certain findings of fact, the court would presume that it did. In re Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

**Where the record did not include a transcript containing the defendants' objection** and where the defendants failed to make a timely motion to ensure that witness testimony supporting their theory of the case be made available to the jury, the defendants failed to carry their burden of demonstrating that prejudice resulted from the jury's erroneous receipt, in spite of defendants' objections, during deliberations of an unredacted copy of the police report. Nunnery v. Baucom, 135 N.C. App. 556, 521 S.E.2d 479 (1999).

**Where record on appeal did not indicate that the trial court considered plaintiff's motions,** as required by this rule, the court could not review plaintiff's assignment of error pursuant to N.C.R.A.P. Rule 10(b)(1). Buckingham v. Buckingham, 134 N.C. App. 82,

516 S.E.2d 869 (1999), cert. denied, 351 N.C. 100, 540 S.E.2d 353 (1999).

**Where the record on appeal contains two conflicting narratives of the evidence,** the appeal should be dismissed for failure to bring forward a "settled" record as required under this rule and N.C.R.A.P., Rule 11; however, where defendant did not assert that the trial court's findings quoted were unsupported by sufficient evidence at the custody hearing below, but instead asserted the trial court's conclusions were erroneous or were not supported by the findings actually made, under these limited circumstances, a narrative of evidence or a verbatim transcript was not necessary to understand defendant's assignment of error; therefore, the appellate court addressed the merits of his assignments of error. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

**Subsection (c) provides an alternative to narrating evidence into the record;** that is, the filing of a complete stenographic transcript with the clerk of the court in which the appeal is docketed. Whichever method is chosen (N.C.R.A.P., Rule 9 or Rule 28), the result must be the same: to-wit, to provide the reviewing court with all the information necessary to understand each question presented. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

**Narration of the evidence as specified in subsection (c) is mandatory.** — Britt v. Allen, 291 N.C. 630, 231 S.E.2d 607 (1977), decided prior to the 1981 amendment which added the third paragraph of subsection (c)(1).

**N.C.R.A.P., Rule 28(b)(4) serves the same function as subdivision 9(c)(1) of this rule serves** with respect to records filed wherein the evidence is narrated; it assures that the court will have before it the evidence necessary to answer the questions presented, and that such evidence is in a condensed and readily available form. State v. Briley, 59 N.C. App. 335, 296 S.E.2d 501 (1982).

**N.C.R.A.P., Rule 28(b)(4) Must Be Followed When Stenographic Transcript Used.** — It is imperative that defendants using the stenographic transcript alternative allowed by subdivision (c)(1) of this rule carefully follow the requirements of N.C.R.A.P., Rule 28(b)(4) in order that appellate courts not be left the time-consuming and burdensome task of searching through the transcript for the pertinent pages. The omission of the pertinent transcript pages requires that the transcript be circulated among all the judges on the panel, requiring each of them to go through this time-consuming and burdensome task and is grounds for dismissal of the appeal. State v. Wilson, 58 N.C. App. 818, 294 S.E.2d 780 (1982), cert. denied, — N.C. —, 342 S.E.2d 907 (1986).

**When Appendix Required.** — An appendix is not contemplated for each question that requires a verbation reproduction of a part of the transcript in order to understand that question. Instead, subdivision (b)(4) of N.C.R.A.P., Rule 28 is designed to ensure that verbatim reproductions appear either in the brief itself or in an appendix to the brief. The appendix method should be employed when the question presented requires long verbatim reproductions of the transcript. Placing such reproductions in an appendix serves the dual purpose of providing the reviewing court with all the information necessary in order to make an informed determination while preserving the clarity and directness of the argument. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

N.C.R.A.P., Rule 28 only requires the inclusion of the portions of the transcript necessary to understand, not decide, the question. Any other interpretation would require many appellants, especially those who question the sufficiency of the evidence, to include a verbatim copy of the entire transcript in the appendix to the brief. This interpretation should not encourage appellants to use less than due diligence in following the rules. Indeed, it is usually the safer and wiser course to do more than meet the minimum requirements. State v. Nickerson, 308 N.C. 376, 302 S.E.2d 221 (1983).

Although a complete stenographic transcript contains all the evidence in a case, it is too time consuming and too burdensome a task to expect each member of the reviewing court to search through pages of the transcript in order to find those passages necessary to the understanding of each question presented. Therefore, it is imperative that whenever a stenographic transcript is used in lieu of narrating the evidence into the record, all relevant portions of the transcript must be reproduced in either the brief or its appendix. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

**Items Arranged Chronologically.** — Each item in the record on appeal should be arranged chronologically, in the same order in which it occurred at trial. State v. Easter, 51 N.C. App. 190, 275 S.E.2d 861, cert. denied and appeal dismissed, 303 N.C. 183, 280 S.E.2d 455 (1981).

**Subdivision (a)(3)(ix) was broadly worded so as to include any proceeding** in any court which would be material to the consideration of the case on appeal. If there is a question as to the relevancy of the proceedings from other courts, the parties may settle the dispute according to the procedures provided in N.C.R.A.P., Rule 11. The trial judge properly ordered the inclusion of the voir dire of a previous trial into the record. State v. Cumber, 32 N.C. App. 329, 232 S.E.2d 291, cert. denied, 292 N.C. 642, 235 S.E.2d 63 (1977).

**Counsel's failure to timely file the record on appeal** in a criminal prosecution

amounted to inadequate assistance of counsel, and the loss of one's only direct appeal because of counsel's neglect constitutes a serious deprivation. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

**Counsel Taxed with Costs for Filing Redundant Records.** — Because counsel representing one codefendant and counsel representing the other defendants filed two records instead of one and because they included unnecessary material in each of the records filed, each counsel will be personally taxed with a portion of the costs. State v. Bryson, 30 N.C. App. 71, 226 S.E.2d 392, cert. denied, 290 N.C. 664, 228 S.E.2d 455 (1976).

By appealing the three cases consolidated below separately, counsel has prepared and caused to be printed two redundant records on appeal; these records on appeal constitute matter not necessary for an understanding of the errors assigned. There has been no showing of compelling circumstances to justify the filing of three records on appeal instead of one. Consequently, counsel will be personally taxed with costs. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Because of the filing of an unnecessary record on appeal and because unnecessary matter was included in the records filed, counsel for defendants will be personally taxed with a portion of the costs. State v. Ashe, 30 N.C. App. 74, 226 S.E.2d 398, cert. denied, 290 N.C. 664, 228 S.E.2d 455 (1976).

**Record in Improper Form.** — Where appellants' record was not in proper form for appeal, appellants' counsel was personally taxed with the costs of printing the memoranda of law filed in the trial court and unnecessarily included in the record on appeal. Smallwood v. Eason, 123 N.C. App. 661, 474 S.E.2d 411 (1996), rev'd on other grounds, 346 N.C. 171, 484 S.E.2d 526 (1997).

**It is improper procedure for counsel to file three separate records** on appeal from a trial at which the three cases were consolidated. Aside from the question of the unnecessary expenses, the filing of three separate records on appeal creates the undue burden on the appellate courts of having to read three when one would have sufficed. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

**Minutes Are Not Substitute for Copy of Judgment.** — The "minutes" of the trial court in a criminal action included in the record on appeal are not a substitute for a copy of the judgment. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

**When the court has ordered consolidation of cases or charges for trial, counsel cannot, of his own enterprise, sever the cases** or charges and appeal each separately in the absence of a showing of compelling circumstances. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

**Omission of Jury Instructions.** — Errors assigned to jury instructions not considered on appeal where defendant failed to include a transcript of the entire jury charge in the record. State v. Deese, 127 N.C. App. 536, 491 S.E.2d 682 (1997).

**Omission of Exhibits.** — Where Board of Education failed to include certain exhibits presented to the trial court in the record on appeal, the court could not consider those portions of the exhibits not included in the record. Ronald G. Hinson Elec., Inc. v. Union County Bd. of Educ., 125 N.C. App. 373, 481 S.E.2d 326 (1997).

**Omission of Necessary Part of Record.** — When a necessary part of the record on appeal of a criminal action has been omitted, the appeal will be dismissed. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

**Where record was, at best, a haphazard arrangement** of pleadings, orders and parts of prior records on appeal, spanning an almost ten-year period of litigation, the appeal would be dismissed for violation of subdivision (b)(1) of this rule. Lowder v. All Star Mills, Inc., 91 N.C. App. 621, 372 S.E.2d 739 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 234 (1989).

**Weapon Added to Record on Appeal.** — Where the court admitted the weapon (a box cutter) itself into evidence, while a verbal description supplemental to introduction of the weapon would have been preferable, its omission was not fatal; pursuant to subsection (b)(5) of this rule, the appellate court would order the box cutter sent up and added to the record on appeal. State v. Wiggins, 78 N.C. App. 405, 337 S.E.2d 198 (1985).

**Trial Court's Ruling Presumed Correct.** — Where the defendant failed to include in the appeal record a copy of an investigative report that he contended was work product, and the record showed that the trial court reviewed the report, weighed its contents, and considered the appropriate evidentiary rule, the appellate court was required to presume that the trial court properly ordered the defendant to produce the report. State v. Reaves, 132 N.C. App. 615, 513 S.E.2d 562 (1999).

**Record Silent as to Jurisdiction of Lower Court.** — When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

**When the record shows a lack of jurisdiction in the lower court,** the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered

without authority. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

**Court's violation of § 7A-198 did not relieve appellant of her burden** of complying with paragraph (a)(1)(v) of this rule and showing prejudicial error. Miller v. Miller, 92 N.C. App. 351, 374 S.E.2d 467 (1988).

**Motion to Amend Record.** — After the case has been docketed in the appellate court, the proper method to request amendment of the record, when the inclusion of a document has not been addressed by a trial court order settling the record on appeal, is to make a motion in the appellate court to amend the record under subdivision (b)(5). Horton v. New South Ins. Co., 122 N.C. App. 265, 468 S.E.2d 856 (1996), cert. denied, — N.C. —, 472 S.E.2d 8 (1996).

A motion to correct or amend a judgment in order to make it speak the truth is properly made to the appellate court rather than the trial court once the record on appeal has been filed with the appellate court. State v. Dixon, 139 N.C. App. 332, 533 S.E.2d 297 (2000).

**Motion to Amend Record Should Be Supported with Explanation.** — Defendant ex-wife's bare assertion that portions of certain depositions should be added to the record as "necessary to an understanding of the errors assigned" was insufficient to support her motion to amend, because she provided no explanation as to why they were necessary or why they were not included in the record, given that they were included in the first Record on Appeal. Robinson, Bradshaw & Hinson, P.A. v. Smith, 139 N.C. App. 1, 532 S.E.2d 815 (2000).

**Motion to Amend Denied.** — Motion for leave to amend the record on appeal to include material relating to a superseding indictment was denied where the records in question originated after the trial court's order to compel was entered and after notice of appeal was given. Staton v. Brame, 136 N.C. App. 170, 523 S.E.2d 424 (1999).

**Improper Documents in Appendix.** — It is improper for a party to attach a document not in the record and not permitted under Rule 28 of the Rules of Appellate Procedure in an appendix to its brief. Horton v. New South Ins. Co., 122 N.C. App. 265, 468 S.E.2d 856 (1996), cert. denied, — N.C. —, 472 S.E.2d 8 (1996).

**Noncompliance Resulting in Sanctions Against Plaintiff's Attorneys.** — Given plaintiff's attorneys' willful disobedience of the trial court's explicit order and their substantial noncompliance with Rules 9, 28, and 37, the court imposed sanctions against plaintiff's attorneys in the form of costs associated with the appeal. Coiner v. Cales, 135 N.C. App. 343, 520 S.E.2d 61 (1999).

**Applied** in Johnson v. Hooks, 27 N.C. App. 584, 219 S.E.2d 664 (1975); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976); State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976); State v. Montgomery, 291 N.C. 91, 229 S.E.2d 572 (1976); State v. Chavis, 30 N.C. App. 75, 226 S.E.2d 389 (1976); State v. Pevia, 30 N.C. App. 79, 226 S.E.2d 394 (1976); Williams v. Williams, 31 N.C. App. 747, 230 S.E.2d 428 (1976); State v. Ellis, 32 N.C. App. 226, 231 S.E.2d 285 (1977); State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977); State v. Musumeci, 33 N.C. App. 88, 234 S.E.2d 31 (1977); State v. Dixon, 33 N.C. App. 78, 234 S.E.2d 37 (1977); State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977); State v. Spruill, 33 N.C. App. 731, 236 S.E.2d 717 (1977); State v. Hugenberg, 34 N.C. App. 91, 237 S.E.2d 327 (1977); State v. Truzy, 44 N.C. App. 53, 260 S.E.2d 113 (1979); State v. Tatum, 44 N.C. App. 77, 259 S.E.2d 774 (1979); State v. Clark, 300 N.C. 116, 265 S.E.2d 204 (1980); State v. Trueblood, 46 N.C. App. 545, 265 S.E.2d 664 (1980); Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980); State v. Washington, 51 N.C. App. 458, 276 S.E.2d 470 (1981); Burns v. McElroy, 57 N.C. App. 299, 291 S.E.2d 278 (1982); State v. Long, 58 N.C. App. 467, 294 S.E.2d 4 (1982); State v. Pearson, 59 N.C. App. 87, 295 S.E.2d 499 (1982); State v. Nickerson, 59 N.C. App. 236, 296 S.E.2d 298 (1982); Duke Power Co. v. Flinchem, 59 N.C. App. 349, 296 S.E.2d 804 (1982); Williams v. East Coast Sales, Inc., 59 N.C. App. 700, 298 S.E.2d 80 (1982); West v. Slick, 60 N.C. App. 345, 299 S.E.2d 657 (1983); State v. Willis, 61 N.C. App. 244, 300 S.E.2d 829 (1983); State v. Monk, 63 N.C. App. 512, 305 S.E.2d 755 (1983); Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983); Haywortha v. Brooks Lumber Co., 65 N.C. App. 555, 309 S.E.2d 572 (1983); State v. Milam, 65 N.C. App. 788, 310 S.E.2d 141 (1984); State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984); Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984); Sessoms v. Sessoms, 76 N.C. App. 338, 332 S.E.2d 511 (1985); In re Bass, 77 N.C. App. 110, 334 S.E.2d 779 (1985); Murrow v. Daniels, 85 N.C. App. 401, 355 S.E.2d 204 (1987); Mosley & Mosley Bldrs., Inc. v. Landin Ltd., 87 N.C. App. 438, 361 S.E.2d 308 (1987); Paschall v. North Carolina Dep't of Cor., 88 N.C. App. 520, 364 S.E.2d 144 (1988); C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co., 326 N.C. 133, 388 S.E.2d 557 (1990); Forrest v. Pitt County Bd. of Educ., 100 N.C. App. 119, 394 S.E.2d 659 (1990); Matheson v. City of Asheville, 102 N.C. App. 156, 402 S.E.2d 140 (1991); Edelstein v. Pinnacle Inn & Country Club Condominium Owners' Ass'n, 103 N.C. App. 86, 403 S.E.2d 927 (1991); Crews v. North Carolina DOT, 103 N.C. App. 372, 405 S.E.2d 595 (1991); Smith v. Smith, 103 N.C. App. 488, 405 S.E.2d 912 (1991); Rowan County Bd. of

Educ. v. United States Gypsum Co., 103 N.C. App. 288, 407 S.E.2d 860 (1991); State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992); State v. Talley, 110 N.C. App. 180, 429 S.E.2d 604 (1993); Baker v. Baker, 115 N.C. App. 337, 444 S.E.2d 478 (1994); Jackson v. Carolina Hardwood Co., 120 N.C. App. 870, 463 S.E.2d 571 (1995); Graham v. Hardee's Food Sys., 121 N.C. App. 382, 465 S.E.2d 558 (1996); Graham v. Rogers, 121 N.C. App. 460, 466 S.E.2d 290 (1996); Ryals v. Hall-Lane Moving & Storage Co., 122 N.C. App. 134, 468 S.E.2d 69 (1996); Sharpe v. Nobles, 127 N.C. App. 705, 493 S.E.2d 288 (1997); Edwards v. West, 128 N.C. App. 570, 495 S.E.2d 920 (1998), cert. denied, 348 N.C. 282, 501 S.E.2d 918 (1998); Penland v. Harris, 135 N.C. App. 359, 520 S.E.2d 105 (1999); State v. Brooks, 138 N.C. App. 185, 530 S.E.2d 849 (2000).

**Quoted** in Dawkins v. Dawkins, 32 N.C. App. 497, 232 S.E.2d 456 (1977); Wright v. Asheville Pool & Gunite Co., 44 N.C. App. 80, 259 S.E.2d 797 (1979); State v. Jorgenson, 51 N.C. App. 425, 276 S.E.2d 707 (1981); Mohamad v. Simmons, 139 N.C. App. 610, 534 S.E.2d 616 (2000); Kellihan v. Thigpen, 140 N.C. App. 762, 538 S.E.2d 232 (2000).

**Stated** in Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980); State v. Grimes, 47 N.C. App. 476, 267 S.E.2d 387 (1980); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); State v. Pennell, 54 N.C. App. 252, 283 S.E.2d 397 (1981); State v. Earnhardt, 56 N.C. App. 748, 290 S.E.2d 376 (1982); State v. Nickerson, 62 N.C. App. 754, 303 S.E.2d 569 (1983); Oxendine v. Moss, 64 N.C. App. 205, 306 S.E.2d 831 (1983); State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250 (1987); McLendon v. Woodard, 719 F. Supp. 441 (W.D.N.C. 1989); Buncombe County ex rel. Child Support Enforcement Agency ex rel. Andres v. Newburn, 111 N.C. App. 822, 433 S.E.2d 782 (1993); King v. King, 112 N.C. App. 92, 434 S.E.2d 669 (1993); Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994); Fickley v. Greystone Enters., 140 N.C. App. 258, 536 S.E.2d 331 (2000); Piedmont Triad Regional Water Auth. v. Sumner Hills, Inc., 353 N.C. 343, 543 S.E.2d 844 (2001).

**Cited** in State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979); State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Davis v. Zoning Bd. of Adjustment, 41 N.C. App. 579, 255 S.E.2d 444 (1979); Miller Grading & Constr. Co. v. Luckey, 44 N.C. App. 378, 260 S.E.2d 774 (1979); State v. Harvell, 45 N.C. App. 243, 262 S.E.2d 850 (1980); State v. Sinclair, 301 N.C. 193, 270 S.E.2d 418 (1980); Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980); State v. Jordan, 49 N.C. App. 560, 272 S.E.2d 405 (1980); In re Ford, 49 N.C. App. 680, 272 S.E.2d 157 (1980); State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981); Greensboro-High Point Airport Auth. v. Irvin, 306 N.C. 263, 293 S.E.2d 149 (1982); Davis v. Flynn, 57 N.C. App. 575, 291 S.E.2d 818 (1982); State v. Monroe, 57 N.C. App. 597, 292 S.E.2d 21 (1982); State v. Woodrup, 60 N.C. App. 205, 298 S.E.2d 439 (1982); State v. Proctor, 62 N.C. App. 233, 302 S.E.2d 812 (1983); State v. Sigmon, 74 N.C. App. 479, 328 S.E.2d 843 (1985); Burriss v. Heavner, 83 N.C. App. 538, 350 S.E.2d 897 (1986); L. Harvey & Son Co. v. Shivar, 83 N.C. App. 673, 351 S.E.2d 335 (1987); State v. Edwards, 85 N.C. App. 145, 354 S.E.2d 344 (1987); Lawton v. County of Durham, 85 N.C. App. 589, 355 S.E.2d 158 (1987); Bridges v. Bridges, 85 N.C. App. 524, 355 S.E.2d 230 (1987); Neal v. Craig Brown, Inc., 86 N.C. App. 157, 356 S.E.2d 912 (1987); State v. Barts, 321 N.C. 170, 362 S.E.2d 235 (1987); State v. Drayton, 321 N.C. 512, 364 S.E.2d 121 (1988); Jackson v. Housing Auth., 321 N.C. 584, 364 S.E.2d 416 (1988); State v. Holden, 321 N.C. 689, 365 S.E.2d 626 (1988); Helms Ins. Agency, Inc. v. Redshaw, Inc., 94 N.C. App. 716, 381 S.E.2d 187 (1989); State v. McMillian, 101 N.C. App. 425, 399 S.E.2d 410 (1991); Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991); State v. Stone, 104 N.C. App. 448, 409 S.E.2d 719 (1991); State v. Glenn, 333 N.C. 296, 425 S.E.2d 688 (1993); State v. Griffin, 109 N.C. App. 131, 425 S.E.2d 722 (1993); District Bd. of Metro. Sewerage Dist. v. Blue Ridge Plating Co., 110 N.C. App. 386, 430 S.E.2d 282 (1993); In re Barbour, 112 N.C. App. 368, 436 S.E.2d 169 (1993); State v. Futrell, 112 N.C. App. 651, 436 S.E.2d 884 (1993); State v. Shedd, 117 N.C. App. 122, 450 S.E.2d 13 (1994); Crowell Constructors, Inc. v. State, 342 N.C. 838, 467 S.E.2d 675 (1996); State v. Price, 344 N.C. 583, 476 S.E.2d 317 (1996); State v. Ward, 127 N.C. App. 115, 487 S.E.2d 798 (1997); State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997), cert. denied, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998); State v. Saunders, 126 N.C. App. 524, 485 S.E.2d 853 (1997); Sharpe v. Nobles, 127 N.C. App. 705, 493 S.E.2d 288 (1997); Edwards v. West, 128 N.C. App. 570, 495 S.E.2d 920 (1998), cert. denied, 348 N.C. 282, 501 S.E.2d 918 (1998); Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998); State v. Allred, 131 N.C. App. 11, 505 S.E.2d 153 (1998); State v. Dayberry, 131 N.C. App. 406, 507 S.E.2d 587 (1998); State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998); State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998); Atlantic Veneer Corp. v. Robbins, 133 N.C. App. 594, 516 S.E.2d 169 (1999); May v. City of Durham, 136 N.C. App. 578, 525 S.E.2d 223 (2000); State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807 (2000); State v.

Alston, 139 N.C. App. 787, 534 S.E.2d 666 (2000).

## II. DECISIONS UNDER PRIOR LAW.

### A. In General.

***Editor's note.*** — *The cases cited below were decided under former Rules 19 and 20, Rules of Practice in the Supreme Court of North Carolina, and under former Rule 19, Rules of Practice in the Court of Appeals of North Carolina.*

**The purpose of this rule** which requires that each assignment of error itself disclose with particularity the specific matters alleged as error without requiring "a voyage of discovery" through an often voluminous record, is twofold: (1) To enable the members of the Supreme Court, in their preargument examination of the record, to ascertain the questions involved in the appeal and thus to obtain maximum benefits from the arguments; (2) to reduce the possibility that an error in the trial below will escape detection. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

**The primary purpose of this rule** is to save the time of the Supreme Court in reviewing the evidence and to reduce printing costs. Keller v. Security Mills of Greensboro, Inc., 260 N.C. 571, 133 S.E.2d 222 (1963).

**Rules Mandatory.** — This rule and the rule relating to assignments of error and exceptions, are mandatory. Pamlico County v. Davis, 249 N.C. 648, 107 S.E.2d 306 (1959); Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961); Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962); Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963).

This rule is mandatory, and failure to comply limits the appeal to errors presented by the record proper, and in the absence of such error, the appeal will be dismissed. Laughinghouse v. Farm Bureau Mut. Auto. Ins. Co., 239 N.C. 678, 80 S.E.2d 457 (1954); State v. McNeill, 239 N.C. 679, 80 S.E.2d 680 (1954); Whiteside v. Ralston Purina Co., 242 N.C. 591, 89 S.E.2d 159 (1955); State v. Griffin, 246 N.C. 680, 100 S.E.2d 49 (1957); State v. Womack, 251 N.C. 342, 111 S.E.2d 332 (1959); Standard Amusement Co. v. Tarkington, 251 N.C. 461, 111 S.E.2d 538 (1959).

**And this rule may not be waived by the parties.** Huie v. Templeton, 246 N.C. 86, 97 S.E.2d 455 (1957); State v. Griffin, 246 N.C. 680, 100 S.E.2d 49 (1957).

**The appellate court is bound by the contents of the record on appeal.** State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

**The record on appeal imports verity.** State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

**The omission of the essential parts of a transcript, as required by this rule, is fatal** to the appeal. Allen v. Allen, 235 N.C. 554, 70 S.E.2d 505 (1952).

**Impertinent Matter Stricken.** — Where "impertinent" matter is introduced into the pleadings, it is, according to the course of the Supreme Court, to be stricken out at the expense of the party introducing it. Powell v. Cobb, 56 N.C. 1 (1856).

No matter is impertinent, however scandalous it may be, or however much it may tend to degrade, provided it bears upon the point about which the parties are at issue. Powell v. Cobb, 56 N.C. 1 (1856).

**Exceptions not filed in the record are deemed abandoned.** Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

**Record Too Incomplete to Present Constitutional Question.** — The Supreme Court will not anticipate questions of constitutional law in advance of the necessity of deciding them, nor will it give advisory opinions on such questions, and where the record in a case on appeal is so incomplete that it may not be determined that the constitutionality of a statute is squarely presented, the questions will not be decided. J.O. Plott Co. v. H.K. Ferguson Constr. Co., 198 N.C. 782, 153 S.E. 396 (1930).

**When Party May Amend Pleadings.** — The Supreme Court on appeal may allow a party to amend so as to make his pleadings conform to the stipulations of the parties and the theory upon which the case was tried in the lower court, but the Supreme Court will not allow an amendment which would not make the record conform to the facts developed on the trial but would present matter relating to a theory different from that upon which the trial court proceeded. Kayler v. Gallimore, 269 N.C. 405, 152 S.E.2d 518 (1967).

The Supreme Court may in its discretion allow plaintiff to amend his complaint so that the pleadings conform to the proof where it appears that the defendant was not taken by surprise by such proof and that he failed to object to the admission thereof. Anderson v. Carter, 272 N.C. 426, 158 S.E.2d 607 (1968).

**Motion to Reinstate Appeal.** — A motion to reinstate a case on appeal that has been dismissed on appellee's motion, for nonconformity with the rules of the court requiring the record to be indexed, and to show the appellant's exceptions under proper assignments of error in accordance with the manner specified, will be denied, when the granting of the motion would not cure the defects. Redding v. Dunn, 185 N.C. 311, 117 S.E. 26 (1923).

**Jurisdiction of Trial Court Should Appear.** — In order to sustain an appeal to the Supreme Court it is essential that the jurisdiction of the trial court should be made to appear. State v. Patterson, 222 N.C. 179, 22 S.E.2d 267 (1942).

Where the record fails to disclose jurisdiction in the court below, the Supreme Court acquires no jurisdiction by appeal, and the appeal must be dismissed. State v. Banks, 241 N.C. 572, 86 S.E.2d 76 (1955).

**Submission of Controversy without Action.** — Upon appeal from judgment entered in a submission of controversy without action, the agreed facts with the required affidavits are necessary parts of the record proper. Consolidated Realty Corp. v. Koon, 215 N.C. 459, 2 S.E.2d 360 (1939).

**Where two separate actions which cannot be joined in the same action are tried together for convenience** but not consolidated by the trial court into one action, separate appeals should be taken and separate records filed by the respective applicants, and this rule is not applicable. Osborne v. Canton, 219 N.C. 139, 13 S.E.2d 265 (1941).

**Supreme Court May Decide Merits Where Rules Not Followed.** — The Supreme Court, in the exercise of its supervisory jurisdiction, may decide questions on the merits even though the procedure prescribed by the rules of practice as necessary to present such questions has not been followed. Eastern Steel Prods. Corp. v. Chestnutt, 252 N.C. 269, 113 S.E.2d 587 (1960).

Although case on appeal was not prepared in accordance with this rule the appeal was allowed, as a dismissal would have been a denial of justice. Messick v. City of Hickory, 211 N.C. 531, 191 S.E. 43 (1937).

**Appeal in Forma Pauperis.** — That the action is in forma pauperis, does not excuse the appellant in sending up the transcribed stenographer's notes in a voluminous record. Skipper v. Kingsdale Lumber Co., 158 N.C. 322, 74 S.E. 342 (1912).

### B. Assignment of Error.

**Assignment of Error Necessary.** — Appellee's motion to dismiss the appeal will be allowed when the record contains no assignment of error. Hobbs v. Hobbs, 218 N.C. 468, 11 S.E.2d 311 (1940).

Where the record contains no assignments of error, this is ground for dismissal for failure to comply with this rule. Eastern Steel Prods. Corp. v. Chestnutt, 252 N.C. 269, 113 S.E.2d 587 (1960); Williams v. Denning, 260 N.C. 540, 133 S.E.2d 148 (1963).

This rule and Rule 10 require that asserted error must be based on an appropriate exception, and must be properly assigned. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966).

**Exceptions Not Set Out Deemed Abandoned.** — This rule provides that all exceptions not set out are deemed abandoned. State v. Biggerstaff, 226 N.C. 603, 39 S.E.2d 619 (1946).

Exceptions not brought forward as separate assignments of error and not discussed in the brief are deemed abandoned. Keith v. Wilder, 241 N.C. 672, 86 S.E.2d 444 (1955).

**Effect of Absence of Assignments of Error.** — Where the record and brief contain no assignments of error as required by this rule, only the face of the record proper is presented for review. Bumgarner & Bowman Bldg., Inc. v. Hollar, 7 N.C. App. 14, 171 S.E.2d 60 (1969).

**A sole assignment of error to the signing of a judgment** presents the face of the record proper for review, but review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form. In re Morrison, 6 N.C. App. 47, 169 S.E.2d 228 (1969).

**Assignment of error must be based upon an exception duly taken,** in apt time, during the trial and preserved as required by this rule and Rule 10. State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961).

This rule and Rule 10 require that asserted error must be based on an appropriate exception, and must be properly assigned. These rules of practice in the Supreme Court are mandatory and will be enforced. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

An assignment of error is worthless unless it is based upon an exception duly taken in apt time during the trial and preserved as required by this rule and Rule 10. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

**Or Judgment Below Will Be Sustained.** — Where the case on appeal contains no assignments of error as required by this rule, unless error appears on the face of the record proper, or the issues are insufficient to support the judgment entered, the judgment will be sustained. Anson Bank & Trust Co. v. Henry, 267 N.C. 253, 148 S.E.2d 7 (1966).

In the absence of assignments of error in the record or brief, the judgment below will be sustained in the absence of error appearing on the face of the record proper. State v. Williams, 268 N.C. 295, 150 S.E.2d 447 (1966).

**Assignments of error to the charge** should quote the portion of the charge to which appellant objects, and assignments based on failure to charge should set out appellant's contention as to what the court should have charged. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

**An assignment of error relating to restrictions placed on cross-examination** does not comply with this rule and Rule 10 if it does not contain any question put to any witness on cross-examination. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

**The questions arising on an appeal are those defined by appropriate exceptions** taken by the appellant in the superior court.

Sprinkle v. City of Reidsville, 235 N.C. 140, 69 S.E.2d 179 (1952).

**Not Sufficient to Show Exceptions in Record.** — This rule is not complied with by showing in the record the various exceptions numbered, but on different pages, when there is no assignment of errors at the end of the case, either before or after the judge's signature; and the appeal will be dismissed. Jones v. Atlantic Coast Line R.R., 153 N.C. 419, 69 S.E. 427 (1910). See State v. Biggerstaff, 226 N.C. 603, 39 S.E.2d 619 (1946).

This rule and Rule 10 require an assignment of error to show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); In re Will of Adams, 268 N.C. 565, 151 S.E.2d 59 (1966); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

**Assignments Not Supported by Exceptions Therein Noted Will Not Be Considered.** — Assignments of error not supported by exceptions therein noted cannot be considered. The Supreme Court will not search through a record in an effort to determine whether or not it contains an exception or exceptions that will sustain the assignments. State v. Worley, 246 N.C. 202, 97 S.E.2d 837 (1957).

The Supreme Court will not consider assignments not based on specific exceptions and which do not comply with its rules. Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961); Vance v. Hampton, 256 N.C. 557, 124 S.E.2d 527 (1962); Corns v. Nickelston, 257 N.C. 277, 125 S.E.2d 588 (1962).

**Reason for Requiring Designation of Exceptions.** — The reason which requires appellant in the case on appeal to assign or designate the exceptions on which he will rely is apparent. Appellee is entitled to know which of the exceptions taken appellant intends to rely on, so that there may be included in the record such parts as may be necessary to show that there was in fact no error. Conrad v. Conrad, 252 N.C. 412, 113 S.E.2d 912 (1960).

What the Supreme Court requires is that exceptions which are presented to the court for decision shall be stated clearly and intelligibly by the assignment of error, and not by referring to the record, and therewith there shall be set out so much of the evidence or other matter of circumstance as shall be necessary to present clearly the matter to be debated. In this way the scope of inquiry is narrowed to the identical points which the appellant thinks are material and essential, and the court is not sent scurrying through the entire record to find the matters complained of. Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961); Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).

**Where the exceptions appear in the record only under the assignments of error, they are ineffectual,** since the rules require that assignments of error be based upon exceptions previously noted, and the rules are mandatory and will be enforced ex mero motu. Bulman v. Southern Baptist Convention, 248 N.C. 392, 103 S.E.2d 487 (1958).

Purported exceptions appearing nowhere except in the assignments of error will not be considered on appeal. Vance v. Hampton, 256 N.C. 557, 124 S.E.2d 527 (1962).

**Assignments Must Point Out the Error Relied Upon.** — Purported assignments of error will not be considered by the court where they do not throw the slightest light on the questions the court is asked to pass upon. State v. Reel, 254 N.C. 778, 119 S.E.2d 876 (1961).

The error relied upon should be definitely and clearly presented, and the court should not be compelled to go beyond the assignment itself to learn what the question is. Allen v. Allen, 244 N.C. 446, 94 S.E.2d 325 (1956); State v. Mills, 244 N.C. 487, 94 S.E.2d 324 (1956); Tillis v. Calvine Cotton Mills, Inc., 244 N.C. 587, 94 S.E.2d 600 (1956); Armstrong v. Howard, 244 N.C. 598, 94 S.E.2d 594 (1956); Nichols v. McFarland, 249 N.C. 125, 105 S.E.2d 294 (1958); Phillips v. North Carolina R.R., 257 N.C. 239, 125 S.E.2d 603 (1962); Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962); State v. Mohrmann, 265 N.C. 594, 144 S.E.2d 645 (1965); State v. Oliver, 268 N.C. 280, 150 S.E.2d 445 (1966).

This rule and Rule 10 require the assignment of error to show what question is intended to be presented for consideration without the necessity of paging through the record to find the asserted error. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. Hunt v. Davis, 248 N.C. 69, 102 S.E.2d 405 (1958); Douglas v. W.C. Mallison & Son, 265 N.C. 362, 144 S.E.2d 138 (1965).

This rule and Rule 10 require an assignment of error to state clearly and intelligently what question is intended to be presented without the necessity of the court going beyond the assignment of error itself "on a voyage of discovery" through the record to find the asserted error and the precise question involved. Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962).

Assignments of error do not comply with the requirements of this rule and are insufficient where they do not present the errors relied upon without the necessity of going beyond the assignments themselves to learn what the questions are, and the particular portions of the charge objected to are not specifically set out. Hill v. Logan, 262 N.C. 488, 137 S.E.2d 822 (1964).

Assignments of error, when properly prepared, pinpoint the controversy. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

An assignment of error to the admission or exclusion of evidence must include so much of that testimony as will enable the Supreme Court to understand the question sought to be presented without the necessity of going beyond the assignment itself. Grimes v. Home Credit Co., 271 N.C. 608, 157 S.E.2d 213 (1967).

The assignment must be so specific that the court is given some real aid and a voyage of discovery through an often voluminous record not rendered necessary. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

Assignments of error which are insufficient to present the errors relied upon without the necessity of going beyond the assignments themselves to learn what the questions are do not comply with this rule. Jones v. Saunders, 257 N.C. 118, 125 S.E.2d 350 (1962); Long v. Honeycutt, 268 N.C. 33, 149 S.E.2d 579 (1966); Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966); State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970); State v. Henderson, 276 N.C. 430, 173 S.E.2d 291 (1970).

A mere reference in the assignment of error to the page of the record where the asserted error may be discovered is not a compliance with this rule. Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

**Lack of Definiteness.** — Where the charge covered 36 pages of the record, and all except 15 lines were made the subject of the 72 exceptions taken, and some of the exceptions related to two or more pages of the charge, the exceptions did not point up with the definiteness required by this rule. State v. Stevens, 244 N.C. 40, 92 S.E.2d 409 (1956).

**The exceptions which are bona fide shall be stated clearly and intelligibly** by the assignment of errors and not by referring to the record, and therewith shall be set out so much of the evidence or of the charge or other matter or circumstance as shall be necessary to present clearly the matter to be debated. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

**Appeal Itself Treated as Exception to Judgment.** — Where the exceptions are not grouped, the assignments of error will not be considered, but the appeal itself will be treated as an exception to the judgment. Ellis v. Atlantic Coast Line R.R., 241 N.C. 747, 86 S.E.2d 406 (1955).

**When Only One Exception Taken.** — An appeal will not be dismissed for noncompliance with this rule, requiring all the exceptions relied on to be set out immediately after the statement of the case on appeal, where the appellee was not prejudiced; there being only one exception taken, and that being stated in the record, though improperly. Wall v. Holloman, 156 N.C. 275, 72 S.E. 369 (1911).

**When Error Plainly Apparent.** — Where the exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the appellee to affirm will be denied if the error intended to be assigned is plainly apparent. Hicks v. Kenan, 139 N.C. 337, 51 S.E. 941 (1905).

**When Only Correctness of Judgment Questioned.** — When the appeal calls in question only the correctness of the judgment, no summary of exceptions is required because it is error on the face of the record. Wilson v. Beaufort County Lumber Co., 131 N.C. 163, 42 S.E. 565 (1902); Ullery v. Guthrie, 148 N.C. 417, 62 S.E. 552 (1908).

**Discretion of Supreme Court to Dispose of Case.** — Where the exceptions are separately numbered and only one of them is necessary to be considered in disposing of the appeal, the Supreme Court in its discretion may dispose of the case on its merits notwithstanding failure of appellant to separately assign the exceptions as error. Aydlett v. Keim, 232 N.C. 367, 61 S.E.2d 109 (1950).

While not in strict compliance with this rule, plaintiff's assignments of error are specific and definite. Since the rules of the Supreme Court are made for the court's convenience and in dispatch of its appellate jurisdiction, the Supreme Court will consider appellant's assignment of error. Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

**An exception "to each conclusion of law embodied in the judgment"** is a broadside exception and does not comply with this rule and § 1-186. Jamison v. City of Charlotte, 239 N.C. 682, 80 S.E.2d 904 (1954).

**An assignment of error which attempts to present several questions of law** is broadside and ineffective. State v. Blackwell, 276 N.C. 714, 174 S.E.2d 534, cert. denied, 400 U.S. 946, 91 S. Ct. 253, 27 L. Ed. 2d 252 (1970).

**Exception Held Ineffectual.** — An exception to the charge on the ground that it "did not give the contentions of the plaintiffs with equal dignity with those of defendant" was ineffectual as a broadside exception in that it failed to point out any particular contention or series of contentions given or omitted by the court as the basis for the exception. Poniros v. Nello L. Teer Co., 236 N.C. 145, 72 S.E.2d 9 (1952).

An assignment of error that the court failed to declare and explain the law applicable to the facts in the case, without pointing out what matters appellant contends were omitted, is a broadside exception. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966).

**C. Composition of Record.**

**Requirements of Rule Strictly Adhered to.** — The requirement that errors relied on be assigned in the record, and that the exceptions relied on shall be grouped, numbered, and set out immediately after the statement of the case on appeal, must be strictly adhered to, except when the appeal is on the ground the judgment was not justified by the facts found or admitted, or that the court did not have jurisdiction. Sigman v. Southern R.R., 135 N.C. 181, 47 S.E. 420 (1904); Pegram v. Hester, 152 N.C. 765, 68 S.E. 8 (1910).

**The record on appeal should consist of a plain, accurate, and concise statement** of what the record shows occurred in the trial court, compiled and presented in the order prescribed and pursuant to this rule. State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

**The pages of the record in an appeal in forma pauperis must be numbered.** Pearce v. Hewitt, 261 N.C. 408, 134 S.E.2d 662 (1964).

**The absence of the complaint from the record makes it necessary to dismiss the appeal.** Williams v. Asheville Contracting Co., 259 N.C. 232, 130 S.E.2d 340 (1963).

**Filing Date of Every Document Required.** — This rule requires, inter alia, that the filing date of every pleading, motion, affidavit or other document in the transcript on appeal shall appear. Oliver v. Williams, 266 N.C. 601, 146 S.E.2d 648 (1966).

**Causes of Action Must Be Separately Stated.** — Where plaintiff brings suit on two causes of action, each must be separately stated. Bannister & Sons v. Williams, 261 N.C. 586, 135 S.E.2d 572 (1964).

**Where two or more cases are consolidated and tried together as one case and there are two or more appeals** arising from the action, ordinarily only one copy of the record and the proceedings of the trial in the trial tribunal should be filed in the Court of Appeals. State v. Tyler, 4 N.C. App. 682, 167 S.E.2d 509 (1969).

**Referring to Prior Paragraphs by Number Insufficient.** — A party may not bring forward allegations contained in prior paragraphs of the pleading by referring to such paragraphs by number and stating that pleader repleads them. Guy v. Baer, 234 N.C. 276, 67 S.E.2d 47 (1951); Wrenn v. Graham, 236 N.C. 719, 74 S.E.2d 232 (1952).

**Stenographer's Notes.** — The stenographer's notes will be of valuable aid to refresh his memory, but the stenographer does not displace the judge in any of his functions. State v. Allen, 4 N.C. App. 612, 167 S.E.2d 505 (1969).

Stenographer's notes are not the compelling and supreme authority as to what transpired during the trial. The judge in charging the jury, always tells them that their recollection, and not that of the court itself, must govern them as to what was the testimony of the witnesses. And in settling the cases on appeal the first authority is that of counsel themselves in agreeing as to what occurred at the trial as to the evidence, as to the charge, and otherwise, and when they do not agree the judge must settle what really occurred. State v. Allen, 4 N.C. App. 612, 167 S.E.2d 505 (1969).

Stenographic notes will be of great weight with the judge, but are not conclusive if he has reason to believe there was error or mistake. The stenographer cannot take the place of the judge who is alone authorized and empowered by the Constitution to try the cause, and who alone if counsel disagree can settle for the court what occurred during the trial. State v. Allen, 4 N.C. App. 612, 167 S.E.2d 505 (1969).

**Stenographer's Notes Insufficient.** — When the appellant has set out in the case on appeal the transcribed stenographer's notes of the trial, he fails to prepare a concise statement of the case as required by this rule, and his appeal will be dismissed, when upon examination no error is found in the record proper. Buckner v. South & W. Ry., 157 N.C. 443, 73 S.E. 137 (1911); Skipper v. Kingsdale Lumber Co., 158 N.C. 322, 74 S.E. 342 (1912).

**Only one copy of the stenographic transcript is required to be filed.** Bryant v. Snyder, 3 N.C. App. 65, 164 S.E.2d 35 (1968).

**A statement of case on appeal is not an essential part of the record on appeal.** Moss v. Southern Ry., 2 N.C. App. 50, 162 S.E.2d 633 (1968).

**A brief is not a part of the record on appeal.** Civil Serv. Bd. v. Page, 2 N.C. App. 34, 162 S.E.2d 644 (1968); Tractor & Auto Supply Co. v. Fayetteville Tractor & Equip. Co., 2 N.C. App. 531, 163 S.E.2d 510 (1968).

**Order of Proceedings and Documents.** — The record does not comply with this rule where the proceedings are not set forth therein in the order of time in which they occurred and are not arranged so as to follow each other in the order in which they were filed, and the documents included in the record do not plainly show the date on which they were filed. Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

**Proceedings Not Set Forth in Order of Time.** — Where the transcript does not set forth the proceedings in the order of time in which they occur, and the record shows no error warranting an order for a new trial, the appeal will be dismissed on motion. Hobbs v. Cashwell, 158 N.C. 597, 74 S.E. 23 (1912).

**An index of exhibits** solely by the alphabetical designation of such exhibits does not comply with this rule of practice. Millwood v. Firestone Cotton Mills, 215 N.C. 519, 2 S.E.2d 560 (1939).

**Failure to Index.** — Appeals will be dis-

missed where no index is sent up in the record and printed and no marginal references prepared. Sigman v. Southern R.R., 135 N.C. 181, 47 S.E. 420 (1904). See also Alexander v. Alexander, 120 N.C. 472, 27 S.E. 121 (1897); Pretzfelder v. Merchants Ins. Co., 123 N.C. 164, 31 S.E. 470 (1898).

**Pleadings, Issues and Judgment Part of Record.** — The rules of practice in the Supreme Court require among other things that the pleadings, issues and judgment shall be a part of the record proper, and this appeal, the record not including the summons or complaint, and the court, consequently, not being informed as to the nature of the action, is dismissed. Waters v. Waters, 199 N.C. 667, 155 S.E. 564 (1930). See Goodman v. Goodman, 208 N.C. 416, 181 S.E. 328 (1935); Washington County v. Norfolk S. Land Co., 222 N.C. 637, 24 S.E.2d 338 (1943).

The pleadings are an essential part of the record in order that the Supreme Court may be advised as to the nature of the action or proceeding. Allen v. Allen, 235 N.C. 554, 70 S.E.2d 505 (1952).

The pleadings are a necessary part of the record proper upon appeal, and where the pleadings are omitted from the record, the appeal must be dismissed. State v. Ravensford Lumber Co., 207 N.C. 47, 175 S.E. 713 (1934); Griffin v. Barnes, 242 N.C. 306, 87 S.E.2d 560 (1955).

**Where the pleadings and the referee's report have been omitted from the record,** the appeal must be dismissed as not conforming to this rule. Payne v. Brown, 205 N.C. 785, 172 S.E. 348 (1934).

**Verified Answer Attached to Motion to Set Aside Default Judgment.** — On appeal from an order setting aside a default judgment upon the court's finding of surprise and a meritorious defense, the verified answer of defendant, which was attached to and made a part of the motion to set aside the judgment, is a necessary part of the record proper, and on failure to send it up the appeal will be dismissed, since in the absence of the answer it cannot be determined whether the finding of a meritorious defense was supported by evidence. Mooneyham v. Mooneyham, 249 N.C. 641, 107 S.E.2d 66 (1959).

**Copy of Judgment Omitted.** — Where on appeal no printed copy of the judgment accompanies the record, the appeal will be dismissed under this rule. Wiley v. Bessemer City Mining Co., 117 N.C. 489, 23 S.E. 448 (1895).

**Dismissal of Appeal.** — The case on appeal to the Supreme Court will be dismissed when the transcript does not conform to the rules of court regulating appeals. Bridgers v. Griffin, 195 N.C. 862, 142 S.E. 221 (1928); In re Anderson, 251 N.C. 176, 110 S.E.2d 832 (1959).

Under this rule the complaint is a necessary part of the record proper, and when it is not contained therein, the case on appeal will be dismissed. Schwarberg v. Howard, 197 N.C. 126, 147 S.E. 741 (1929); J.O. Plott Co. v. H.K. Ferguson Constr. Co., 198 N.C. 782, 153 S.E. 396 (1930); Thrush v. Thrush, 245 N.C. 63, 94 S.E.2d 897 (1956); Williams v. Asheville Contracting Co., 259 N.C. 232, 130 S.E.2d 340 (1963).

Where on appeal the record contains only a synopsis of the complaint, the appeal will be dismissed. J.O. Plott Co. v. H.K. Ferguson Constr. Co., 198 N.C. 782, 153 S.E. 396 (1930).

Where the record does not show either the organization of the court below or the authority of the special judge who signed the judgment, nor disclose that the judgment was entered at term, the appeal is dismissible under this rule. Vail v. Stone, 222 N.C. 431, 23 S.E.2d 329 (1942).

### D. Criminal Actions.

**Essential Parts of Transcript in Criminal Cases.** — On appeal in criminal cases, the indictment or warrant and plea on which the case is tried, the verdict and the judgment appealed from are essential parts of the transcript. State v. Jenkins, 234 N.C. 112, 66 S.E.2d 819 (1952); State v. Stubbs, 265 N.C. 420, 144 S.E.2d 262 (1965), aff'd, 266 N.C. 295, 145 S.E.2d 899 (1966).

**Where indictments relating to one offense against several defendants are properly consolidated** for trial, only one record should be filed on the appeals of defendants. State v. Jackson, 226 N.C. 760, 40 S.E.2d 417 (1946).

Where two defendants are jointly tried for the same offense upon a joint indictment, only a single transcript should be docketed upon their respective appeals. State v. Frazier, 268 N.C. 249, 150 S.E.2d 431 (1966).

**Case Decided on False Record.** — Where a criminal case is decided in the Supreme Court on a record afterwards found to be false, it will be restored to the docket and a certiorari issued to correct the record. State v. Marsh, 134 N.C. 184, 47 S.E. 6 (1903).

**In Capital Case.** — Where defendant's exceptions are not brought forward and grouped as required by this rule, the appeal will be dismissed, but where defendant has been convicted of a capital crime this will be done only after an inspection of the record proper and the exceptions fail to disclose prejudicial error. State v. Thompson, 224 N.C. 661, 32 S.E.2d 24 (1944); State v. West, 229 N.C. 416, 50 S.E.2d 3 (1948).

### E. Evidence.

**Assignments of error as to the admission of evidence** shall state with particularity the

alleged incompetent evidence, and not require a search through the record to find the challenged evidence. Bridges v. Graham, 246 N.C. 371, 98 S.E.2d 492 (1957).

**Failure to State Evidence in Narrative Form.** — An appeal is dismissed for failure of the defendants to state the evidence in narrative form. State v. Benfield, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

**Record Not Containing Evidence.** — When the evidence adduced at the trial is not contained in the record, the appeal must be dismissed in the absence of error appearing upon the face of the record. State v. Benfield, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

**Insufficient Statement of Evidence.** — Where it is impossible for the court to determine from whom the evidence was being elicited, who was examining the witnesses, whether there was cross-examination, the purpose for which the witnesses were being examined, and exactly what the evidence was, the recital, rather than being a narration of the evidence, is a recitation of the events surrounding the arrest of the defendants. State v. Benfield, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

**Exclusion of Evidence.** — Assignment of error relating to the exclusion of evidence did not comply with this rule in that appellant did not incorporate therein the excluded evidence and thus disclose the alleged error. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

The assignments of error should set forth, within itself, the question asked, the objection, the ruling on the objection, and what the witness would have answered if he had been permitted to testify. Douglas v. W.C. Mallison & Son, 265 N.C. 362, 144 S.E.2d 138 (1965).

Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial. This rule applies as well to questions asked on cross-examination. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

An assignment of error, unsupported by exception, that the court erred in finding that the evidence was insufficient to sustain appellant's motion, is a broadside exception and ineffectual because of noncompliance with this rule and Rule 10. Columbus County v. Thompson, 249 N.C. 607, 107 S.E.2d 302 (1959).

An assignment of error that the court failed to declare the law arising on the evidence, is a broadside exception and ineffectual. Chalmers v. Womack, 269 N.C. 433, 152 S.E.2d 505 (1967).

When the evidence adduced at the trial is not contained in the record, the appeal must be dismissed in the absence of error appearing upon the face of the record. State v. Prince, 270 N.C. 769, 154 S.E.2d 897 (1967); State v. Benfield, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

**Requirements Cannot Be Waived.** — The requirements of the rule of the Supreme Court, that the evidence must appear in the case on appeal in narrative form, cannot be waived by the parties. Buckner v. South & W. Ry., 157 N.C. 443, 73 S.E. 137 (1911); First Nat'l Bank v. Fries, 162 N.C. 516, 77 S.E. 678 (1913); State v. McNeill, 239 N.C. 679, 80 S.E.2d 680 (1954); Standard Amusement Co. v. Tarkington, 251 N.C. 461, 111 S.E.2d 538 (1959).

**Effect of Failure to Comply.** — Where the appellant has failed to make a concise statement of the evidence according to the rules of practice, but gives the entire evidence in the form of questions to and answers of witnesses, taken from the stenographer's notes, the appeal will be dismissed and the judgment affirmed upon motion of the appellee. Casey v. East Carolina Ry., 198 N.C. 432, 152 S.E. 38 (1930); Rhoades v. City of Asheville, 220 N.C. 443, 17 S.E.2d 500 (1941).

An appeal will not be dismissed under this rule, unless the narration of the evidence is fatally defective. Keller v. Security Mills of Greensboro, Inc., 260 N.C. 571, 133 S.E.2d 222 (1963).

Where the evidence in the case on appeal is set out entirely in questions and answers instead of in narrative form as required by this rule, the Supreme Court considers only errors presented by the record proper. Anson Bank & Trust Co. v. Henry, 267 N.C. 253, 148 S.E.2d 7 (1966).

**Objection to Noncompliance Presented by Counter-Case or Exceptions to Case.** — Objection that appellant, instead of reducing the testimony to narrative form as required by this rule, merely gave conclusions as to the meaning of the testimony should ordinarily be presented by counter-case or exceptions to the case on appeal. Keller v. Security Mills of Greensboro, Inc., 260 N.C. 571, 133 S.E.2d 222 (1963).

**Filing Copies of Plat.** — Where a plat is referred to in the pleadings and evidence, and is necessary to the understanding of an appeal, the same number of copies of the plat must be filed as is required of the printed record and briefs, or the judgment below will be affirmed or appeal dismissed. Stephens v. McDonald, 132 N.C. 135, 43 S.E. 592 (1903).

This is also true of an exhibit made part of the case on appeal. Fleming v. McPhail, 121 N.C. 183, 28 S.E. 258 (1897); Hicks v. Royal, 122 N.C. 405, 29 S.E. 413 (1898).

But where the map or plat is irrelevant its exclusion will not be held error. Fulwood v. Fulwood, 161 N.C. 601, 77 S.E. 763 (1913).

**Rule 10. Assigning error on appeal.**

(a) *Function in limiting scope of review.* Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly making them the basis of assignments of error, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law.

(b) *Preserving questions for appellate review.*

(1) *General.* In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

(2) *Jury instructions; findings and conclusions of judge.* A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(3) *Sufficiency of the evidence.* A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action or for judgment as in case of nonsuit is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(c) *Assignments of error.*

(1) *Form; Record references.* A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one

ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

(2) *Jury instructions.* Where a question concerns instructions given to the jury, the party shall identify the specific portion of the jury charge in question by setting it within brackets or by any other clear means of reference in the record on appeal. A question of the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its substance in the record on appeal immediately following the instructions given, or findings or conclusions made.

(3) *Sufficiency of evidence.* In civil cases, questions that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single assignment of error raising both contentions if the record references and the argument under the point sufficiently direct the court's attention to the nature of the question made regarding each such issue or finding or legal conclusion based thereon.

(4) *Assigning plain error.* In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

(d) *Cross-assignments of error by appellee.* Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record or transcript of proceedings necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the verbatim transcript of proceedings, if one is filed under Rule 9(c)(2). (Adopted June 13, 1975; Amended June 10, 1981 — 10(b)(2), applicable to every case the trial of which begins on or after October 1, 1981; July 7, 1983 — 10(b)(3); November 27, 1984 — applicable to appeals in which the notice of appeal is filed on or after February 1, 1985; December 8, 1988 — effective for all judgments of the trial division entered on or after July 1, 1989.)

**Legal Periodicals.** — For survey of 1980 law on evidence, see 59 N.C.L. Rev. 1173 (1981).

**CASE NOTES**

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A. Form; Record References.
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D. Plain Error.
V. Cross-Assignments by Appellee.

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## I. IN GENERAL.

***Editor's note.*** *— Many of the cases below were decided prior to the amendment effective July 1, 1989, deleting references to exceptions.*

**Rules of Appellate Procedure are mandatory** and failure to follow the rules subjects an appeal to dismissal. Marsico v. Adams, 47 N.C. App. 196, 266 S.E.2d 696 (1980); Wiseman v. Wiseman, 68 N.C. App. 252, 314 S.E.2d 566 (1984).

**When a conflict arises between a subsection of § 15A-1446 and this rule,** the rule should control. State v. O'Neal, 77 N.C. App. 600, 335 S.E.2d 920 (1985).

To the extent that § 15A-1446(d)(5) is inconsistent with subdivision (b)(3) of this rule, the statute must fail. State v. Stocks, 319 N.C. 437, 355 S.E.2d 492 (1987); State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

**Discretionary Review Allowed Under N.C.R.A.P., Rule 2 Even Though Issue Not Preserved for Appeal.** — Defendant did not properly preserve for appeal either issue on which he now relies. However, court of appeals may hear appeals in its discretion under N.C.R.A.P., Rule 2. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

**Court of appeals review of administrative agency's decision is governed by the Administrative Procedure Act,** § 150B-1, et seq., and court may reverse or modify agency's decision only if it violates one of five statutory grounds. Court will determine if agency's findings, inferences, conclusions, or decisions are affected by error of law or unsupported by substantial evidence admissible under § 150B-29(a), § 150B-30, or § 150B-31 in view of entire record as submitted. North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

**This rule functions as an important vehicle to ensure that errors are not "built into" the record,** thereby causing unnecessary appellate review. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983); State v. Ayers, 92 N.C. App. 364, 374 S.E.2d 428 (1988).

A party may not, after trial and judgment, comb through the transcript of the proceedings and randomly insert an exception notation in disregard of the mandates of section (b) of this rule. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

**Purpose to Allow Appellee to Assess Sufficiency of Record.** — One purpose of this rule is to identify for the appellee's benefit all the errors possible to be urged on appeal so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position. State v. Baggett, 133 N.C. App. 47, 514 S.E.2d 536 (1999).

**Party may waive statutory or constitutional provisions by express consent or conduct** inconsistent with a purpose to insist upon it. As a corollary to this rule, in order for an appellant to assert such right on appeal, the issue must have been presented to the trial court. State v. Horner, 310 N.C. 274, 311 S.E.2d 281 (1984).

**The scope of review on appeal is limited to those issues presented by assignment of error** in the record on appeal. Koufman v. Koufman, 330 N.C. 93, 408 S.E.2d 729 (1991).

**Use of Statements Precludes Objection.** — Defendant waived any objection as to use of a witnesses' prior statements by using them extensively himself on cross-examination, and by failing to object to the use of the statements to refresh the witnesses' memory. State v. Demery, 113 N.C. App. 58, 437 S.E.2d 704 (1993).

**Recordation of Trial.** — In district court, where there are no official court reporters, a party seeking recordation of a hearing or trial must request a reporter or mechanical recordation; failure to make such a request prevents the issue from being raised on appeal. Holterman v. Holterman, 127 N.C. App. 109, 488 S.E.2d 265 (1997).

**Applied** in State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); Dawson Indus., Inc. v. Godley Constr. Co., 29 N.C. App. 270, 224 S.E.2d 266 (1976); Foy v. Bremson, 30 N.C. App. 662, 228 S.E.2d 88 (1976); Wycoff v. Pritchard Paint & Glass Co., 31 N.C. App. 246, 229 S.E.2d 47 (1976); Bullard v. North Carolina Nat'l Bank, 31 N.C. App. 312, 229 S.E.2d 245 (1976); Sturdivant v. Sturdivant, 31 N.C. App. 341, 229 S.E.2d 318 (1976); In re Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977); Borg-Warner Acceptance Corp. v. David, 32 N.C. App. 559, 232 S.E.2d 867 (1977); Dawson v. Sugg, 32 N.C. App. 650, 233 S.E.2d 639 (1977); Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977); State v. Woods, 293 N.C. 58, 235 S.E.2d 47 (1977); Productive Tool Corp. v. Pilot Freight Carriers, Inc., 33 N.C. App. 241, 234 S.E.2d 758 (1977); Moore v. Smith, 33 N.C. App. 275, 235 S.E.2d 102 (1977); State v. Tuttle, 33 N.C. App. 465, 235 S.E.2d 412 (1977); State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977); State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977); Neasham v. Day, 34 N.C. App. 53, 237 S.E.2d 287 (1977); State v.

Cunningham, 34 N.C. App. 72, 237 S.E.2d 334 (1977); Parker v. Williams, 34 N.C. App. 563, 239 S.E.2d 270 (1977); State v. Graham, 35 N.C. App. 700, 242 S.E.2d 512 (1978); State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978); State v. Abernathy, 36 N.C. App. 527, 244 S.E.2d 696 (1978); Russell v. Taylor, 37 N.C. App. 520, 246 S.E.2d 569 (1978); Williams v. Dameron, 37 N.C. App. 491, 246 S.E.2d 586 (1978); Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252 (1978); Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978); State v. Hodges, 296 N.C. 66, 249 S.E.2d 371 (1978); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978); State v. Gibbs, 297 N.C. 410, 255 S.E.2d 168 (1979); State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979); North Carolina Nat'l Bank v. Goode, 298 N.C. 485, 259 S.E.2d 288 (1979); State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979); Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979); Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979); Nicholson v. Hugh Chatham Mem. Hosp., 43 N.C. App. 615, 259 S.E.2d 586 (1979); American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979); State v. Smith, 43 N.C. App. 727, 259 S.E.2d 805 (1979); Shirley v. Administrative Office of Courts, 44 N.C. App. 188, 260 S.E.2d 448 (1979); Patrick v. Mitchell, 44 N.C. App. 357, 260 S.E.2d 809 (1979); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980); State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980); North Carolina State Bar v. Combs, 44 N.C. App. 447, 261 S.E.2d 207 (1980); Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment, 44 N.C. App. 539, 261 S.E.2d 520 (1980); Duke Power Co. v. Winebarger, 300 N.C. 57, 265 S.E.2d 227 (1980); State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980); Thomas v. Deloatch, 45 N.C. App. 322, 263 S.E.2d 615 (1980); Griffin v. Griffin, 45 N.C. App. 531, 263 S.E.2d 39 (1980); Swygert v. Swygert, 46 N.C. App. 173, 264 S.E.2d 902 (1980); Hazard v. Hazard, 46 N.C. App. 280, 264 S.E.2d 908 (1980); Spartan Equip. Co. v. Troitino & Brown, Inc., 46 N.C. App. 343, 264 S.E.2d 759 (1980); State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980); Heist v. Heist, 46 N.C. App. 521, 265 S.E.2d 434 (1980); State v. Trueblood, 46 N.C. App. 545, 265 S.E.2d 664 (1980); Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980); Outer Banks Contractors v. Forbes, 47 N.C. App. 371, 267 S.E.2d 63 (1980); DeJaager v. DeJaager, 47 N.C. App. 452, 267 S.E.2d 399 (1980); Thompson v. Lenoir Transf. Co., 48 N.C. App. 47, 268 S.E.2d 534 (1980); Rice v. Peters, 48 N.C. App. 697, 269 S.E.2d 740 (1980); Tan v. Tan, 49 N.C. App. 516, 272 S.E.2d 11 (1980); State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981); In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981); State v. 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App. 362, 299 S.E.2d 439 (1983); West v. Slick, 60 N.C. App. 345, 299 S.E.2d 657 (1983); State v. Owens, 61 N.C. App. 342, 300 S.E.2d 581 (1983); State v. Capps, 61 N.C. App. 225, 300 S.E.2d 819 (1983); State v. Setzer, 61 N.C. App. 500, 301 S.E.2d 107 (1983); Four Seasons Homeowners Ass'n v. Sellers, 62 N.C. App. 205, 302 S.E.2d 848 (1983); State v. Sanderson, 62 N.C. App. 520, 302 S.E.2d 899 (1983); Martin-Kahill Ford Lincoln Mercury, Inc. v. Skidmore, 62 N.C. App. 736, 303 S.E.2d 392 (1983); McKay v. Parham, 63 N.C. App. 349, 304 S.E.2d 784 (1983); State v. Williams, 309 N.C. 170, 305 S.E.2d 519 (1983); In re Ballard, 63 N.C. App. 580, 306 S.E.2d 150 (1983); First Union Nat'l Bank v. King, 63 N.C. App. 757, 306 S.E.2d 508 (1983); State v. Cantrell, 64 N.C. App. 207, 306 S.E.2d 555 (1983); State v. Yarborough, 64 N.C. App. 500, 307 S.E.2d 794 (1983); State v. Jones, 64 N.C. App. 505, 307 S.E.2d 823 (1983); City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983); State v. 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S.E.2d 477 (1984); Faught v. Faught, 67 N.C. App. 37, 312 S.E.2d 504 (1984); State v. Bradley, 67 N.C. App. 81, 312 S.E.2d 519 (1984); Housing Auth. v. Clinard, 67 N.C. App. 192, 312 S.E.2d 524 (1984); State v. Byrd, 67 N.C. App. 168, 312 S.E.2d 528 (1984); State v. Joyner, 67 N.C. App. 134, 312 S.E.2d 681 (1984); State v. Williams, 67 N.C. App. 519, 313 S.E.2d 236 (1984); State v. Bennett, 67 N.C. App. 407, 313 S.E.2d 277 (1984); Wachovia Bank & Trust Co. v. Guthrie, 67 N.C. App. 622, 313 S.E.2d 603 (1984); State v. Aldridge, 67 N.C. App. 655, 314 S.E.2d 139 (1984); Texaco, Inc. v. Creel, 310 N.C. 695, 314 S.E.2d 506 (1984); State v. Smith, 311 N.C. 287, 316 S.E.2d 73 (1984); State v. Elliott, 69 N.C. App. 89, 316 S.E.2d 632 (1984); State v. Nelson, 69 N.C. App. 455, 317 S.E.2d 70 (1984); Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); State v. Perry, 69 N.C. App. 477, 317 S.E.2d 428 (1984); Smith-Douglass v. Kornegay, 70 N.C. 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342 S.E.2d 534 (1986); State v. Taylor, 80 N.C. App. 500, 342 S.E.2d 539 (1986); Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986); Hartman v. Hartman, 80 N.C. App. 452, 343 S.E.2d 11 (1986); State v. Costner, 80 N.C. App. 666, 343 S.E.2d 241 (1986); State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986); State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986); State v. James, 81 N.C. App. 91, 344 S.E.2d 77 (1986); Cherry, Bekaert & Holland v. Worsham, 81 N.C. App. 116, 344 S.E.2d 97 (1986); State v. Sanders, 81 N.C. App. 438, 344 S.E.2d 592 (1986); State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986); Cook v. Southern Bonded, Inc., 82 N.C. App. 277, 346 S.E.2d 168 (1986); State v. Joplin, 318 N.C. 126, 347 S.E.2d 421 (1986); State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986); Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986); State v. Thompson, 318 N.C. 395, 348 S.E.2d 798 (1986); Spence v. Jones, 83 N.C. App. 8, 348 S.E.2d 819 (1986); State v. Monroe, 83 N.C. 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N.C. 484, 480 S.E.2d 659 (1997); Holt v. Williamson, 125 N.C. App. 305, 481 S.E.2d 307 (1997), cert. denied, 346 N.C. 178, 486 S.E.2d 204 (1997); Taylor v. NationsBank Corp., 125 N.C. App. 515, 481 S.E.2d 358 (1997); State v. Ray, 125 N.C. App. 721, 482 S.E.2d 755 (1997); Farmah v. Farmah, 126 N.C. App. 210, 484 S.E.2d 96 (1997), 24-5 note deleted (9/1999); State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997); State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997); State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997); Whitfield v. Gilchrist, 126 N.C. App. 241, 485 S.E.2d 61 (1997); Whitfield v. Gilchrist, 126 N.C. App. 241, 485 S.E.2d 61 (1997), rev'd on other grounds, 348 N.C. 39, 497 S.E.2d 412 (1998); State v. Buckom, 126 N.C. App. 368, 485 S.E.2d 319 (1997), cert. denied, 522 U.S. 973, 118 S. Ct. 425, 139 L. Ed. 2d 326 (1998); Amjad Al-Hourani v. Ashley, 126 N.C. App. 519, 485 S.E.2d 887 (1997); State v. Woods, 126 N.C. App. 581, 486 S.E.2d 255 (1997); State v. Brice, 126 N.C. App. 788, 486 S.E.2d 719 (1997); State v. Jones, 346 N.C. 704, 487 S.E.2d 714 (1997); State v. LeGrande, 346 N.C. 718, 487 S.E.2d 727 (1997); State v. Neal, 346 N.C. 608, 487 S.E.2d 734 (1997), cert. denied, 522 U.S. 1125, 118 S. Ct. 1072, 140 L. Ed. 2d 131 (1998); State v. Beck, 346 N.C. 750, 487 S.E.2d 751 (1997); State v. Ward, 127 N.C. App. 115, 487 S.E.2d 798 (1997); State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (1997); State v. Allen, 346 N.C. 731, 488 S.E.2d 188 (1997); State v. Stinson, 127 N.C. App. 252, 489 S.E.2d 182 (1997); State v. Flowers, 347 N.C. 1, 489 S.E.2d 391 (1997); Smith v. Sealed Air Corp., 127 N.C. App. 359, 489 S.E.2d 445 (1997); State v. Barfield, 127 N.C. App. 399, 489 S.E.2d 905 (1997); State v. Applewhite, 127 N.C. App. 677, 493 S.E.2d 297 (1997); State v. Applewhite, 127 N.C. App. 677, 493 S.E.2d 297 (1997); Wicker v. Holland, 128 N.C. App. 524, 495 S.E.2d 398 (1998); Rousselo v. Starling, 128 N.C. App. 439, 495 S.E.2d 725 (1998), appeal dismissed, 348 N.C. 74, 505 S.E.2d 876 (1998), review denied, 348 N.C. 74, 505 S.E.2d 876 (1998); State v. Taylor, 128 N.C. App. 394, 496 S.E.2d 811 (1998), cert. denied, 348 N.C. 76, 505 S.E.2d 884 (1998), appeal dismissed, — N.C. —, 505 S.E.2d 884 (1998), aff'd, 349 N.C. 219, 504 S.E.2d 785 (1998); State v. Gary, 348 N.C. 510, 501 S.E.2d 57 (1998); Condellone v. Condellone, 129 N.C. App. 675, 501 S.E.2d 690 (1998); State v. Rich, 130 N.C. App. 113, 502 S.E.2d 49 (1998), cert. denied, 349 N.C. 237, 516 S.E.2d 605 (1998); Law Offices of Kirby v. Industrial Contractors, 130 N.C. App. 119, 501 S.E.2d 710 (1998); Leonard v. Lowe's Home Ctrs., Inc., 131 N.C. App. 304, 506 S.E.2d 291 (1998); State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998), cert. denied, 525 U.S. 1124, 119 S. Ct. 909, 142 L. Ed. 2d 907 (1999); Ultra Innovations, Inc. v. Food Lion, Inc., 130 N.C. App. 315, 502 S.E.2d 685 (1998); Barber v. Constien, 130 N.C. App. 380, 502 S.E.2d 912 (1998); Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998); Holland Group, Inc. v. North Carolina Dep't of Admin., 130 N.C. App. 721, 504 S.E.2d 300 (1998); State v. Allred, 131 N.C. App. 11, 505 S.E.2d 153 (1998); State v. Flippen, 349 N.C. 264, 506 S.E.2d 702 (1998), cert. denied, 526 U.S. 1135, 119 S. Ct. 1813, 143 L. Ed. 2d 1015 (1999); Inspirational Network, Inc. v. Combs, 131 N.C. App. 231, 506 S.E.2d 754 (1998); State v. Love, 131 N.C. App. 350, 507 S.E.2d 577 (1998), aff'd, 350 N.C. 586, 516 S.E.2d 382 (1999); State v. Alston, 131 N.C. App. 514, 508 S.E.2d 315 (1998); Albrecht v. Dorsett, 131 N.C. App. 502, 508 S.E.2d 319 (1998); State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998); Charles Vernon Floyd, Jr. & Sons v. Cape Fear Farm Credit, 350 N.C. 47, 510 S.E.2d 156 (1999); Hearndon v. Hearndon, 132 N.C. App. 98, 510 S.E.2d 183 (1999); Fallis v. Watauga Med. Ctr., Inc., 132 N.C. App. 43, 510 S.E.2d 199 (1999), cert. denied, 350 N.C. 308, 534 S.E.2d 589 (1999); In re Bean, 132 N.C. App. 363, 511 S.E.2d 683 (1999); State v. Owen, 133 N.C. App. 543, 516 S.E.2d 159 (1999), cert. denied, 351 N.C. 117, 540 S.E.2d 743 (1999); State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999); State v. Barrow, 350 N.C. 640, 517 S.E.2d 374 (1999); Twaddell v. Anderson, 136 N.C. App. 56, 523 S.E.2d 710 (1999), cert. denied, 351 N.C. 480, 543 S.E.2d 510 (2000); State v. Griffin, 136 N.C. App. 531, 525 S.E.2d 793 (2000); State v. Briggs, 137 N.C. App. 125, 526 S.E.2d 678 (2000); In re Estate of Montgomery, 137 N.C. App. 564, 528 S.E.2d 618 (2000); State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807 (2000); State v. Hyde, 352 N.C. 37, 530 S.E.2d 281 (2000), cert. denied, 531 U.S. 1114, 121 S. Ct. 862, 148 L. Ed. 2d 775 (2001); Melton v. Stamm, 138 N.C. App. 314, 530 S.E.2d 622 (2000); Allen v. Roberts Constr. Co., 138 N.C. App. 557, 532 S.E.2d 534 (2000); State v. Smith, 352 N.C. 531, 532 S.E.2d 773 (2000), cert. denied, — U.S. —, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001); State v. Thibodeaux, 352 N.C. 570, 532 S.E.2d 797 (2000); State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000); Naddeo v. Allstate Ins. Co., 139 N.C. App. 311, 533 S.E.2d 501 (2000); State v. Walker, 139 N.C. App. 512, 533 S.E.2d 858 (2000); Williamson v. Bullington, 139 N.C. App. 571, 534 S.E.2d 254 (2000); State v. Bates, 140 N.C. App. 743, 538 S.E.2d 597 (2000); State v. McCord, 140 N.C. App. 634, 538 S.E.2d 633 (2000), review denied, writ denied, 353 N.C. 392 (2001), review denied, 353 N.C. 392 (2001); State v. Davis, 353 N.C. 1, 539 S.E.2d 243 (2000); Fisher v. Carolina S.R.R., 141 N.C. App. 73, 539 S.E.2d 337 (2000); Jones v. Weyerhaeuser Co., 141 N.C. App. 482, 539 S.E.2d 380 (2000); Disciplinary Hearing Comm'n v. Frazier, 141 N.C. App. 514,

540 S.E.2d 758 (2000), cert. granted sub nom. North Carolina State Bar v. Frazier, 353 N.C. 378, 547 S.E.2d 434 (2001); Smith v. Beaufort County Hosp. Ass'n, 141 N.C. App. 203, 540 S.E.2d 775 (2000), cert denied, 353 N.C. 381, 547 S.E.2d 435 (2001); In re Flowers, 140 N.C. App. 225, 536 S.E.2d 324 (2000); State v. Baldwin, 141 N.C. App. 596, 540 S.E.2d 815 (2000); State v. Allen, 141 N.C. App. 610, 541 S.E.2d 490 (2000), cert. denied, 353 N.C. 382, — S.E.2d — (2001); State v. McEachin, 142 N.C. App. 60, 541 S.E.2d 792 (2001), cert. denied, 353 N.C. 392, — S.E.2d — (2001); Claremont Prop. Owners Ass'n v. Gilboy, 142 N.C. App. 282, 542 S.E.2d 324 (2001); Clark v. Sanger Clinic, P.A., 142 N.C. App. 350, 542 S.E.2d 668 (2001), cert. denied, 353 N.C. 450, — S.E.2d — (2001); State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694 (2001); State v. Washington, 142 N.C. App. 657, 544 S.E.2d 249 (2001); DeMent v. Nationwide Mut. Ins. Co., 142 N.C. App. 598, 544 S.E.2d 797 (2001); In re Estate of Parrish, 143 N.C. App. 244, 547 S.E.2d 74 (2001); State v. Call, 353 N.C. 400, 545 S.E.2d 190 (2001).

## II. LIMITING SCOPE OF REVIEW.

### A. Generally.

**Generally, review by court of appeals is limited by properly presented assignments of error** and exceptions. North Carolina Dep't of Cor. v. Hodge, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

**Question Must Be Presented on Appeal.** — The proviso to subsection (a) allows review of the questions, without exceptions or assignments of error, which were reviewed under the old rules by the appeal itself or an exception to the judgment (such as the legal sufficiency of the indictment, subject matter jurisdiction, the plea, the jury verdict and the judgment) but this proviso does not negate the requirement of N.C.R.A.P., Rule 28 question must be presented and argued in the brief in order to obtain appellate review of it. State v. Brothers, 33 N.C. App. 233, 234 S.E.2d 652, cert. denied, 293 N.C. 160, 236 S.E.2d 704 (1977).

A defendant may properly present on appeal the questions in subsection (a) of this rule without taking any exceptions or making any assignments of error in the record and may properly present for review the denial of his motion for nonsuit under § 15-173 without making any exception in the record. However, in both these situations, the defendant must still bring those questions forward in his brief, argue them and cite authorities in support of his arguments. Failure to do so means that those questions are not properly presented for review. State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979).

Appellate review depends on specific exceptions and proper assignments of error presented in the record on appeal. Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

**Grounds for Obstruction and Error Must Be the Same.** — Although defendant objected to instructions, he did not object on the ground upon which he asserted error, and he did not preserve the alleged error for appellate review. State v. Francis, 341 N.C. 156, 459 S.E.2d 269 (1995).

### B. Issues Not Requiring Objection or Motion.

**Findings and Conclusions of Law May Be Challenged for First Time in Brief.** — This rule provides that notwithstanding the absence of exceptions, an appeal duly taken from a final judgment may present for review, if properly raised in the brief, the question of whether the judgment is supported by the findings of fact and conclusions of law. Anderson Chevrolet/Olds, Inc. v. Higgins, 57 N.C. App. 650, 292 S.E.2d 159 (1982).

**Exceptions or specific assignments of error are not required where the question is whether summary judgment was properly granted.** The appeal from the judgment is itself an exception thereto. Vernon, Vernon, Wooten, Brown & Andrews v. Miller, 73 N.C. App. 295, 326 S.E.2d 316 (1985).

Section (a) of this rule does not require a party against whom summary judgment has been entered to place exceptions and assignments of error into the record on appeal. Ellis v. Williams, 319 N.C. 413, 355 S.E.2d 479 (1987).

Although the enumeration of findings of fact and conclusions of law is technically unnecessary and generally inadvisable in summary judgment cases, summary judgment, by definition, is always based on two underlying questions of law: (1) Whether there is a genuine issue of material fact and (2) whether the moving party is entitled to judgment. On appeal, review of summary judgment is necessarily limited to whether the trial court's conclusions as to these questions of law were correct ones. Thus, notice of appeal adequately apprises the opposing party and the appellate court of the limited issues to be reviewed. Ellis v. Williams, 319 N.C. 413, 355 S.E.2d 479 (1987).

An appeal from entry of summary judgment presents the question of whether the judgment is supported by the conclusions of law, and therefore constitutes an exception to the general requirement of section (a) of this rule that assignments of error must appear in the record. Burton v. NCNB Nat'l Bank, 85 N.C. App. 702, 355 S.E.2d 800 (1987).

**Or Where Questions of Jurisdiction or Sufficiency of Criminal Charge Are Raised.** — Under this rule, upon appeal, any

party may present for review, by properly raising the issue in the brief, the questions of whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law. This is true, notwithstanding the absence of exceptions or assignments of error in the record on appeal. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

Under section (a) any party may present for review, by properly raising the issue in his brief, the questions of whether the court had jurisdiction of the subject matter and whether a criminal charge is sufficient in law. This rule applies even when no motion is made to quash. State v. Jones, 36 N.C. App. 263, 243 S.E.2d 827 (1978).

Failure to object at trial ordinarily waives the right to assert error on appeal. However, the sufficiency of a criminal charge may be challenged without any exceptions or assignment of error having been made. State v. Wortham, 80 N.C. App. 54, 341 S.E.2d 76 (1986), rev'd in part on other grounds, 318 N.C. 669, 351 S.E.2d 294 (1987).

Whether assault on a female is charged as a lesser included offense by an indictment charging attempted rape questions the sufficiency of the indictment. Accordingly, the issue may be raised on appeal, even in the absence of timely objection at trial. State v. Wortham, 80 N.C. App. 54, 341 S.E.2d 76 (1986), rev'd in part on other grounds, 318 N.C. 669, 351 S.E.2d 294 (1987).

**Subject Matter Jurisdiction.** — Notwithstanding the absence of exceptions properly set out in the record on appeal, a party may present for review the question of subject matter jurisdiction by raising the issue in his brief. Carter v. North Carolina State Bd. of Registration, 86 N.C. App. 308, 357 S.E.2d 705 (1987).

**Whether one has standing to obtain judicial review of administrative decisions is a question of subject matter jurisdiction** which, notwithstanding the absence of exceptions or assignments of error in the record on appeal, a party may present for review by properly raising the issue in his brief. In re Wheeler, 85 N.C. App. 150, 354 S.E.2d 374 (1987).

**When a trial court acts contrary to a statutory mandate and a defendant is prejudiced** thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial. State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985); Herell v. Taylor, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

## III. PRESERVING QUESTIONS FOR APPEAL.

### A. Generally.

**When a party fails to raise an appealable issue, the appellate court will generally not raise it** for that party. Harris v. Harris, 307 N.C. 684, 300 S.E.2d 369 (1983).

Only exceptions noted in the record and made the basis for assignments of error will be considered on appeal. State v. Kidd, 60 N.C. App. 140, 298 S.E.2d 406 (1982), cert. denied, 307 N.C. 700, 301 S.E.2d 393 (1983).

A party must, prior to arguing an alleged error in his brief, (a) alert the appellate court that no action was taken by counsel at the trial level, and (b) establish his right to review by asserting in what manner the exception is preserved by rule or law or, when applicable, how the error amounted to a plain error or defect affecting a substantial right which may be noticed although not brought to the attention of the trial court. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Where defendant failed to specifically and distinctly allege that the trial court's instruction amounted to plain error, defendant waived any appellate review. State v. Hamilton, 338 N.C. 193, 449 S.E.2d 402 (1994).

**In order to preserve a question for appellate review,** a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent. State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991).

**Failure to Move for Dismissal.** — Juvenile was precluded from raising the issue of sufficiency of the evidence of second-degree sexual offense on appeal where he failed to move for a dismissal at the close of the evidence. In re Clapp, 137 N.C. App. 14, 526 S.E.2d 689 (2000).

**Burden of Establishing Right to Review Where Not Raised at Trial.** — Where no action was taken by counsel during the course of the proceedings, the burden is on the party alleging error to establish its right to review; that is, that an exception, "by rule or law was deemed preserved or taken without any such action," or that the alleged error constitutes plain error. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

When a defendant contends that an exception, in the words of subdivision (b)(1) of this rule, "by rule or law was deemed preserved or taken without" objection made at trial, he has the burden of establishing his right to appellate review by showing that the exception was preserved by rule or law or that the error alleged constitutes plain error. In so doing, he must alert the appellate court to the fact that no action was taken by counsel at trial and then establish his right to review by asserting the manner in which the exception was preserved or how the error may be noticed although not brought to the attention of the trial court. State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

**Failure to Except Precludes Review.** — The general rule is that where no objection or

exception is made at trial to the allegedly improperly admitted evidence, the appellant may not challenge the item for the first time on appeal. State v. Jordan, 49 N.C. App. 561, 272 S.E.2d 405 (1980).

The appellate court will not consider arguments based upon issues which were not presented or adjudicated by the trial tribunal and the lack of an exception or assignment of error addressed to the issue attempted to be raised is a fatal defect. State v. Smith, 50 N.C. App. 188, 272 S.E.2d 621 (1980).

In an action for breach of contract, plaintiff waived its objection to the trial court's framing of an issue submitted to the jury since plaintiff did not object to that issue at trial nor did it request a different issue. Burke County Pub. Sch. Bd. of Educ. v. Juno Constr. Corp., 50 N.C. App. 238, 273 S.E.2d 504, cert. withdrawn as improvidently granted, 304 N.C. 187, 282 S.E.2d 778 (1981).

In plaintiff's action for divorce from bed and board on the ground that defendant had rendered such indignities as to make her life burdensome, defendant could not complain on appeal that the issue of plaintiff's indignities offered to defendant should have been submitted to the jury, since defendant never demanded submission of the issue at trial. Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243, cert. denied, 302 N.C. 634, 280 S.E.2d 449 (1981).

The plaintiffs, who did not object at trial to the submission of the contributory negligence issue to the jury, could not complain on appeal. Kirk v. R. Stanford Webb Agency, Inc., 75 N.C. App. 148, 330 S.E.2d 262, cert. denied, 314 N.C. 541, 335 S.E.2d 18 (1985).

Where the trial judge improperly excluded evidence because he viewed it as parol evidence varying the terms of an express contract, but plaintiff assigned no error to the ruling, it could not be reached on appeal. Catoe v. Helms Constr. & Concrete Co., 91 N.C. App. 492, 372 S.E.2d 331 (1988).

Where State neither objected nor excepted to defendant's oral motion to suppress, and instead the district attorney stated that he was prepared to go forward with a hearing so that he could show why the statements made by defendant were admissible, objection and exception would not be deemed to have been made by operation of law, and the State was precluded from arguing on appeal that defendant's motion was untimely or improper. State v. Seagle, 96 N.C. App. 318, 385 S.E.2d 532 (1989).

Where defendant assigned error to the trial judge's ruling allowing six questions/exchanges on cross-examination, but only four of them were objected to on appeal, the remaining two questions were waived, as they were not properly preserved on appeal. State v. Gallagher, 101 N.C. App. 208, 398 S.E.2d 491 (1990).

Plaintiff's argument was dismissed where plaintiff did not raise the issues in the court below. Pharr v. Worley, 125 N.C. App. 136, 479 S.E.2d 32 (1996).

The defendant waived his right to raise on appeal the trial court's failure to ensure the presence of a defense witness, where after hearing the trial court's statements concerning the absence of the witness, the defense did not request a recess, move for a continuance, or request the issuance of a material witness order. State v. Smith, 130 N.C. App. 71, 502 S.E.2d 390 (1998).

Defendant insurer's claim that the trial court erroneously credited the $ 50,000 paid by an insurance company solely to another UIM insurer instead of allowing the two UIM insurance companies to share the credit pro rata, based on its determination that the other UIM policy was "primary" and the defendant's UIM policy was "excess," was not preserved, and therefore, not reviewable, in that the defendant did not specifically assign error to the foregoing portion of the trial court's judgment. Dutch v. Harleysville Mut. Ins. Co., 139 N.C. App. 602, 534 S.E.2d 262 (2000).

**Capital Cases.** — In every case where a death sentence has been pronounced, it is the practice of the Supreme Court to carefully review the entire record to determine if prejudicial error appears. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

The general rule that exceptions to improper remarks of counsel during argument must be taken before verdict has been modified so that it does not apply to death cases where the argument of counsel is so prejudicial to defendant that the prejudicial effect of such argument could not have been removed from the jurors' minds by any instruction the trial judge might have given. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated in part on other grounds, Carter v. North Carolina, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

If, after careful review of the entire record in capital cases error does appear, even though not assigned by defendant, the Supreme Court will take cognizance of the error ex mero motu. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

If, upon an examination of the record for the ascertainment of reversible error in capital cases, error is found, it then becomes the duty of the Supreme Court upon its own motion to recognize and act upon the error so found. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

Defendant who assigned error to the submission of an aggravating circumstance to the jury preserved his exception by objecting to it on several occasions, thus defendant could appeal pursuant to subdivision (b)(1). State v.

Bunning, 338 N.C. 483, 450 S.E.2d 462 (1994).

**In a prosecution for murder the trial court erred in allowing the defendant a new trial** on the basis that the retroactivity of the Mullaney rule (see Hankerson v. North Carolina, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977)) was applicable, where the defendant-appellant did not object or assign as error on appeal the instructions of the trial court to the jury requiring the defendant to prove the absence of malice or that he acted in self-defense in order to reduce the alleged crime of murder in the second degree to voluntary manslaughter. State v. Watson, 37 N.C. App. 399, 246 S.E.2d 25, appeal dismissed, 295 N.C. 652, 257 S.E.2d 434 (1978).

**Purpose of provision in subdivision (b)(1)** of this rule that an exception shall be set out immediately following the record of judicial action to which it is addressed is to make appellate review more effective by narrowing the scope of inquiry to, and providing a visible reference point in the record for, the particular judicial action which the appellant assigns as error. State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250, cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987).

**Failure to object to the introduction of evidence is a waiver** of the right to do so, and its admission, even if incompetent, is not a proper basis for appeal. State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981).

Where no action was taken by counsel during the course of the proceedings, the burden is on the party alleging error to establish its right to review, that is, that an exception, by rule or law was deemed preserved or taken without any such action, or that the alleged error constitutes plain error. State v. Gardner, 68 N.C. App. 515, 316 S.E.2d 131 (1984), aff'd, 315 N.C. 444, 340 S.E.2d 701 (1986).

Where defendant failed to object to the district attorney's summary of the evidence offered upon his guilty plea, he waived his right to appeal any possible error regarding this evidence. State v. Mullican, 95 N.C. App. 27, 381 S.E.2d 847 (1989), aff'd, 329 N.C. 683, 406 S.E.2d 854 (1991).

**Failure to Object to Testimony.** — By failing to object to State's questioning of pathologist regarding fecal matter found in victim's vagina, defendant waived this assignment of error. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

**Untimely Objection.** — Where, at the time of defendant's objection to the admission of the envelope's contents, plaintiff had previously been permitted to testify about them without objection, defendant's objection was not raised in a timely manner. Main St. Shops, Inc. v. Esquire Collections, Ltd., 115 N.C. App. 510, 445 S.E.2d 420 (1994).

**Evidence Incompetent by Statute.** — Failure of the trial judge to exclude evidence rendered incompetent by statute is reversible error, whether objection is interposed and exception noted or not. State v. McCall, 289 N.C. 570, 223 S.E.2d 334 (1976).

Another exception to the waiver rule implicit in subsection (b) is the admission of evidence contrary to a statute which precludes its admission in furtherance of some public policy of the State. In this instance failure to object to the evidence does not waive one's right to have the error considered on appeal. State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976).

**Motion in Limine by Itself Is Insufficient to Preserve Issue.** — Where defendants filed a pre-trial motion in limine to exclude all references to insurance matters but failed to object to individual questions regarding insurance, they had not preserved their objection to the testimony. Nunnery v. Baucom, 135 N.C. App. 556, 521 S.E.2d 479 (1999).

**Matters Underlying a Motion in Limine.** — It is not sufficient to simply file a pretrial motion in limine to exclude evidence which the trial judge has not heard; to preserve for appeal matters underlying a motion in limine, the movant must make at least general objection when the evidence is offered at trial. Beaver v. Hampton, 106 N.C. App. 172, 416 S.E.2d 8 (1992), rev'd on other grounds, 333 N.C. 455, 427 S.E.2d 317 (1993).

**Hearsay.** — Although the Court of Appeals disapproves of the admission of hearsay statements three or four times removed from the original declarant under the guise of corroborating the corroborative witness, a defendant must object on that ground, giving the trial court the opportunity to correct any perceived error, in order to preserve the question for appellate review. State v. Petty, 132 N.C. App. 453, 512 S.E.2d 428 (1999).

**Discretion of Trial Judge.** — A motion to strike out testimony, to which no objection was aptly made, is addressed to the discretion of the trial judge, and his ruling in the exercise of such discretion, unless abuse of that discretion appears, is not subject to review on appeal. State v. Hensley, 29 N.C. App. 8, 222 S.E.2d 716, cert. denied, 290 N.C. 95, 225 S.E.2d 325 (1976).

**Discretion of Appellate Court.** — Although defendant did not properly preserve for appeal either issue on which he was relying, the Court of Appeals may hear appeals in its discretion under N.C.R.A.P., Rule 2. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

**An objection to testimony not taken in apt time is waived.** State v. Hensley, 29 N.C. App. 8, 222 S.E.2d 716, cert. denied, 290 N.C. 95, 225 S.E.2d 325 (1976).

Exceptions to improper remarks of counsel during argument to the jury, like those to the

admission of incompetent evidence, must be made in apt time or else be lost. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated in part on other grounds, Carter v. North Carolina, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Errors based on rulings made during the trial must ordinarily be called to the attention of the court by an objection taken when the ruling is made. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Ordinarily, exceptions to improper remarks of counsel during argument must be taken before verdict. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated in part on other grounds, Carter v. North Carolina, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

While, ordinarily, failure to object in apt time to incompetent testimony will be regarded as a waiver of objection, and its admission not assignable as error, this rule is subject to an exception where the introduction or use of the evidence is forbidden by statute. State v. McCall, 289 N.C. 570, 223 S.E.2d 334 (1976).

When there is no objection to an offer of evidence or a motion to strike after its admission, any objection or exception is lost. Unless objection is made at the proper time, it is waived. State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327, cert. denied, 303 N.C. 548, 281 S.E.2d 398 (1981).

Failure to make contemporaneous objection to the jury charge prevents the court from recalling the jury to correct allegedly prejudicial errors; such failure constitutes a waiver of the right to challenge the instructions on appeal. Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323, cert. denied, 311 N.C. 401, 319 S.E.2d 271 (1984).

Defendant neither moved for recess nor objected to trial court's decision to proceed when his witnesses had not appeared after fifty minutes. Thus, defendant cannot argue on appeal for first time that trial court erred by proceeding to jury without testimony by such witnesses. State v. Williams, 100 N.C. App. 567, 397 S.E.2d 364 (1990), appeal dismissed, 328 N.C. 576, 403 S.E.2d 520 (1991).

**Except where the error complained of is so prejudicial** that even upon timely objection no purported curative instruction could possibly remove the prejudicial effect, counsel's failure to make timely objection will not waive defendant's right to object under subsection (b). State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976).

**Or Where Error Violates Defendant's Constitutional Rights.** — Where the error violates defendant's right to a trial by a jury of twelve, defendant's failure to object is not fatal to his right to raise the question on appeal. State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985).

**Where defendant failed to object to trial court's termination of first trial by a declaration of mistrial,** defendant was not entitled by reason of former jeopardy to dismissal of charge against him; defendant was given notice and opportunity to object before mistrial was declared. State v. Sanders, 122 N.C. App. 691, 471 S.E.2d 641 (1996).

**Where record on appeal did not indicate that the trial court considered plaintiff's motions,** as required by N.C.R.A.P. Rule 9, the court could not review plaintiff's assignment of error pursuant to subdivision (b)(1) of this rule. Buckingham v. Buckingham, 134 N.C. App. 82, 516 S.E.2d 869 (1999), cert. denied, 351 N.C. 100, 540 S.E.2d 353 (1999).

**Court Transcript.** — While defendant's brief contained references to the court transcript, none of the referenced pages specifically indicated that defendant had moved to set aside the verdict, and the court would not review on appeal. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

**Review Limited to Plain Error.** — Where defendant failed to object to jury instruction at trial, Supreme Court's review of alleged error was limited on appeal to review for plain error. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Where a defendant did not object to instruction at trial, any defect in the instruction must rise to the level of plain error for defendant to be entitled to relief on appeal. State v. Terry, 329 N.C. 191, 404 S.E.2d 658 (1991).

**Exception to Default Judgment.** — Defendant's exception to judgment, entered in open court, permitted him to challenge on appeal whether a default judgment could be based upon plaintiff's complaint. Hunter v. Spaulding, 97 N.C. App. 372, 388 S.E.2d 630 (1990).

**When a defendant presents evidence at trial,** he waives his right on appeal to assert the trial court's error in denying the motion to dismiss at the close of the state's evidence. State v. Davis, 101 N.C. App. 409, 399 S.E.2d 371 (1991).

**An unrepresented party is not relieved of the duty to object** to evidence in order to preserve the issue for appeal. Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643, cert. denied, 322 N.C. 113, 367 S.E.2d 917 (1988).

**Where a statement contains both corrobative and noncorroborative evidence,** the defendant must object specifically to the inadmissible portions. State v. Demery, 113 N.C. App. 58, 437 S.E.2d 704 (1993).

**Withdrawal of Challenged Questions.** — Where a defendant withdraws challenged questions, the court's ruling on those questions is not preserved for review. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

**Loss of Right to Challenge Search Warrant.** — Defendant's assignment of error asserting that search warrant was deficient under § 15A-244(3) in failing to meet the requirements of § 15A-245(b) and was prohibited under Article I, Section 20 of the North Carolina Constitution was dismissed as not properly before the Court pursuant to subsection (c) of this rule. State v. Washington, 134 N.C. App. 479, 518 S.E.2d 14 (1999).

**Substantial Compliance Sufficient for Preservation of Error.** — Where at the charge conference, plaintiff specifically objected to the submission to the jury of the issue of the doctrine of sudden emergency, and later objected to the content of sudden emergency charge, and plaintiff specifically referenced this portion of the transcript within his brief and included a copy of the trial court's instruction on the sudden emergency doctrine, plaintiff substantially complied with the rules of Appellate Procedure and therefore adequately preserved to question for appellate review. Holbrook v. Henley, 118 N.C. App. 151, 454 S.E.2d 676 (1995).

**Issue Not Preserved.** — Defendant argued that cautionary instruction was error, as it drew particular attention to prosecutor's improper question; however, before the judge gave the second instruction, defense counsel did not object and defendant failed to preserve the issue for appellate review. State v. Ballew, 113 N.C. App. 674, 440 S.E.2d 565 (1994), aff'd, 339 N.C. 733, 453 S.E.2d 865 (1995).

The defendant failed to preserve his claim that a prospective juror should have been excused for cause in his capital murder trial, where he argued on appeal that a police officer should have been excused because he had heard about the case during his employment as a police officer and because the officer said that he would find a police officer to be a more credible witness simply due to his status as an officer, but he did not make these arguments at trial, arguing there that the officer should be dismissed because he was seen talking to a deputy sheriff during a break. State v. Hoffman, 349 N.C. 167, 505 S.E.2d 80 (1998), cert. denied, 526 U.S. 1053, 119 S. Ct. 1362, 143 L. Ed. 2d 522 (1999).

Defendant failed to preserve his objection to testimony by a child sexual abuse expert that he contended was contradictory rather than corroborative, where he did not object on the ground that it was outside the scope of corroborative testimony, but merely requested the trial court to instruct the jury that the evidence was offered for only corroborative purposes. State v. Petty, 132 N.C. App. 453, 512 S.E.2d 428 (1999).

In his appellate brief, plaintiff argued issues of negligence versus intent, policy coverage and defendant's duty to defend the insured in the prior proceeding; however, plaintiff did not preserve the right to argue these issues on appeal where he neither moved the trial court for a directed verdict or judgment notwithstanding the verdict, nor did he give notice of appeal from the jury verdict. Pate v. State Farm Fire & Cas. Co., 136 N.C. App. 836, 526 S.E.2d 497 (2000).

**No Objection to Proceedings Pro Se Before Industrial Commission.** — The issue of whether the Industrial Commission erred in allowing the claimant to proceed pro se with her appeal after her counsel withdrew was not preserved for appeal, where claimant assented to her counsel's withdrawal, fully participated in the hearing before the Commission, and never objected to counsel's withdrawal or proceeding pro se. Porter v. Fieldcrest Cannon, Inc., 133 N.C. App. 23, 514 S.E.2d 517 (1999).

Where defendant lodged no objection on the record, court refused to allow defendant to bootstrap his unpreserved argument regarding submission of punitive damages to the jury onto his challenge to the court's allowance of plaintiff's motion to amend. Shore v. Farmer, 133 N.C. App. 350, 515 S.E.2d 495 (1999), rev'd on other grounds, 351 N.C. 166, 522 S.E.2d 73 (1999).

On appeal from adverse name change decision, the appellate court declined to address petitioner's constitutionally-based assignments of error because the record failed to show that she raised them before the clerk or the superior court. In re Crawford, 134 N.C. App. 137, 517 S.E.2d 161 (1999).

Where defendant failed to address the increased sentence received after his lower consolidated sentence was declared illegal, never addressed the constitutionality (double jeopardy or due process concerns) of the resentencing, and argued only that the offenses should have been consolidated, he failed to preserve those issues for review. State v. Branch, 134 N.C. App. 637, 518 S.E.2d 213 (1999).

Defendant abandoned the issue of whether the aggravating factor of damage causing great monetary loss could be applied to the offense of conspiracy, by not stating it in his assignments of error. State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63 (1999).

**Illustrative Cases.** — The court could not address the defendants' claim that the trial court erred in instructing the jury that violation of an OSHA regulation is negligence per se, and in admitting OSHA citations into evidence along with expert testimony regarding the OSHA violations, because they were not properly raised in the trial court. Wolfe v.

Wilmington Shipyard, Inc., 135 N.C. App. 661, 522 S.E.2d 306 (1999).

**The purpose of** subdivision 10(b)(2) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions to cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. State v. Allen, 339 N.C. 545, 453 S.E.2d 150 (1995), overruled on other grounds, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

### B. Jury Instructions; Findings and Conclusions of Judge.

**The purpose of subdivision (b)(2) of this rule** is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. Indeed, even when the "plain error" rule is applied, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983); State v. Sigmon, 74 N.C. App. 479, 328 S.E.2d 843 (1985).

The purpose of subdivision (b)(2) of this rule appears to be to provide the trial court an opportunity to correct any obvious defects and thereby eliminate the need for an appeal and a new proceeding. Implicit in this rule is also an obligation on a party to object to erroneous findings made by the trial court. State v. Bradley, 91 N.C. App. 559, 373 S.E.2d 130 (1988), cert. denied, 324 N.C. 114, 377 S.E.2d 238 (1989).

**Subdivision (b)(2) of this rule and Rule 21 of the Rules of Practice for the Superior and District Courts were designed to prevent unnecessary new trials** caused by errors in instructions that the court could have corrected if brought to its attention at the proper time. This policy is met when a request to alter an instruction has been submitted and the trial judge has considered and refused the request. In most instances, it is obvious that further objection at the close of the instructions would be unavailing. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984); Mills v. New River Wood Corp., 77 N.C. App. 576, 335 S.E.2d 759 (1985).

**Subdivision (b)(2) Mandatory.** — Subdivision (b)(2) of this rule, requiring objection to the charge before the jury retires, is mandatory and not merely directory. State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982); State v. Sigmon, 74 N.C. App. 479, 328 S.E.2d 843 (1985); Mills v. New River Wood Corp., 77 N.C. App. 576, 335 S.E.2d 759 (1985); State v. Ayers, 92 N.C. App. 364, 374 S.E.2d 428 (1988).

**Section 15A-1446(d)(13) Abrogated by Subdivision (b)(2).** — By enacting subdivision (b)(2) of this rule, the Supreme Court has by preemption abrogated § 15A-1446(d)(13). State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982), modified on other grounds, 308 N.C. 530, 302 S.E.2d 786 (1983).

Insofar as the provisions of § 15A-1446(d)(5) allow a party to raise arguments regarding the sufficiency of the evidence to support a finding of fact at sentencing, it is inconsistent with the spirit and purpose of subdivision (b)(2), and statutes which are in conflict with the Rules of Appellate Procedure are ineffective. State v. Bradley, 91 N.C. App. 559, 373 S.E.2d 130 (1988), cert. denied, 324 N.C. 114, 377 S.E.2d 238 (1989).

**Construction of Subdivision (b)(2) with § 15A-1231.** — Subdivision (b)(2) of this rule and § 15A-1231 are in conflict. Subdivision (b)(2) of this rule, however, is a rule of appellate practice and procedure, promulgated by the Supreme Court pursuant to its exclusive authority under N.C. Const., Art. IV, § 13(2). Therefore, to the extent that § 15A-1231 is inconsistent with subdivision (b)(2) of this rule, the statute must fail. State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983).

**F.R.Civ.P., Rule 51, contains language almost identical to subdivision (b)(2)** of this rule. Under F.R.Civ.P., Rule 51, no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

**A motion for a new trial made under § 1A-1, Rule 59 is a substitute for the obligation of counsel to timely object** to the jury instructions. Hanna v. Brady, 73 N.C. App. 521, 327 S.E.2d 22, cert. denied, 313 N.C. 600, 332 S.E.2d 179 (1985).

**Objections Required by Subdivision (b)(2).** — Pursuant to subdivision (b)(2) of this rule, in order to preserve a right to appeal a party must object to the jury charge, or any omission therefrom, before the jury retires. The rule also explicitly requires a party to object to the failure of the trial court to make necessary findings and conclusions in order to advance these issues on appeal. State v. Bradley, 91 N.C. App. 559, 373 S.E.2d 130 (1988), cert. denied, 324 N.C. 114, 377 S.E.2d 238 (1989).

Where jury was erroneously instructed that it could award prejudgment interest on damages under § 24-5 the court declined to disturb the judgment because defendant did not object to the instruction as required by subdivision (b)(2) of this Rule and the jury awarded no interest. Estate of Smith ex rel. Smith v. Underwood, 127 N.C. App. 1, 487 S.E.2d 807 (1997), cert. denied, 347 N.C. 398, 494 S.E.2d 410 (1997).

**Subdivision (b)(2) of this rule has no**

**application once the jury has begun its deliberations.** City of Winston-Salem v. Hege, 61 N.C. App. 339, 300 S.E.2d 589 (1983).

**This rule requires that a party object to the jury charge before the jury retires** to consider its verdict. Failure to do so waives any such objection. State v. Horner, 310 N.C. 274, 311 S.E.2d 281 (1984).

**Objection Must Be Specific to Item Reviewed.** — Where defendant objected only to the trial court's reading of the first sentence of the jury instruction and his objection was not directed to the circumstances under which the jury could find a statutory aggravating circumstance, defendant waived appellate review of this assignment of error. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

**High Degree of Specificity Required under Subdivision (b)(2).** — Defendant, who failed to object to an intervening negligence instruction as omitting reference to foreseeability, did not preserve that issue for review, although he had made a general objection to the instruction. Burchette v. Lynch, 139 N.C. App. 756, 535 S.E.2d 77 (2000).

**Where defense counsel submitted written request for particular instructions** prior to the jury arguments, which the court denied, defendant was not required by either subdivision (b)(2) of this rule or Rule 21 of the General Rules of Practice for the Superior and District Courts to repeat his objection to the jury instructions, after the fact, in order to properly preserve his exception for appellate review. State v. Smith, 311 N.C. 287, 316 S.E.2d 73 (1984).

**Failure to Sign Written Instructions Did Not Prevent Issue Preservation.** — A written request for jury instructions was sufficient to preserve plaintiff's objection to the instructions on appeal although it was not signed by plaintiff's counsel as required by § 1A-1, Rule 51(b). Kinsey v. Spann, 139 N.C. App. 370, 533 S.E.2d 487 (2000).

**Failure to Except to Jury Instructions.** — Defendant waived his right to assign error to certain instructions on appeal where, at trial, before the judge had completed his final instructions to the jury, the judge called the attorneys to the bench and inquired whether either attorney had any further requests, additions, or corrections regarding the instructions to the jury and both attorneys responded negatively, since defense counsel had the opportunity to make an objection out of the hearing of the jury but made no objection at trial. State v. Norfleet, 65 N.C. App. 355, 309 S.E.2d 260 (1983).

Defendants, who failed to object to certain instructions at trial, were barred from raising them on appeal. Lowder v. All Star Mills, Inc., 75 N.C. App. 233, 330 S.E.2d 649, cert. denied, 314 N.C. 541, 335 S.E.2d 19 (1985); Martin v. Hare, 78 N.C. App. 358, 337 S.E.2d 632 (1985).

It was conclusively presumed that the jury instructions, not objected to by the defendant, conformed to the issues submitted and were without legal error. Dailey v. Integon Gen. Ins. Corp., 75 N.C. App. 387, 331 S.E.2d 148, cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985).

Where a defendant failed to object to an instruction, this rule barred her from assigning error to this portion of the judge's instruction. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Failure to object to the instructions given constitutes a waiver of the right to challenge the instructions on appeal. Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 891 (1986).

Where defendant failed to object before the jury retired to that portion of the judge's instructions to the jury to which he took exception, although the court gave him opportunities to object, the assignment of error lacked a properly preserved exception and had no merit. State v. Powell, 91 N.C. App. 441, 371 S.E.2d 724 (1988), cert. denied, 324 N.C. 116, 377 S.E.2d 243 (1989).

Where plaintiff failed to except and cross-assign error to the failure of the trial judge to submit any issue relating to the liability of corporate defendant, that portion of the lower court's judgment taxing attorney's fees and expenses against the corporate defendant for unwarranted refusal to settle the case was not properly before the Court of Appeals. Taylor v. Foy, 91 N.C. App. 82, 370 S.E.2d 442 (1988), aff'd in part, 324 N.C. 331, 377 S.E.2d 745 (1989).

A party to a trial may not assign as error any portion of the jury charge unless it was objected to at trial prior to the jury retiring to deliberate. In such cases defendant is entitled to relief only if he can show that the instructions complained of constitute "plain error." State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Where defendant pled gross contributory negligence as a defense in his answer but made no request that the court give such an instruction at either of the two charge conferences or when given the opportunity to object to the jury instructions before the jury retired to consider its verdict, defendant waived the objection that the trial court erred in failing to instruct the jury on gross contributory negligence. Berrier v. Thrift, 107 N.C. App. 356, 420 S.E.2d 206 (1992), cert. denied, 333 N.C. 254, 424 S.E.2d 918 (1993).

Defendant failed to object to trial court's denial of his request for a punitive damages charge and accordingly could not contest the issue on appeal. Powell v. Omli, 110 N.C. App.

336, 429 S.E.2d 774, cert. denied, 334 N.C. 621, 435 S.E.2d 338 (1993).

Where the defendant claimed the trial court erred in its instructions on lack of mental capacity as a factor tending to negate the specific intent required for first-degree murder but the defendant did not object to the instructions, the assignment of error was barred. State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994).

Although plaintiff urged the court to dismiss assignments of error for failure to contemporaneously object to the trial court's instruction, the policy of Rule 10(b)(2) is met when a request to alter an instruction has been submitted to the trial court at the charge conference. Roberts v. Young, 120 N.C. App. 720, 464 S.E.2d 78 (1995).

Because defendant's tender of modified jury instructions prior to voir dire was not sufficient to constitute a request for Conner instructions during the questioning of two jurors, he waived his right to assert that trial court improperly denied his request for instructions to disregard parole-related considerations in determining his sentence. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

**Same — Law Changed Hours Before Charge.** — Although plaintiffs did not object to jury instructions, it was not error for the trial court to grant a new trial on the grounds that the jury had been erroneously charged, where both court and counsel were understandably unaware that the law had changed only hours before the jury was charged. Any objections lodged by the plaintiffs would have been unavailing where the trial judge instructed the jury in accordance with what to him was still established law. Hunnicutt v. Griffin, 76 N.C. App. 259, 332 S.E.2d 525, cert. denied, 314 N.C. 665, 336 S.E.2d 400 (1985).

**A request for an instruction at the charge conference is sufficient compliance** with this rule to warrant the Supreme Court's full review on appeal, where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions. State v. Ross, 322 N.C. 261, 367 S.E.2d 889 (1988).

Although the defendant's counsel did not object to the jury charge when it was given, his earlier request for the alibi instruction at the charge conference was sufficient under subdivision (b)(2) of this rule to warrant the court's full review on appeal. State v. Hood, 332 N.C. 611, 422 S.E.2d 679 (1992), cert. denied, 507 U.S. 1055, 113 S. Ct. 1955, 123 L.Ed.2d 659 (1993).

**Instructions on Self-Defense.** — Subdivision (b)(2) of this rule does not alter the rule of State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980), holding that where competent evidence is presented, the trial judge must give self-defense and "no duty to retreat" instructions even absent a specific request. However, it operates to preclude a defendant from assigning as error on appeal a trial judge's failure to so instruct unless defendant preserves the error by making a timely objection at trial. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

**The necessity for identifying the instruction objected to** has long been the established practice in North Carolina. The new rules merely clarify the requirement. State v. Snyder, 31 N.C. App. 745, 230 S.E.2d 599 (1976), cert. denied, 292 N.C. 268, 233 S.E.2d 395 (1977).

Where the exceptions supporting the assignment of error as to the jury charge refer the court to every transcript page of the jury charge, and defendant fails to clearly identify the objectional portions by setting them within brackets or by any other clear means of reference, the alleged error in the jury charge is not present for consideration on appeal. Henderson v. Traditional Log Homes, Inc., 70 N.C. App. 303, 319 S.E.2d 290, cert. denied, 312 N.C. 622, 323 S.E.2d 923 (1984).

**And Substance of Inadequacy Must Be Supplied.** — Subdivision (b)(2) of this rule means that when an appellant excepts to the inadequacy of the court's instruction on a particular point, in contrast to the court's failure to give any charge on the subject, appellant must set out the substance of the inadequacy, that is, substantially supply the omission which he contends rendered the charge insufficient. State v. Freeman, 295 N.C. 210, 244 S.E.2d 680 (1978).

**The review of the evidence and the statement of the parties' contentions are a "portion of the jury charge"** and come within the purview of subdivision (b)(2) of this rule. Green Hi-Win Farm, Inc. v. Neal, 83 N.C. App. 201, 349 S.E.2d 614 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

**Preservation of Jury Instruction Objections for Review Prior to 1981 Amendment.** — See Cole v. Stevenson, 620 F.2d 1055 (4th Cir.), cert. denied, 449 U.S. 1004, 101 S. Ct. 545, 66 L. Ed. 2d 301 (1980), rehearing denied, 449 U.S. 1119, 101 S. Ct. 932, 66 L. Ed. 2d 848 (1981).

**Error Not Preserved.** — Where the State made a general request for an instruction on aiding and abetting, and defense counsel did not object and did not make a specific request as to the form of the instruction the trial court was never made aware of specific instruction sought by the parties. Thus, because defense counsel did not object to the instructions the court decided to give, the court never had the opportunity to cure any perceived errors in the instructions and the question was not preserved for appeal. State v. Allen, 339 N.C. 545, 453 S.E.2d 150 (1995), overruled on other

grounds, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

**Failure to Except to Findings of Fact.** — When no exceptions are made to the findings of fact, they are presumed to be supported by competent evidence and are binding on appeal. Anderson Chevrolet/Olds, Inc. v. Higgins, 57 N.C. App. 650, 292 S.E.2d 159 (1982).

Failure to object to disputed charge during the opportunity provided results in failure to properly preserve the assignment of error for appeal, as required by this rule. State v. Morris, 60 N.C. App. 750, 300 S.E.2d 46 (1983).

When no exceptions are made to separate findings of fact, they are presumed to be supported by competent evidence. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Assignments of error not supported by exceptions duly noted in the record or transcript as required by this rule presented no question for review. Wachovia Bank & Trust Co. v. Southeast Airmotive, Inc., 91 N.C. App. 417, 371 S.E.2d 768 (1988), cert. denied, 323 N.C. 706, 377 S.E.2d 230 (1989).

**Failure to Except to Consideration of Nonstatutory Factors.** — Defendant failed to object at the sentencing hearing to the trial court's consideration of the nonstatutory aggravating factor that defendant had the intent to kill when he assaulted the victims; his right to appellate review on the issue was, therefore, waived. State v. Degree, 110 N.C. App. 638, 430 S.E.2d 491 (1993).

**Issue Preserved in spite of Failure to Record Objection.** — Where there was no dispute that defendant's counsel objected to plaintiff's motion to amend complaint to include an issue of punitive damages, this rule did not bar defendant from challenging the trial court's instruction to the jury and the submission of the issue of punitive damages, even though the objection was not recorded. Shore v. Farmer, 351 N.C. 166, 522 S.E.2d 73 (1999).

### C. Sufficiency of Evidence.

**By introducing evidence, defendant waived his motion to dismiss** at the close of the state's evidence. State v. Elliott, 69 N.C. App. 89, 316 S.E.2d 632, appeal dismissed and cert. denied, 311 N.C. 765, 321 S.E.2d 148 (1984).

**Necessity of Motion to Dismiss.** — Although § 15A-1446(d)(5) provides that questions of insufficiency of the evidence may be the subject of appellate review, even when no objection or motion has been made at trial, subdivision (b)(3) of this rule, which controls, provides that a defendant who fails to make a motion to dismiss at the close of all of the evidence may not attack on appeal the sufficiency of the evidence at trial. State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

The defendant waived appellate review of the issue that insufficient evidence of vaginal penetration was presented, where the defendant moved to dismiss the first degree rape charge at the close of the state's case for insufficient evidence, but the trial court denied that motion, and the defendant did not renew his motion to dismiss at the close of all evidence. State v. Hinnant, 131 N.C. App. 591, 508 S.E.2d 537 (1998).

**Or Judgment as in Case of Nonsuit.** — Although § 15A-1446(d)(5) allows a defendant to appeal on insufficiency of evidence grounds, notwithstanding the fact that no objection, exception or motion was made at trial, such statute is negated by subdivision (b)(3) of this rule, which states that a defendant may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit at trial. State v. Jordan, 321 N.C. 714, 365 S.E.2d 617 (1988).

**Having failed to preserve a record of any motion for directed verdict** at the close of all evidence, defendant waived his right to assign error to either the trial judge's purported ruling on that motion or the ruling on the motion for judgment notwithstanding the verdict. Jansen v. Collins, 92 N.C. App. 516, 374 S.E.2d 641 (1988).

**Defendants' motion for a new trial did not meet the requirements of § 1A-1, Rule 7(b)(1)** where defendants merely stated that they were entitled to a new trial under § 1A-1, Rule 59(a)(5), (a)(7) and (a)(8), but did not state any specific basis for granting a new trial. Meehan v. Cable, 135 N.C. App. 715, 523 S.E.2d 419 (1999).

## IV. ASSIGNMENTS OF ERROR.

### A. Form; Record References.

**Compliance Universally Mandatory.** — Since appellate rules apply to everyone, the court would dismiss the appeal of pro se defendant who failed to comply with N.C.R.A.P., Rules 9(a)(1)(c), 9(a)(1)(k), 9(b)(3), 10(c)(1), 12(a), and 28(b)(5). Bledsoe v. County of Wilkes, 135 N.C. App. 124, 519 S.E.2d 316 (1999).

**Assignments of error are now mandatory to perfect an appeal.** Shook v. County of Buncombe, 125 N.C. App. 284, 480 S.E.2d 706 (1997).

Failure to assign error to court's conclusion regarding forum non conveniens constituted an acceptance and a waiver of the right to challenge said conclusion as unsupported by the facts. Fran's Pecans, Inc. v. Greene, 134 N.C. App. 110, 516 S.E.2d 647 (1999).

**Where plaintiff failed to assign any error whatsoever in the record on appeal** as required by subsection (a) and subdivision (c)(1), the omission was fatal to the appeal.

Shook v. County of Buncombe, 125 N.C. App. 284, 480 S.E.2d 706 (1997).

**Exceptions appearing only under purported assignments of error, and not duly noted in the record** as required by this rule, are ineffective. State v. White, 82 N.C. App. 358, 346 S.E.2d 243 (1986), cert. denied, 323 N.C. 179, 373 S.E.2d 124 (1988), the court nevertheless exercising its discretion to consider the errors assigned.

**Party may not, after trial and judgment, comb through transcript of proceedings and randomly insert exception** notation in disregard of the mandates of subsection (b) of this rule. State v. Gardner, 68 N.C. App. 515, 316 S.E.2d 131 (1984), aff'd, 315 N.C. 444, 340 S.E.2d 701 (1986).

**Under the "silent record" rule, the appellate court will presume that the court applied the proper evidentiary standard.** Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

**Failure to Address Deficiency in Record.** — The court would not rule on the plaintiff's contention that the final judgment reflected an "oversight or omission regarding the proper designation of defendant," where the portion of the court's denial of a new trial mentioning this rule was been marked out and where the plaintiff did not address this fact or seek to have the record properly made up. Collins v. St. George Physical Therapy, 141 N.C. App. 82, 539 S.E.2d 356 (2000).

**Although defendant did not identify record page on which each exception appeared** as required under subsection (c) of this rule and N.C.R.A.P., Rule 28(b)(5), these omissions were not so egregious as to invoke dismissal. Symons Corp. v. Insurance Co. of N. Am., 94 N.C. App. 541, 380 S.E.2d 550 (1989).

**Where defendant made an assignment of error to the denial of his motion to suppress without making a reference to his inculpatory statement,** the legal basis of his argument, and making reference to the record, but did provide general references to the transcript of the hearing, he had not complied with subdivision (c) of this rule, but the court would address his argument in its discretion in the interest of justice. State v. Benjamin, 124 N.C. App. 734, 478 S.E.2d 651 (1996).

**Listing of Exceptions.** — This rule requires that all assignments of error should be followed by a listing of the exceptions on which they are based, and that these exceptions should be identified by the pages of the record at which they appear; exceptions not listed properly should be deemed abandoned. Peoples Serv. Drug Stores, Inc. v. Mayfair, 50 N.C. App. 442, 274 S.E.2d 365 (1981).

**Numbering of Exceptions.** — Where the defendant numbered two assignments of error as assignment "sixty" and briefed only one of them, the court could not review the other. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36 (2000), cert denied, — U.S. —, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

**Record for Review of Sustained Objection.** — When an objection to a specific question asked on cross-examination is sustained, the answer the witness would have given must be made part of the record or the propriety of the objection will not be considered on appeal. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980); State v. Wilhite, 58 N.C. App. 654, 294 S.E.2d 396, appeal dismissed and cert. denied, 307 N.C. 129, 297 S.E.2d 403 (1982), rev'd on other grounds, 308 N.C. 798, 303 S.E.2d 788 (1983), cert. denied, 322 N.C. 485, 370 S.E.2d 236 (1988).

**Writing in a numbered exception next to a finding of fact or conclusion of law does not raise a legal issue as to its validity;** to raise a legal issue on appeal as to the validity of a finding of fact or conclusion of law, in addition to making an exception, it is also necessary to state by an assignment of error why the finding or conclusion is claimed to be erroneous. Alexvale Furn., Inc. v. Alexander & Alexander, 93 N.C. App. 478, 378 S.E.2d 436, cert. denied, 325 N.C. 228, 381 S.E.2d 783 (1989).

**The trial court's findings of fact are deemed to be supported by competent evidence** and are conclusive on appeal where defendant does not bring forth in the record any of the testimony or evidence in the case. Bethea v. Bethea, 43 N.C. App. 372, 258 S.E.2d 796 (1979), cert. denied, 299 N.C. 119, 261 S.E.2d 922 (1980).

**Matters discussed in the brief outside the record** ordinarily will not be considered since the record certified to the court imports verity and the court is bound by it. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

**Review Limited to Theories and Constitutional Questions Presented Below.** — The theory upon which a case is tried in the lower court must control in constructing the record and determining the validity of the exceptions. Further, a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal. State v. Cooke, 306 N.C. 132, 291 S.E.2d 618 (1982).

**One assignment of error is enough to raise one question of law** under subsection (c) of this rule and N.C.R.A.P., Rule 28(b), even when it questions the correctness of many rulings of the trial court. Pate v. Thomas, 89 N.C. App. 312, 365 S.E.2d 704, cert. denied, 322 N.C. 482, 370 S.E.2d 227 (1988).

**Exceptions Deemed Abandoned by Failure to State Grounds.** — Where plaintiff assigned as error certain admissions and exclusions of evidence and the denial of her motion to set aside the jury verdict, without stating the

grounds upon which the errors were assigned as required by the rules and demonstrated by examples in Appendix C, plaintiff's exceptions upon which assignments of error were based would be deemed abandoned. Kimmel v. Brett, 92 N.C. App. 331, 374 S.E.2d 435 (1988).

Although defendant's assignments of error set out in the record on appeal did not conform to subsection (c), pursuant to the court's discretionary power in Appellate Rule 2, they elected to review the merits of defendants' appeal. Fletcher v. Dana Corp., 119 N.C. App. 491, 459 S.E.2d 31 (1995), cert. denied, 342 N.C. 191, 463 S.E.2d 235 (1995).

**Assignment of Error Held Sufficient.** — Assignment of error stating that the trial judge erred in his utilization of a 1946 conviction, opinion statements by police officers and other improper factors in determining aggravating factors during the sentencing of the defendant was sufficient to state the basis upon which error was assigned, although more detail would have been helpful. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Plaintiff's appeal, which stated three separate errors in one assignment, failed to state the statutory authority exceeded, the procedure violated and the error of law committed, and failed to provide "clear and specific record or transcript references" relating to each alleged error, violated the Rules of Appellate Procedure, and would be dismissed. Bowen v. North Carolina Dep't of Health & Human Servs., 135 N.C. App. 122, 519 S.E.2d 60 (1999).

In a negligence action against an air carrier, an assignment of error which stated that the trial court erred in not allowing plaintiff's expert witness to testify as to her opinion that the pilot had not suffered any physical incapacitation, while allowing defendant's witnesses to testify as to their opinion that the pilot had suffered some form of incapacitation, was argumentative and not concisely stated, thus violating this rule. Wachovia Bank & Trust Co. v. Southeast Airmotive, Inc., 91 N.C. App. 417, 371 S.E.2d 768 (1988), cert. denied, 323 N.C. 706, 377 S.E.2d 230 (1989).

**Assignments of Error Insufficient.** — The defendants' numerous, flagrant violations of the Rules of Appellate Procedure warranted dismissal of the appeal, where the defendants did not provide a listing of assignments of error, they included as appendices to their brief certain documents that were excluded by an earlier order, they failed to include other required material, and they used incorrect point type and spacing. Duke Univ. v. Bishop, 131 N.C. App. 545, 507 S.E.2d 904 (1998).

**Basis upon Which Error Assigned Insufficient.** — Where plaintiff stated that the court "erred to plaintiff's prejudice," this was not a sufficient basis upon which to assign error. Kimmel v. Brett, 92 N.C. App. 331, 374 S.E.2d 435 (1988).

**Where no assignment of error corresponded to the issue presented,** the matter was not properly presented for consideration by the Supreme Court. State v. Thomas, 332 N.C. 544, 423 S.E.2d 75 (1992).

**Where plaintiff in workers' compensation case, proceeding in forma pauperis, failed to present any assignments of error** within the record, and neither the exceptions nor the assignments of error which plaintiff relied on were set forth at the conclusion of the record on appeal, the Court of Appeals, in order to prevent any manifest injustice to plaintiff, would nonetheless review the merits of his appeal. Swindell v. Davis Boat Works, Inc., 78 N.C. App. 393, 337 S.E.2d 592 (1985), cert. denied and appeal dismissed, 316 N.C. 385, 342 S.E.2d 908 (1986).

**Assignment Held Insufficient.** — Plaintiff's purported assignments of error violated the provisions of subsection (c)(1). Bustle v. Rice, 116 N.C. App. 658, 449 S.E.2d 10 (1994).

Assignment of error regarding jury instruction overruled where the record did not reflect whether the plaintiff made a timely objection to the instruction on the doctrine of sudden emergency. McNeil v. Hicks, 119 N.C. App. 579, 459 S.E.2d 47 (1995).

### B. Jury Instructions.

**Where the charge to the jury is not included in the record on appeal,** it is presumed that the jury was properly instructed as to the law arising upon the evidence as required by statute. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

**Waiver by Failure to Present Question on Appeal.** — Where the defendant in a murder prosecution did not assign as error on direct appeal the failure of the trial judge in his instructions to place the burden of proving the absence of heat of passion or the absence of self-defense on the State, he waived his right to complain about such errors in post-conviction review. State v. Watson, 37 N.C. App. 399, 246 S.E.2d 25, appeal dismissed, 295 N.C. 652, 257 S.E.2d 434 (1978).

**Where trial judge's refusal to give requested instruction did not deprive defendants of an alternative basis** in law for the verdict in their favor, the appellate court would not decide it. Segrest v. Gillette, 96 N.C. App. 435, 386 S.E.2d 88 (1989), rev'd on other grounds, 331 N.C 97, 414 S.E.2d 334 (1992).

**Failure to Except Forecloses State Appeal and Federal Habeas Corpus.** — Petitioner's failure to comply with valid state procedural requirements, in that he failed to except to the "presumption of malice" instruction and the alleged burden-shifting instruc-

tions in his assignments of error as required by this rule, and failed to otherwise raise the issue in his appeal, foreclosed both direct and collateral attack in the North Carolina courts, and was an adequate and separate state ground for denying federal habeas corpus relief on those claims. Watson v. North Carolina, 509 F. Supp. 850 (E.D.N.C. 1981).

**Peremptory Instructions.** — Where the record revealed that after an alternate juror was released, the court asked counsel for the State and counsel for defendant if they had any objections to the jury instructions as given and neither attorney objected, the issue of peremptory instructions was not properly preserved by defendant for review. State v. Pavone, 104 N.C. App. 442, 410 S.E.2d 1 (1991).

**Allegedly Erroneous View of the Law.** — Trial court did not commit prejudicial error by presenting an allegedly erroneous view of the law regarding breach of fiduciary duty in its instruction to the jury by basing the instruction on a North Carolina case rather than on several Georgia cases cited in plaintiffs' brief, because there was no substantial difference between the Georgia and North Carolina cases regarding the treatment of minority stockholders in a close corporation. Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774, cert denied, 334 N.C. 621, 435 S.E.2d 338 (1993).

**Failure to Instruct at Defendants Request Not Error.** — Where record reflected that at the conference on instructions, defendant specifically requested the trial court not to submit the offense of non-felonious breaking or entering as a lesser included offense, he was barred by subsection (b)(2) from assigning as error the failure of the trial court to instruct the jury on the lesser included offense. State v. Robinson, 115 N.C. App. 358, 444 S.E.2d 475, cert. denied, 337 N.C. 697, 448 S.E.2d 538 (1994).

**Failure to Demonstrate Prejudice.** — Where the record did not include a transcript containing defendants' objection and where defendants failed to make a timely motion to ensure that witness testimony supporting their theory of the case be made available to the jury, defendants' failed to carry their burden of demonstrating that prejudice resulted from the jury's erroneous receipt, in spite of defendants' objections, during deliberations of an unredacted copy of the police report. Nunnery v. Baucom, 135 N.C. App. 556, 521 S.E.2d 479 (1999).

### C. Sufficiency of Evidence.

**Waiver of Right to Challenge Sufficiency of Evidence as to Particular Findings.** — On appeal from a judgment containing findings of fact and conclusions of law, the appellant must except and assign error separately to each finding or conclusion that he or she contends is not supported by the evidence, then state which assignments support which questions in the brief. Failure to do so will result in waiver of the right to challenge the sufficiency of the evidence to support particular findings of fact. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

**The assignment of error must clearly disclose the question presented.** A single assignment generally challenging the sufficiency of the evidence to support numerous findings of fact is broadside and ineffective. Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260, cert. denied, 313 N.C. 612, 330 S.E.2d 616 (1985).

**A broadside exception** presents these questions only: (1) Do the facts found support the judgment, and (2) does error of law appear on the face of the record. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

A broadside exception does not bring up for review the sufficiency of the evidence to support any particular finding of fact. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

**Appeal Reduced to Broadside Attack.** — Where defendant properly excepted to a large number of the court's findings of fact and the resulting conclusions of law, and correctly assigned error individually to each excepted finding and conclusion, but then, rather than direct the Court of Appeals to the particular findings he challenged, he instead argued the general denial of his Rule 41(b) motion, he thereby reduced his appeal relative to the sufficiency of the evidence to a single broadside attack. Therefore the only question presented was whether the findings of fact supported the conclusions of law and whether the conclusions supported the judgment. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

**Assignment of only the granting of defendant's motion for summary judgment as error was a broadside assignment,** since it did not state any specific basis for the alleged error, as this rule requires, and the only questions it raised were whether the facts found by the court supported the judgment and whether any error of law appeared on the face of the record. Pamlico Properties, IV v. Seg Anstalt Co., 89 N.C. App. 323, 365 S.E.2d 686 (1988).

**Assigning error to the signing of a judgment presents only the question of whether** an error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment and whether the judgment is regular in form. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316

S.E.2d 911, cert. denied, 312 N.C. 622, 323 S.E.2d 922 (1984).

**Respondent was precluded from challenging the sufficiency of the evidence** where he moved to dismiss the juvenile petitions at the close of the State's evidence, but went on to present evidence and failed to renew his motion at the close of all evidence. In re Davis, 345 N.C. App. 749, 483 S.E.2d 440 (1997).

### D. Plain Error.

**Meaning of "Plain Error".** — The term "plain error" does not simply mean obvious or apparent error. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983).

In deciding whether a defect in the jury instruction constitutes "plain error," the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983); State v. Tucker, 317 N.C. 532, 346 S.E.2d 417 (1986).

The adoption of the "plain error" rule to allow for review of some assignments of error normally barred by waiver rules such as subdivision (b)(2) of this rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial. To hold so would negate subdivision (b)(2) of this rule which is not the intent or purpose of the "plain error" rule. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983).

**The "plain error" rule permits review of a very narrow range of errors** notwithstanding a defendant's failure to object at trial to the jury charge. State v. Moore, 311 N.C. 442, 319 S.E.2d 150 (1984).

**Even Though Such Errors Were Not Brought to Attention of Court.** — The "plain error" rule, adopted in State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983) as an exception to subdivision (b)(2) of this rule, provides that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. State v. Lilley, 78 N.C. App. 100, 337 S.E.2d 89 (1985), cert. denied as to additional issues, 316 N.C. 199, 341 S.E.2d 582, aff'd, 318 N.C. 390, 348 S.E.2d 788 (1986).

The plain error rule waives subdivision (b)(2) of this rule and allows review of fundamental errors or defects in jury instructions affecting substantial rights which were not brought to the attention of the trial court. State v. Rathbone, 78 N.C. App. 58, 336 S.E.2d 702 (1985), cert. denied, 316 N.C. 200, 341 S.E.2d 582 (1986).

To mitigate the potential harshness of subdivision (b)(2) of this rule, the plain error rule allows the appellate court to cure errors or defects affecting substantial rights which were not brought to the attention of the court below. This rule, however, is always to be applied cautiously and only in the exceptional case where the claimed error is a fundamental error. State v. Oliver, 73 N.C. App. 118, 325 S.E.2d 682, cert. denied, 313 N.C. 513, 329 S.E.2d 401 (1985).

**Plain error must fall within these areas:** (1) A fundamental error, meaning something so basic, so prejudicial, so lacking in its elements that justice cannot be done; or (2) a grave error, which must amount to a denial of a fundamental right of the accused; or (3) an error which has resulted in a miscarriage of justice; or (4) an error that denies appellant a fair trial; or (5) an error that seriously affects the fairness, integrity or public reputation of judicial proceedings; or (6) where it can be fairly said that the instructional mistake had a probable impact on the jury's finding that the defendant was guilty. State v. Reilly, 71 N.C. App. 1, 321 S.E.2d 564 (1984), aff'd, 313 N.C. 499, 329 S.E.2d 381 (1985).

**The plain error rule is not available in civil cases.** Alston v. Monk, 92 N.C. App. 59, 373 S.E.2d 463 (1988), cert. denied, 324 N.C. 246, 378 S.E.2d 420 (1989).

**Plain Error Rule May Allow Relief Without Objection.** — On rare occasions the "plain error" rule may allow a party relief even though no objection was made. Before relief will be granted under the "plain error" rule, however, the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. State v. Hartman, 90 N.C. App. 379, 368 S.E.2d 396 (1988).

**The plain error rule is always to be applied cautiously and only in the exceptional case** where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983); State v. Gardner, 68 N.C. App. 515, 316 S.E.2d 131 (1984), aff'd, 315 N.C. 444, 340 S.E.2d 701 (1986); State v. Moore, 311 N.C. 442, 319 S.E.2d 150 (1984); State v. McCoy, 320 N.C. 581, 359 S.E.2d 764 (1987).

The plain error rule will be applied only in exceptional circumstances where the error was sufficiently fundamental and prejudicial to amount to a miscarriage of justice or the denial of a fair trial, or where it can fairly be said that the instructional mistake had a probable impact on the jury's finding that the defendant was guilty. State v. Harris, 315 N.C. 556, 340 S.E.2d 383 (1986).

The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. State v. Riddle, 316 N.C. 152, 340 S.E.2d 75 (1986); State v. Walker, 316 N.C. 33, 340 S.E.2d 80 (1986); State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986); State v. Tucker, 317 N.C. 532, 346 S.E.2d 417 (1986).

Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. State v. Torain, 316 N.C. 111, 340 S.E.2d 465, cert. denied, 479 U.S. 836, 107 S. Ct. 133, 93 L. Ed. 2d 77 (1986); State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

The "plain error" rule is only applied in exceptional cases. State v. Sams, 317 N.C. 230, 345 S.E.2d 179 (1986).

**In order for the Supreme Court to grant a new trial under the "plain error" exception** to subdivision (b)(2) of this rule, a judge's charge must be so fundamentally flawed that it can be fairly said that the mistake probably had an impact on the defendant's conviction. State v. Wrenn, 316 N.C. 141, 340 S.E.2d 443 (1986).

In order to consider an assignment of error under the plain error rule, an appellate court must determine that the alleged error tilted the scales and caused the jury to reach its verdict convicting the defendant. State v. Dixon, 321 N.C. 111, 361 S.E.2d 562 (1987).

Before granting a new trial to a defendant under the plain error rule, the appellate court must be convinced that absent the alleged error, a jury probably would have reached a different verdict. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

**The test for "plain error" places a much heavier burden upon defendant than that imposed by § 15A-1443** upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection. State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986); State v. Walker, 316 N.C. 33, 340 S.E.2d 80 (1986); State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

**Where a defendant fails to assert plain error** in his assignments of error he has waived even plain error review. State v. Moore, 132 N.C. App. 197, 511 S.E.2d 22 (1999).

**Plain error in the context of jury instructions** occurs when the instructional mistake had a probable impact on the jury's finding that defendant was guilty. If this occurred, such a plain error would deprive defendant of his fundamental right to a fair trial. State v. Grainger, 78 N.C. App. 123, 337 S.E.2d 77 (1985), cert. denied, 316 N.C. 198, 341 S.E.2d 572 (1986).

The plain error rule does not negate subdivision (b)(2) of this rule, and rarely will an improper instruction which was not objected to at trial justify reversal. State v. Rathbone, 78 N.C. App. 58, 336 S.E.2d 702 (1985), cert. denied, 316 N.C. 200, 341 S.E.2d 582 (1986).

Even after the adoption of the "plain error" rule, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. State v. Lilley, 78 N.C. App. 100, 337 S.E.2d 89 (1985), cert. denied as to additional issues, 316 N.C. 199, 341 S.E.2d 582 aff'd, 318 N.C. 390, 348 S.E.2d 788 (1986).

It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

A prerequisite to the court engaging in a "plain error" analysis is the determination that the instruction complained of constitutes "error" at all. State v. Torain, 316 N.C. 111, 340 S.E.2d 465, cert. denied, 479 U.S. 836, 107 S. Ct. 133, 93 L. Ed. 2d 77 (1986).

To obtain relief under the "plain error" rule, defendant must show both that a particular instruction was error and that this error had a probable impact on the jury's finding of guilt. State v. Sams, 317 N.C. 230, 345 S.E.2d 179 (1986); State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Even when the "plain error" rule is applied, an improper instruction will rarely justify reversal of a criminal conviction when no objection was made in the trial court. State v. Blue, 115 N.C. App. 108, 443 S.E.2d 748 (1994).

**Review of Instructions to Determine If Plain Error Was Committed.** — Where instructions were not objected to before the jury retired, as required by subdivision (b)(2) of this rule, court would review them only for the limited purpose of determining whether "plain error" was committed. State v. Tabron, 78 N.C. App. 424, 337 S.E.2d 186 (1985).

**Plain Error Shown.** — The failure of the trial court to include an instruction on either simple assault or assault inflicting serious injury, where jury was instructed on the offense of

assault with a deadly weapon, was plain error entitling defendant to a new trial. State v. Bell, 87 N.C. App. 626, 362 S.E.2d 288 (1987).

**Plain Error Not Shown.** — Where the trial judge's initial instruction created the mistaken impression that to convict defendant of murder, defendant himself must have actually done the shooting, and to convict defendant of attempted armed robbery, defendant had to have been holding the gun, and only the next morning did the judge correctly instruct the jury as to the elements of the crimes under a theory of acting in concert, the initial instruction was in fact favorable to defendant, and the plain error rule would not be applied thereto. State v. Harris, 315 N.C. 556, 340 S.E.2d 383 (1986).

While defendant's constitutional rights were violated when the prosecutor cross-examined him concerning his silence after he was arrested and advised of his constitutional rights, given the peculiar facts of the case, such error did not cause the jury to reach a different verdict than it would have reached otherwise. Therefore, the defendant did not carry his burden of showing "plain error." State v. Walker, 316 N.C. 33, 340 S.E.2d 80 (1986), indicating, however, that such prosecutorial tactics may often amount to "plain error" and require a new trial.

Although it was error for the trial court not to instruct the jury as to defendant's right to stand his ground if it believed his testimony and found that he was not the aggressor, where this error was not properly preserved for review by reason of defendant's failure to comply with subdivision (b)(2) of this rule, upon review of the record as a whole, such error did not constitute "plain error." State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

In prosecution for assault with a deadly weapon inflicting serious injury, while the trial court should have included an instruction that defendant had no duty to retreat in his own home, the failure to give such an instruction did not constitute "plain error" under the circumstances. State v. Lilley, 318 N.C. 390, 348 S.E.2d 788 (1986).

In light of the fact that the trial court (1) repeatedly instructed the jury that they had to find that the defendant acted with malice in order to find him guilty of second degree murder, and (2) instructed the jury that if the State failed to prove the defendant acted with malice, then defendant could be guilty of no more than voluntary manslaughter, the court's misstatement that second degree murder was killing without malice in the final mandate did not constitute plain error. State v. Jones, 83 N.C. App. 593, 351 S.E.2d 122 (1986), cert. denied, 319 N.C. 461, 356 S.E.2d 9 (1987).

Judge's failure to give instruction on accident in a murder prosecution was error; however, where defendant's testimony was contradicted by State's witness, defendant was impeached by his prior inconsistent statements and his past criminal activity, and defendant's story completely lacked the ring of truth, no plain error was found. State v. Loftin, 322 N.C. 375, 368 S.E.2d 613 (1988).

Where instruction given in first degree rape case was essentially the pattern jury instruction in N.C.P.I.—Crim. 101.36, there was no error, under the "plain error" doctrine or otherwise. State v. Ayers, 92 N.C. App. 364, 374 S.E.2d 428 (1988).

Where the only issue before the jury was whether a shooting was accidental or intentional, judge's remark at end of instruction that "of course, pointing a gun at a person is not lawful conduct," did not affect the proceeding so that without the statement the verdict would have been different; therefore, there was no plain error. State v. Kinney, 92 N.C. App. 671, 375 S.E.2d 692 (1989).

Erroneous admission of hearsay did not constitute plain error such as would warrant granting defendant a new trial, where there was sufficient other competent evidence by which the jury could have reached its verdict. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

The court did not commit plain error in instructing the venire on accomplice testimony during voir dire. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, 512 U.S. 1246, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Defendant's contention that the trial court erred in failing to exclude testimony prejudicially tainted by homosexual innuendo was without merit. State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 513 U.S. 1089, 115 S.Ct. 750, 130 L.Ed. 2d 650 (1995).

Testimony that defendant had beaten witness and had stolen things from her and her children, and that she was afraid to leave him because there would be trouble when he found her, was relevant to prove that witness' fear of defendant was the reason she waited as long as she did before coming forward to tell of the crime charged, and it was not plain error to admit the testimony. State v. Lamb, 342 N.C. 151, 463 S.E.2d 189 (1995).

Admission of statements by a capital murder defendant's former co-employees was not plain error, where the statements were made shortly after a shooting spree at the business from which he recently had been fired, all to the effect that the speakers thought that the defendant would return for revenge, but it could not be said that the statements tainted the results at trial. State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998), cert. denied, 526 U.S. 1161, 119 S. Ct. 2053, 144 L. Ed. 2d 219 (1999).

Trial court did not commit plain error in its charge to the jury for robbery with a firearm and attempted armed robbery, because restate-

ment on acting in concert clarified any confusion. State v. Hasty, 133 N.C. App. 563, 516 S.E.2d 428 (1999).

**The plain error doctrine was not applicable** to statements made without objection, outside the presence of the jury, during witness voir dire. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36 (2000), cert denied, — U.S. —, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

**Plain error review was not appropriate** where a party had failed to object to statements made by the other party during jury voir dire. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36 (2000), cert denied, — U.S. —, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

**Statement was inadmissible hearsay and therefore erroneously admitted, but did not constitute plain error** such as would warrant granting defendant new trial, as there was sufficient other competent evidence by which jury could have reached its verdict. Court must be convinced that, absent error, jury probably would have reached different verdict. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

**Admission of Testimony Not Plain Error.** — The court's admission of state-proffered hearsay testimony during the sentencing proceeding as rebuttal to the hearsay evidence offered by defendant in support of the (f)(4) mitigating circumstance and a nonstatutory mitigating circumstance that defendant requested, i.e. based on his contentions that someone else pulled the trigger and that his role in the murders was relatively small, did not result in plain error where other evidence existed from which the jury could infer that he shot and killed the victims. State v. Lemons, 352 N.C. 87, 530 S.E.2d 542 (2000), cert. denied, 531 U.S. 1091, 121 S. Ct. 813, 148 L. Ed. 2d 698 (2001).

**N.C.R.A.P., Rule 2, Rather than Plain Error Rule, Applies to Certain Cases.** — At least for all trials conducted after State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, 322 N.C. 243, 367 S.E.2d 644 (1988) and before Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), Supreme Court will decline to require that error under McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), be reviewed under plain error standard when defendant failed to object at trial to error, and will instead apply N.C.R.A.P., Rule 2. State v. Sanderson, 327 N.C. 397, 394 S.E.2d 803 (1990).

**The plain error doctrine was not extended to child custody cases.** Raynor v. Odom, 124 N.C. App. 724, 478 S.E.2d 655 (1996).

**No Cumulative Plain Error Review Available** — The court refused to apply the plain error doctrine on a cumulative basis where defendant was assigning error to unrelated admissions of evidence to which he did not object, and the trial court made no affirmative ruling on the admissibility of any of them. None of the errors complained of, individually, met the standard required by State v. Odom, 307 N.C. 655, 300 S.E.2d 375. State v. Holbrook, 137 N.C. App. 766, 529 S.E.2d 510 (2000).

**For discussion of "plain error rule,"** see In re Will of Maynard, 64 N.C. App. 211, 307 S.E.2d 416 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 885 (1984).

### V. CROSS-ASSIGNMENTS BY APPELLEE.

**The purpose of cross-assignments of error is to** allow review of actions or omissions by the trial court which deprive the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal is taken. St. Clair v. Rakestraw, 67 N.C. App. 602, 313 S.E.2d 228 (1984), aff'd in part and rev'd in part, 313 N.C. 171, 326 S.E.2d 19 (1985).

**Purpose of Subsection (d).** — Subsection (d) of this rule introduces a new procedure designed to protect appellees who have been deprived in the trial court of an alternative basis in law upon which their favorable judgment might be supported and who face the possibility that on appeal prejudicial error will be found in the ground upon which their judgment was actually based. Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980); Carawan v. Tate, 304 N.C. 696, 286 S.E.2d 99 (1982).

**List of Cross-Assignments Not Necessary on Appeal from Summary Judgment.** — Just as appellant from entry of summary judgment is not required to list exceptions and assignments of error in the record on appeal, an appellee is not required to list cross-assignments of error on appeal from summary judgment. Cieszko v. Clark, 92 N.C. App. 290, 374 S.E.2d 456 (1988).

**Issue Preserved by Cross-Assignment.** — The plaintiff's cross-assignment of error on defendant's appeal preserved plaintiff's challenge to the trial court's decision to allow defendants to file a defense bond, where the decision possibly deprived the plaintiff of an alternative basis in law for supporting the judgment. Swan Quarter Farms, Inc. v. Spencer, 133 N.C. App. 106, 514 S.E.2d 735 (1999).

**Issue Not Preserved by Cross-Assignment.** — Because plaintiff's cross-assignment of error did not present an alternative basis upon which to support the judgment, the question argued therein was not properly before the Court of Appeals; the proper method to have preserved this issue for review would have been

a cross-appeal. Stanback v. Westchester Fire Ins. Co., 68 N.C. App. 107, 314 S.E.2d 775 (1984).

Where in her cross-assignments of error the defendant did not contend that the trial court's order deprived her of additional bases supporting the court's order, but rather, that certain portions of the order were erroneous, the proper means by which to raise such an attack would have been an independent appeal, rather than a cross-assignment of error, and defendant's cross-assignments of error were therefore overruled. Whedon v. Whedon, 68 N.C. App. 191, 314 S.E.2d 794 (1984), rev'd on other grounds, 313 N.C. 200, 328 S.E.2d 437 (1985).

Where defendants did not appeal from judgment, challenges thereto were not properly raised by cross-assignments of error, which under subsection (d) of this rule are reserved for errors which deprived the appellee of an alternative basis in law for supporting the judgment. W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 78 N.C. App. 664, 338 S.E.2d 135, cert. denied, 316 N.C. 731, 345 S.E.2d 398 (1986).

In cross-assignment of error, plaintiffs did not present alternative basis in law for supporting judgment. Instead, plaintiffs contended that trial court erred in refusing to set aside jury verdicts as too small. Therefore, plaintiffs' contention is not properly before court on appeal. Proper method to have preserved issue for review would have been cross-appeal. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

The petitioner's argument that the relief granted by the trial court was inadequate could not be made by cross-assignment of error under this rule but was required to be made by cross-appeal, since the argument did not relate to an alternative basis in law for supporting the judgment, order, or other determination from which the appeal was taken. Neal v. Fayetteville State Univ., 131 N.C. App. 377, 507 S.E.2d 574 (1998).

**Issue Not Preserved by Cross-Assignment.** — Where trial court's sole conclusion of law denying defendant's motion to compel arbitration was that no agreement to arbitrate existed and plaintiff had not cross-assigned error to the trial court's failure to find as an alternate basis for its decision that arbitration agreement was egregious and violative of her constitutional rights, the appellate court could not consider this issue on appeal. Howard v. Oakwood Homes Corp., 134 N.C. App. 116, 516 S.E.2d 879 (1999), cert. denied, 350 N.C. 832, 539 S.E.2d 288 (1999), cert. denied, 528 U.S. 1155, 120 S. Ct. 1161, 145 L. Ed. 2d 1072 (2000).

**Issues for Cross-Appeal Not Proper Cross-Assignments.** — The cross-assignments of error made by defendant/realtors' board were rejected because the issues it attempted to raise, the dismissal of its "wrongful civil proceeding" claim and the denial of its request for attorney's fees, should have been raised by cross-appeal. Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, Inc., 134 N.C. App. 468, 518 S.E.2d 28 (1999).

Plaintiff's attempt to argue that the Commission erred both in concluding that the defendant insurer's policy did not cover plaintiff's North Carolina injuries, and in failing to assess a 10% late payment penalty against the defendant pursuant to § 97-18 failed, because he did not file a cross-appeal and because neither of his cross-assignments of error, if sustained, would provide an alternative basis for upholding the Commission's order and award. Harrison v. Tobacco Transp., Inc., 139 N.C. App. 561, 533 S.E.2d 871 (2000), cert. denied, 353 N.C. 263, 546 S.E.2d 96 (2000).

**Failure to Cross-Appeal.** — Where plaintiffs, in their cross-assignment of error, did not present an alternative basis in law for supporting judgment, but instead, contended that the trial court erred in refusing to set aside the jury verdict as too small, plaintiffs' contention was not properly before the court on appeal. The proper method to have preserved the issue for review would have been a cross-appeal. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

Where neither of plaintiff/appellee's cross-assignments of error, if sustained, would provide an alternative basis for upholding the judgment, the plaintiff should have cross-appealed in order to properly present the alleged errors for appellate review. Mann Contractors v. Flair with Goldsmith Consultants-II, Inc., 135 N.C. App. 772, 522 S.E.2d 118 (1999).

**Failure to Cross-Appeal Lack of Conclusions.** — Where trial court erroneously failed to render conclusions concerning all statutory grounds for review raised by the petition for review, petitioners' failure to cross-appeal any such error to the appellate court waived its consideration on appeal. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572, rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

## VI. DECISIONS UNDER PRIOR LAW.

### A. Exceptions.

***Editor's note.*** — *The cases cited below were decided under former Rule 21, Rules of Practice in the Supreme Court of North Carolina, and under former Rule 21, Rules of Practice in the Court of Appeals of North Carolina.*

**Rule Mandatory.** — This rule is mandatory. Pamlico County v. Davis, 249 N.C. 648, 107 S.E.2d 306 (1959); Darden v. Bone, 254 N.C.

599, 119 S.E.2d 634 (1961); Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962); Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963); Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); In re Will of Adams, 268 N.C. 565, 151 S.E.2d 59 (1966); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

**Appeal Dismissed for Failure to Follow Rule.** — The court will dismiss the appellant's case when he fails to assign error as required by this rule. Hobbs v. Cashwell, 158 N.C. 597, 74 S.E. 23 (1912); Maddillon Engine & Thresher Co. v. Thomas, 170 N.C. 680, 87 S.E. 327 (1915); In re Bailey, 180 N.C. 300, 103 S.E. 896 (1920).

The appellee's motion to dismiss the appeal because, (1) the exceptions are not "briefly and clearly stated and numbered," (2) the exceptions relied upon are not grouped and numbered immediately after the end of the case on appeal, (3) the index is not placed at the front of the record, will be allowed. Davis v. Wall, 142 N.C. 450, 55 S.E. 350 (1906). See also Jones v. Atlantic Coast Line R.R., 153 N.C. 419, 69 S.E. 427 (1910).

**Rule Cannot Be Waived.** — The rule requiring the assignment of error in the record on appeal is for the benefit of the court, and counsel cannot waive it. Southern Spruce Co. v. Hunnicutt, 166 N.C. 202, 81 S.E. 1079 (1914); Parrott v. Hardesty, 169 N.C. 667, 86 S.E. 582 (1915).

**An Assignment of Error Alone Will Not Suffice.** — Only an assignment of error bottomed on an exception duly entered in the record will serve to present a question of law for the Supreme Court to decide. State v. Williams, 235 N.C. 429, 70 S.E.2d 1 (1952); Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961); Hicks v. Russell, 256 N.C. 34, 123 S.E.2d 214 (1961); Vance v. Hampton, 256 N.C. 557, 124 S.E.2d 527 (1962); Hines v. Frink, 257 N.C. 723, 127 S.E.2d 509 (1962).

**An assignment of error must be based on an exception duly noted.** — State v. Hitchcock, 4 N.C. App. 676, 167 S.E.2d 545 (1969).

**Where the exceptions appear in the record only under the assignments of error, they are ineffectual,** since the rules require that assignments of error be based upon exceptions previously noted, and the rules are mandatory and will be enforced ex mero motu. Bulman v. Southern Baptist Convention, 248 N.C. 392, 103 S.E.2d 487 (1958).

Assignments of error purporting to be supported by exceptions which appear nowhere in the record except in the purported assignments of error are ineffective and will not be considered on appeal. Cratch v. Taylor, 256 N.C. 462, 124 S.E.2d 124 (1962); Vance v. Hampton, 256 N.C. 557, 124 S.E.2d 527 (1962); Bost v. Citizens Nat'l Bank, 1 N.C. App. 470, 162 S.E.2d 158 (1968); Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

An assignment of error must be based upon an exception duly taken, in apt time, during the trial and preserved as required by this rule and Rule 9. State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961); Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

**Court Will Not Consider Error Not Subject of Exception or Assignment.** — The Court of Appeals will not consider an error in the charge and the evidence which has not been made the subject of an exception or assignment of error. State v. Moore, 6 N.C. App. 596, 170 S.E.2d 568 (1969).

**Appellant Must Point Out Error by Exception.** — It is the duty of an appellant who asserts prejudicial error to point out the asserted error by exception. State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962).

**The exceptions which are bona fide shall be stated clearly and intelligibly** by the assignment of errors and not by referring to the record, and therewith shall be set out so much of the evidence or of the charge or other matter or circumstance as shall be necessary to present clearly the matter to be debated. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

**Assignments of error not supported by exceptions present no question of law** for the Supreme Court to decide. Corns v. Nickelston, 257 N.C. 277, 125 S.E.2d 588 (1962).

**An exception which is not assigned as error is deemed abandoned.** Balint v. Grayson, 256 N.C. 490, 124 S.E.2d 364 (1962).

**Assignment of Error Must Be Clearly Stated.** — Assignments of error must be clearly and intelligently stated so that the court will not have to look at exceptions therein referred to in order that they may be understood; for otherwise they will not be considered on appeal. Myrose v. Swain, 172 N.C. 223, 90 S.E. 118 (1916); State v. Burton, 256 N.C. 464, 124 S.E.2d 108 (1962); Balint v. Grayson, 256 N.C. 490, 124 S.E.2d 364 (1962); Jenks v. Morrison, 258 N.C. 96, 127 S.E.2d 895 (1962); Jones v. Saunders, 257 N.C. 118, 125 S.E.2d 350 (1962); Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962); State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965); State v. Mohrmann, 265 N.C. 594, 144 S.E.2d 645 (1965); Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); In re Will of Adams, 268 N.C. 565, 151 S.E.2d 59 (1966); Williams v. Boulerice, 269 N.C. 499, 153 S.E.2d 95 (1967); State v. Coleman, 270 N.C. 357, 154 S.E.2d 485 (1967); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

What the Supreme Court requires is that exceptions which are presented to the court for decision shall be stated clearly and intelligibly

by the assignment of error, and not be referring to the record, and therewith there shall be set out so much of the evidence or other matter of circumstance as shall be necessary to present clearly the matter to be debated. In this way the scope of inquiry is narrowed to the identical points which the appellant thinks are material and essential, and the court is not sent scurrying through the entire record to find the matters complained of. Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961).

Rule 9 and this rule require that asserted error must be based on an appropriate exception, and must be properly assigned. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Assignments of error to a charge which do not set forth the part of the charge challenged do not comply with the rules of practice in the Supreme Court. State v. Dixon, 256 N.C. 698, 124 S.E.2d 821 (1962); Samuel v. Evans, 264 N.C. 393, 141 S.E.2d 627 (1965); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970); State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

An exception must point out some specific part of the charge as erroneous. Jenkins v. Gaines, 272 N.C. 81, 157 S.E.2d 669 (1967).

**Duty to Prepare Assignment of Error.** — The preparation of the assignment of error is the work of the attorney for the appellant, and is not a part of the case on appeal, and its office is to group the exceptions noted in the case on appeal; and, if there is an assignment of error not supported by an exception, it will be disregarded. Worley v. Laurel River Logging Co., 157 N.C. 490, 73 S.E. 107 (1911); Allred v. Kirkman, 160 N.C. 392, 76 S.E. 244 (1912); McLeod v. Gooch, 162 N.C. 122, 78 S.E. 4 (1913).

**An assignment of error must present a single question of law** for consideration by the court. Hines v. Frink, 257 N.C. 723, 127 S.E.2d 509 (1962); State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965).

**An assignment which attempts to raise several different questions is broadside.** Hines v. Frink, 257 N.C. 723, 127 S.E.2d 509 (1962).

**Broadside Exceptions Ineffectual.** — An assignment of error, unsupported by exception, that the court erred in finding that the evidence was insufficient to sustain appellant's motion is a broadside exception and ineffectual because of noncompliance with Rule 9 and this rule. Columbus County v. Thompson, 249 N.C. 607, 107 S.E.2d 302 (1959); Hicks v. Russell, 256 N.C. 34, 123 S.E.2d 214 (1961); State v. Burell, 256 N.C. 288, 123 S.E.2d 795, cert. denied, 370 U.S. 961, 82 S. Ct. 1621, 8 L. Ed. 2d 827 (1962); Corns v. Nickelston, 257 N.C. 277, 125 S.E.2d 588 (1962).

An assignment of error that the court failed to declare and explain the law applicable to the facts in the case, without pointing out what matters appellant contends were omitted, is a broadside exception. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

**And may not be aided by the assignment of error.** — Hicks v. Russell, 256 N.C. 34, 123 S.E.2d 214 (1961).

**Broadside Assignment of Error to Findings of Fact Improper.** — Where plaintiff's assignment of error as to the judge's findings of fact was: "For that the judge of the superior court made certain findings of fact, which findings of fact are not supported by the evidence and which findings are contrary to the evidence," it was a broadside assignment of error, which failed to point out or designate in the assignment of error the particular rulings to which exceptions were taken, so that the Supreme Court could see the alleged error made by the judge. Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

**Exceptions Too General.** — Where the plaintiff files a large number of exceptions to the referee's report and the judge confirms or modifies certain portions of the report and sets aside others, an exception, "The plaintiff excepts to such rulings, adverse to it and appeals," is too general to be considered. Rutherford County Comm'rs v. Erwin, 140 N.C. 193, 52 S.E. 785 (1905).

Where there is a single assignment of error to several rulings of the trial court, and one of them is correct, the assignment must fail. Buie v. Kennedy, 164 N.C. 290, 80 S.E. 445 (1913).

An exception to a portion of a charge embracing a number of propositions is insufficient if any of the propositions are correct. Clifton v. Turner, 257 N.C. 92, 125 S.E.2d 339 (1962); Jenkins v. Gaines, 272 N.C. 81, 157 S.E.2d 669 (1967).

**The questions arising on an appeal are those defined by appropriate exceptions** taken by the appellant in the superior court. Sprinkle v. City of Reidsville, 235 N.C. 140, 69 S.E.2d 179 (1952).

**The failure to except leaves nothing to review.** State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962).

**Scope of Review Where Assignments of Error to Findings of Fact Are Insufficient.** — Where the assignments of error are insufficient to present the findings of fact for review, the appeal presents the questions whether the findings support the court's inferences and conclusions of law and judgment, and whether error appears on the face of the record. Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

**When no exception has been taken to a finding of fact, such finding is presumed to be supported by competent evidence** and is binding on appeal. Cratch v. Taylor, 256 N.C.

462, 124 S.E.2d 124 (1962).

**Appeal Is to Judgment If No Exceptions Preserved.** — In the absence of any exceptions, or when exceptions have not been preserved in accordance with the requirements of the rules, the appeal will be taken as an exception to the judgment. Cratch v. Taylor, 256 N.C. 462, 124 S.E.2d 124 (1962).

**An appeal to the Supreme Court is itself an exception to the judgment** or to any other matter of law appearing on the face of the record. Balint v. Grayson, 256 N.C. 490, 124 S.E.2d 364 (1962); State v. Hitchcock, 4 N.C. App. 676, 167 S.E.2d 545 (1969).

**The only question raised by an exception to the judgment is whether error of law appears upon the face of the record.** Vance v. Hampton, 256 N.C. 557, 124 S.E.2d 527 (1962).

**Exceptions Must Be Set Out and Numbered.** — Exceptions relied upon in the statement of the case must be set out and numbered. Barnette v. Woody, 242 N.C. 424, 88 S.E.2d 223 (1955).

**Reference by Number Insufficient.** — This rule must be complied with to have the appeal considered by the court; and where the assignments of error each simply refers to the exception of record by number, without giving the purport or text thereof, it is insufficient, and the judgment of the trial court will be affirmed. Porter v. American Cigar Box Lumber Co., 164 N.C. 396, 80 S.E. 443 (1913).

A statement purporting to be assignments of error appearing in the record just after the statement of the case on appeal, setting forth in general terms that the appellant excepted to the rulings of the court, as appeared in certain numbered exceptions of record taken on trial, such exceptions themselves not being sufficiently stated, in excluding evidence, and "to a judgment of nonsuit as noted in the forty-seventh exception," is not definite enough for the court to consider on appeal or to be referred to the clerk to be put in the prescribed shape therefor, and the appeal should be dismissed. Thompson v. Seaboard Air Line R.R., 147 N.C. 412, 61 S.E. 286 (1908).

**It is entirely proper to group more than one exception under one assignment,** when all the exceptions relate to a single question of law. State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965).

**But if Exceptions Relate to Distinct Parts of Charge and Any Part Is Correct, Assignment Fails.** — Where there is a single assignment of error based upon several exceptions to several distinct parts of the judge's charge, and one of the parts excepted to is correct, the assignment must fail. State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965).

**Reference to Page.** — Where the assignments of error are not comprehensive enough to give a clear idea to the court of the matters to be debated without examining the record, they will not be considered, as, "to the question and answer in the admission of the evidence" of a certain witness, "as contained in the exception 1 on page — of the record;" and the giving of proper page will not cure its insufficiency. Rogers v. Jones, 172 N.C. 156, 90 S.E. 117 (1916); Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

**Assignments Not Based on Exceptions Considered in Capital Case.** — Assignments of error should be based upon exceptions briefly and clearly stated and numbered in the record, but in a capital case, wherein the life of defendant is at stake, assignments of error not so based nevertheless will be considered. State v. Herring, 226 N.C. 213, 37 S.E.2d 319 (1946).

**Agreement of Counsel.** — Where the record shows that the solicitor agreed that the statement of case on appeal, containing an exception to his argument to the jury and an assignment of error based thereon, should constitute the case on appeal, this is sufficient as an exceptive assignment of error even though defendant made no objection and took no exception at the time. State v. Hawley, 229 N.C. 167, 48 S.E.2d 35 (1948).

**An exception to the signing of the judgment** presents nothing for review except whether or not the court's conclusion of law is supported by the finding or findings of fact; such exception does not challenge the correctness of any findings of fact. Cratch v. Taylor, 256 N.C. 462, 124 S.E.2d 124 (1962).

**Exception to Issues Submitted.** — Where a cause was tried under one issue, without exception taken, the assignment of error that other issues should have been submitted is not in compliance with the rules of court regulating appeals. McNairy v. Norfolk & W.R.R., 172 N.C. 505, 90 S.E. 497 (1916).

**Questions Discussed in Brief Only.** — A question discussed in the brief but not presented by any exception or assignment of error cannot be considered. Coon v. Southern Ry., 171 N.C. 759, 88 S.E. 510 (1916); Needham v. Southern Ry., 171 N.C. 765, 88 S.E. 511 (1916).

**When Complaint Does Not State Cause of Action.** — A defendant, without filing exception on appeal from an adverse judgment, may move to dismiss the action on the ground that the complaint does not state a cause of action. Lloyd v. North Carolina R.R., 151 N.C. 536, 66 S.E. 604 (1909).

This is not true of an objection for misjoinder of cause of action. Wright v. Kinney, 123 N.C. 618, 31 S.E. 874 (1898).

### B. Evidence.

**Exceptions to Evidence.** — The assignments of error on questions of evidence should

set out the testimony so that their relevancy can be seen; and on the rulings of the court or some other matters occurring at the trial, the ruling itself or the attendant facts and circumstances should be so stated that their bearing on the controversy can be perceived to some extent in reading the assignments themselves. Thompson v. Seaboard Air Line R.R., 147 N.C. 412, 61 S.E. 286 (1908); Carter v. Reaves, 167 N.C. 131, 83 S.E. 248 (1914).

Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial. This rule applies as well to questions asked on cross-examination. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

**Exception Not Considered Where No Objection or Request Made.** — The failure of the court to restrict the admission of testimony competent for the purpose of corroboration is not error where defendant neither objects to the admission of the testimony nor requests that its admission be restricted. State v. Perry, 226 N.C. 530, 39 S.E.2d 460 (1946); Hatcher v. Clayton, 242 N.C. 450, 88 S.E.2d 104 (1955).

The admission of evidence generally and without qualification will not be held erroneous, even though the evidence is competent only for the purpose of corroboration, when at the time of its admission defendant does not request that its purpose be restricted. State v. Johnson, 218 N.C. 604, 12 S.E.2d 278 (1940).

**When it is claimed that findings of fact made by the trial judge are not supported by the evidence,** the exceptions and assignments of error in relation thereto must specifically and distinctly point out the alleged errors. Town of Burnsville v. Boone, 231 N.C. 577, 58 S.E.2d 351 (1950); Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

**Failure to refer in the charge to the difference between substantive evidence and corroborative evidence** and to define each of these terms is not ground for exception. State v. Lee, 248 N.C. 327, 103 S.E.2d 295 (1958).

**An assignment of error relating to restrictions placed on cross-examination** does not comply with this rule and Rule 9 if it does not contain any question put to any witness on cross-examination. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

**Evidence Competent for Some Purpose.** — When evidence is competent for some purpose, its general admission is not reversible error unless the appellant asks at the time of the admission that it be restricted. Tise v. Town of Thomasville, 151 N.C. 281, 65 S.E. 1007 (1909).

A general objection to evidence cannot be sustained if the evidence is competent for any purpose. State v. Casper, 256 N.C. 99, 122 S.E.2d 805 (1961), cert. denied, 376 U.S. 927, 84 S. Ct. 691, 11 L. Ed. 2d 622 (1964).

**Objecting Party to Request Restricted Consideration of Evidence.** — When evidence competent for one purpose only and not for another is offered, it is incumbent upon the objecting party to request the court to restrict the consideration of the jury to that aspect of the evidence which is competent. State v. Williams, 272 N.C. 273, 158 S.E.2d 85 (1967); State v. Goodson, 273 N.C. 128, 159 S.E.2d 310 (1968).

Ordinarily, where evidence admissible for some purposes, but not for all, is admitted generally, its admission will not be held for error unless the appellant requested at the time of its admission that its purpose be restricted. State v. Corl, 250 N.C. 252, 108 S.E.2d 608 (1959).

When evidence competent for some purposes, but not for all, is admitted generally, unless appellant asks at the time of the admission that its purpose be restricted, or requests special instructions to that effect, the failure of the judge to so restrict it is not assignable for error. Hill v. Bean, 150 N.C. 436, 64 S.E. 212 (1909).

Where evidence, admissible only for the purpose of attacking the credibility of a witness, is admitted generally without objection, there is no error in the court's failure to so restrict its use. State v. McKinnon, 223 N.C. 160, 25 S.E.2d 606 (1943).

Where evidence competent for the purpose of corroboration is admitted generally, and defendant fails at the time of its admission to request that its purpose be restricted, his exception to the admission of the testimony cannot be sustained. State v. Walker, 226 N.C. 458, 38 S.E.2d 531 (1946); Humphries v. Queen City Coach Co., 228 N.C. 399, 45 S.E.2d 546 (1947).

**Exception Not Considered.** — A witness may testify to statements he had made to the defendant's agent when in corroboration of his testimony; and where the record states that it was confined to that purpose, or there was no request made that it be so confined, it will not be considered as reversible error on appeal. Whitehurst v. Padgett, 157 N.C. 424, 73 S.E. 240 (1911); Perry v. Branning Mfg. Co., 176 N.C. 68, 97 S.E. 162 (1918); Singleton v. Roebuck, 178 N.C. 201, 100 S.E. 313 (1919).

When the evidence is corroborative, the failure of the trial court to restrict it will not be considered on appeal unless the objecting party asks for an instruction to that effect. Chrisco v. Yow, 153 N.C. 434, 69 S.E. 422 (1910); Cooper v. Seaboard Air Line R.R., 163 N.C. 150, 79 S.E. 418 (1913).

Where several witnesses testified to certain facts which the trial judge at the time stated were competent only for the purpose of corroboration, and when charging the jury in reciting the testimony of one of these witnesses he

repeated that it was to be considered only for the purpose of corroboration, but failed to do so in reciting the testimony of other witnesses, an exception to such omission cannot be sustained, in the absence of a request to charge that the same rule applied to all of the testimony of that class. Liles v. Fosburg Lumber Co., 142 N.C. 39, 54 S.E. 795 (1906).

**Exceptions to Unanswered Questions.** — Where exception is taken to the judge's exclusion of evidence upon the trial, it is upon appellant to show error, and when the exception is taken to unanswered questions, the substance of the answers must be made to appear on appeal, so that the Supreme Court may pass upon its competency. Wallace v. Barlow, 165 N.C. 676, 81 S.E. 924 (1914); Hamlet Ice Co. v. J.A. Jones Constr. Co., 194 N.C. 407, 139 S.E. 771 (1927).

**Objection That Instruction Insufficient.** — Where the declarations of a party to an action are admissible as to him alone, and the judge has so instructed the jury, an objection that the instruction was not sufficiently definite will not be sustained, unless there was a request to make it so, which was refused. Plemmons v. Murphey, 176 N.C. 671, 97 S.E. 648 (1918).

**Unsupported Statements of Appellant.** — A statement in the assignments of error, when there is nothing in the statement or record of the case on appeal to give it any support, is only the unsupported statement of the appellant of what had occurred, and hence the assignment of error depending thereon will not be considered on appeal. State v. Freeze, 170 N.C. 710, 86 S.E. 1000 (1915).

**Where the charge of the court is not set out in the record on appeal,** the presumption is in favor of its correctness, and that the appellant would otherwise have excepted, and especially so when it is stated that the judge charged the jury at length concerning the case. State v. Jones, 182 N.C. 781, 108 S.E. 376 (1921).

## Rule 11. Settling the record on appeal.

(a) *By agreement.* Within 35 days after the reporter's or transcriptionist's certification of delivery of the transcript, if such was ordered (70 days in capitally tried cases), or 35 days after filing of the notice of appeal if no transcript was ordered, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) *By appellee's approval of appellant's proposed record on appeal.* If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within 21 days (35 days in capitally tried cases) after service of the proposed record on appeal upon him an appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) *By judicial order or appellant's failure to request judicial settlement.* Within 21 days (35 days in capitally tried cases) after service upon him of appellant's proposed record on appeal, an appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have served, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case.

If only one appellee or only one set of appellees proceeding jointly have so served, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so served, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial settlement process with the order settling the record on appeal.

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) *Multiple appellants; single record on appeal.* When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The assignments of error of the several appellants shall be set out separately in the single record on appeal and related to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) *[Reserved.]*

(f) *Extensions of time.* The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c). (Adopted June 13, 1975; Amended November 27, 1984 — 11(a), (c), (e), and (f) — applicable to appeals in which the notice of appeal is filed on or after February 1, 1985; December 8, 1988 — 11(a), (b), (c), (e), and (f) — effective for all judgments of the trial tribunal entered on or after July 1, 1989; July 26, 1990 — 11(b), (c), and (d) — effective October 1, 1990; Amended March 6, 1997; November 21, 1997 — effective February 1, 1998.)

**Note on the 1988 Amendment.** — Paragraph (e) formerly contained the requirement that the settled record on appeal be certified by the clerk of the trial tribunal. The 27 November 1984 amendments deleted that step in the process. Under the present version of the rules, once the record is settled by the parties, by agreement or by judicial settlement, the appellant has 15 days to file the settled record with the appropriate appellate court.

**Legal Periodicals.** — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

## CASE NOTES

**Time Schedule.** — The time schedule set out in this rule is designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. State v. Gillespie, 31 N.C. App. 520, 230 S.E.2d 154 (1976), cert. denied, 291 N.C. 713, 232 S.E.2d 205 (1977); Ledwell v. County of Randolph, 31 N.C. App. 522, 229 S.E.2d 836 (1976).

The time schedules set out in the rules are

designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. There are generous provisions for extensions of time by the trial court if counsel can show good cause for extension. State v. Motsinger, 31 N.C. App. 594, 230 S.E.2d 205 (1976), cert. denied, 291 N.C. 714, 232 S.E.2d 202 (1977); In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976).

**Trial Court Loses Jurisdiction to Settle the Record after Notice of Appeal.** — While the recorded judgment did not reflect the judgment rendered by the trial court in open court, the trial court lacked jurisdiction to correct its judgment after defendant had given notice of appeal and the record on appeal had been filed with the appellate court. State v. Dixon, 139 N.C. App. 332, 533 S.E.2d 297 (2000).

**Once the record on appeal has been filed** with the appellate court, motion to correct or amend a judgment in order to make it speak the truth is properly made to the appellate court rather than the trial court. State v. Dixon, 139 N.C. App. 332, 533 S.E.2d 297 (2000).

**The action of the trial judge in settling the record is final** and will not be reviewed on appeal. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

**Appellant bears the burden** of seeing that the record on appeal is properly settled and filed with the court. McLeod v. Faust, 92 N.C. App. 370, 374 S.E.2d 417 (1988).

**Failure to Settle Record.** — Appeal would be dismissed where appellants failed to settle the record on appeal prior to filing with the Court of Appeals. Higgins v. Town of China Grove, 102 N.C. App. 570, 402 S.E.2d 885 (1991).

**Failure to Respond to Defendants's Objections to Record Affected Time for Appeal.** — The court dismissed the appeal of plaintiffs, administratrix and relatives of deceased infant, who failed to file and settle the record within the time limit required by this rule, where although plaintiffs timely served the proposed record on appeal on defendants, they failed to respond to defendants's objections and proposed amendments or to make a request for judicial settlement. As a result, the proposed record on appeal, in conformity with defendants' objections and amendments, became the record on appeal 13 days later (10 days as per N.C.R. A. P., Rule 11(c) plus 3 days as per N.C.R. App. P., Rule 27(b)) since defendants served their objections and amendments by United States mail, and plaintiffs should have filed the record on appeal within 15 days after that. Kellihan v. Thigpen, 140 N.C. App. 762, 538 S.E.2d 232 (2000).

**Court of Appeals Determines Question of Compliance.** — Upon appeal, the opinion of Court of Appeals, not the clerk of the superior court, determines whether service of the proposed record was properly made within the required time, whether the record on appeal was properly settled, and, under former subsection (e), whether the record was certified by the clerk of the superior court within ten days after settlement. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312, vacated on other grounds, 300 N.C. 747, 268 S.E.2d 221 (1980).

**Opposing Counsel of Record at Commitment Hearing.** — Under former § 122-58.24 (see now § 122C-270), the staff attorney of the Attorney General who represents the State at a commitment hearing is the opposing counsel of record within the meaning of N.C.R.A.P. Rule 26 and should be served with the proposed record on appeal as required by this rule where the respondent appeals from an order of commitment. And if the State is not the petitioner in the involuntary commitment proceeding, the proposed record on appeal should be served on opposing counsel of record for the petitioner by the respondent appellant. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312, vacated on other grounds, 300 N.C. 747, 268 S.E.2d 221 (1980).

**Noncompliance Works Loss of Right of Appeal.** — A failure by appellant to meet the requirements of former section (e) of this rule, or to comply with the mandate of N.C.R.A.P. Rule 12(a), works a loss of the right of appeal. Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

**Failure to Comply Restored Jurisdiction to Trial Court.** — Where defendant properly gave notice of appeal on September 1, 1978, but between that date and November 28, 1978, when judgment was entered, a period of 88 days, he took no steps to perfect that appeal, i.e., contrary to the mandate of section (a) of this rule defendant neither tendered a proposed record on appeal within 30 days, nor did he seek any extension of time to settle such a record as permitted by N.C.R.A.P. Rule 27(c), defendant's failure to perfect his appeal constituted an abandonment which reinvested the trial court with jurisdiction to render further order in the cause. McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980).

**Where the record on appeal contains two conflicting narratives of the evidence,** the appeal should be dismissed for failure to bring forward a "settled" record as required under N.C.R.A.P., Rule 9 and this rule; however, where defendant did not assert that the trial court's findings quoted were unsupported by sufficient evidence at the custody hearing below, but instead asserted the trial court's conclusions were erroneous or were not supported by the findings actually made, under these limited circumstances, a narrative of evidence or a verbatim transcript was not neces-

sary to understand defendant's assignment of error; therefore, the appellate court addressed the merits of his assignments of error. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

**It is improper procedure for counsel to file three separate records on appeal from a trial at which the three cases were consolidated.** — Aside from the question of the unnecessary expenses, the filing of three separate records on appeal creates the undue burden on the appellate courts of having to read three when one would have sufficed. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

The filing of two records when there should have been but one and the inclusion in both records of matter which should not have been included has placed an unnecessary burden on this court and has imposed upon the State an expense which was not necessary for the protection of defendants' rights to full appellate review. State v. Bryson, 30 N.C. App. 71, 226 S.E.2d 392, cert. denied, 290 N.C. 664, 228 S.E.2d 455 (1976).

**Counsel Taxed for Redundant Record.** — By appealing the three cases consolidated below separately, counsel has prepared and caused to be printed two redundant records on appeal; these records on appeal constitute matter not necessary for an understanding of the errors assigned. There has been no showing of compelling circumstances to justify the filing of three records on appeal instead of one. Consequently, counsel will be personally taxed with costs. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

**When the court has ordered consolidation of cases or charges for trial, counsel cannot, of his own enterprise, sever the cases** or charges and appeal each separately in the absence of a showing of compelling circumstances. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

**Court Presumed to Have Acted Correctly Where Record Silent.** — Where the record is silent as to whether a jury instruction conference was in fact held, the defendant must hold himself accountable. The defendant, as appellant, has the duty under this rule to preserve the record on appeal. If there was no instruction conference held, the defendant could have sought a stipulation from the State pursuant to subsection (a) of this rule acknowledging the trial court's failure in this regard. Had the State refused to agree to the stipulation, and objected to such a notation in the record, then the defendant could have requested that the trial judge settle the record on appeal pursuant to subsection (c) of this rule. Where the record is silent, it will be presumed that the trial court acted correctly. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

**Time Period Held Inapplicable.** — Where the trial court allowed defendant 45 days to serve objections or file a counter-proposed record on appeal, the 15-day period of this rule was inapplicable. McLeod v. Faust, 92 N.C. App. 370, 374 S.E.2d 417 (1988).

**Extension Held Ineffective.** — Trial court's order extending the time during which plaintiffs could serve proposed record on appeal was ineffective where it was made after the expiration of the 35-day period during which plaintiffs were required by subsection (b) of this rule to serve the proposed record on appeal, it was made upon plaintiffs' oral motion in violation of N.C.R.A.P., Rule 27(c)(1), and the record did not reflect that the other parties, the defendant and third-party defendant, were given notice or an opportunity to be heard as required by N.C.R.A.P., Rule 27(c)(1). Richardson v. Bingham, 101 N.C. App. 687, 400 S.E.2d 757 (1991).

**Failure to Perfect Appeal — Illustrative Cases.** — Where defendant gave oral notice of appeal on January 4, 1988 (date of initial judgment), and tendered her proposed record on appeal pursuant to subsection (b) of this rule 139 days later, the court did not address defendant's first issue because the appeal from the trial court's initial judgment was not properly perfected. Woods v. Shelton, 93 N.C. App. 649, 379 S.E.2d 45 (1989) (effective for judgment entered prior to July 1, 1989).

**Failure of Period to Run.** — Subsection (a) provides that the time in which the record of a case on appeal must be filed runs from the date of the court reporter's certification of delivery of the transcript and if the court reporter fails to certify that the transcript has been delivered within the 60-day period permitted by Rule 7(b), the 35-day period within which an appellant must serve the proposed record on appeal does not begin to run until the court reporter does certify delivery of the transcript; therefore, since the court reporter had not certified delivery of her portion of the transcript prior to the hearing on plaintiff's motion to dismiss the appeal, the defendant's 35-day period to serve the record on appeal never began to run. Lockert v. Lockert, 116 N.C. App. 73, 446 S.E.2d 606 (1994), cert. granted in part and denied in part, writ of supersedeas allowed, 338 N.C. 311, 450 S.E.2d 487 (1994).

**Dismissal for Failure to Comply.** — Where the trial court's purported extension of time to file the records on appeal was ineffective, and where the records on appeal were not filed within the times mandated by the Rules of

Appellate Procedure, each parties' appeals were dismissed for failure to comply with the rules. Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997), rev'd on other grounds, 347 N.C. 672, 500 S.E.2d 88 (1998).

**Notice to Defendant and Counsel.** — The failure to give the defendant or his counsel notice of a hearing to settle the appellate record did not violate due process, where defendant's presence was not required, and defense counsel was present and fully examined the deputy clerk on the method and manner by which jurors were sworn. State v. McNeill, 349 N.C. 634, 509 S.E.2d 415 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 102, 145 L. Ed. 2d 87 (1999).

**Applied** in State v. Cottingham, 30 N.C. App. 67, 226 S.E.2d 387 (1976); State v. Chavis, 30 N.C. App. 75, 226 S.E.2d 389 (1976); State v. Pevia, 30 N.C. App. 79, 226 S.E.2d 394 (1976); State v. Wilson, 31 N.C. App. 323, 229 S.E.2d 314 (1976); Hudson v. Hudson, 31 N.C. App. 547, 230 S.E.2d 188 (1976); State v. Davis, 31 N.C. App. 590, 230 S.E.2d 203 (1976); State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977); State v. Musumeci, 33 N.C. App. 88, 234 S.E.2d 31 (1977); Indian Trace Co. v. Sanders, 33 N.C. App. 386, 235 S.E.2d 91 (1977); Burkhimer v. Coble, 35 N.C. App. 127, 239 S.E.2d 852 (1978); Triplett v. Triplett, 37 N.C. App. 283, 245 S.E.2d 812 (1978); Williams v. Dameron, 37 N.C. App. 491, 246 S.E.2d 586 (1978); State v. Oxendine, 43 N.C. App. 391, 258 S.E.2d 810 (1979); Phillips v. Texfi Indus., Inc., 44 N.C. App. 66, 259 S.E.2d 769 (1979); Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980); Vassey v. Burch, 301 N.C. 68, 269 S.E.2d 137 (1980); State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983); Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984); Smith v. Smith, 103 N.C. App. 488, 405 S.E.2d 912 (1991); Jenkins v. Richmond County, 118 N.C. App. 166, 454 S.E.2d 290 (1995); Seigel v. Patel, 132 N.C. App. 783, 513 S.E.2d 602 (1999); Coiner v. Cales, 135 N.C. App. 343, 520 S.E.2d 61 (1999); Taylor v. City of Lenoir, 140 N.C. App. 337, 542 S.E.2d 222 (2001).

**Quoted** in Patterson v. Strickland, 139 N.C. App. 510, 515 S.E.2d 915 (1999).

**Stated** in John T. Council, Inc. v. Balfour Prods. Group, Inc., 74 N.C. App. 668, 330 S.E.2d 6 (1985).

**Cited** in State v. Cumber, 32 N.C. App. 329, 232 S.E.2d 291 (1977); State v. Davis, 36 N.C. App. 648, 244 S.E.2d 480 (1978); State v. Johnson, 38 N.C. App. 111, 247 S.E.2d 286 (1978); Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978); State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983); Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); State v. Wrenn, 316 N.C. 141, 340 S.E.2d 443 (1986); Roanoke Chowan Regional Hous. Auth. v. Vaughan, 81 N.C. App. 354, 344 S.E.2d 578 (1986); von Hagel v. Blue Cross & Blue Shield, 91 N.C. App. 58, 370 S.E.2d 695 (1988); State ex rel. Thornburg v. Currency in Amount of $52,029.00 in U.S. Currency, 324 N.C. 276, 378 S.E.2d 1 (1989); State v. Shedd, 117 N.C. App. 122, 450 S.E.2d 13 (1994); Curry v. First Fed. Savs. & Loan Ass'n, 125 N.C. App. 108, 479 S.E.2d 286 (1996), cert. denied, 346 N.C. 278, 487 S.E.2d 544 (1997); Pollock v. Parnell, 126 N.C. App. 358, 484 S.E.2d 864 (1997); Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997), rev'd on other grounds, 347 N.C. 672, 500 S.E.2d 88 (1998); Fenz ex rel. Gladden v. Davis, 128 N.C. App. 621, 495 S.E.2d 748 (1998); Groves v. Community Hous. Corp. of Haywood County, — N.C. App. —, 548 S.E.2d 535, 2001 N.C. App. LEXIS 345 (2001).

## Rule 12. Filing the record; Docketing the appeal; Copies of the record.

(a) *Time for filing record on appeal.* Within 15 days after the record on appeal has been settled by any of the procedures provided in this Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) *Docketing the appeal.* At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to G.S. 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in G.S. 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) *Copies of record on appeal.* The appellant need file but a single copy of the record on appeal. Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of

reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court.

In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof. (Adopted June 13, 1975; Amended November 27, 1984 — applicable to appeals in which the notice of appeal is filed on or after February 1, 1985; December 8, 1988 — 12(a) and (c) — effective for all judgments of the trial division entered on or after July 1, 1989; Amended March 6, 1997.)

**Legal Periodicals.** — For a survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

## CASE NOTES

I. In General.
II. Decisions Under Prior Law.

### I. IN GENERAL.

**Compliance Universally Mandatory.** — Since appellate rules apply to everyone, the court would dismiss the appeal of pro se defendant who failed to comply with N.C.R.A.P., Rules 9(a)(1)(c), 9(a)(1)(k), 9(b)(3), 10(c)(1), 12(a), and 28(b)(5). Bledsoe v. County of Wilkes, 135 N.C. App. 124, 519 S.E.2d 316 (1999).

**Section (e) of this rule** contemplates review of petitions for writ of certiorari to review motions for appropriate relief that have been denied; those allowed may be reviewed by the State Supreme Court. State v. Roberts, 351 N.C. 325, 523 S.E.2d 417 (2000).

**Notice Provision Jurisdictional.** — The provisions of this rule as it read prior to amendment effective July 1, 1989, requiring that no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken was jurisdictional and it imposed a limit on the aggrieved party's right to appeal. Only the appropriate appellate court could extend this 150-day time limit. State v. Ward, 61 N.C. App. 747, 301 S.E.2d 507, cert. denied, 309 N.C. 825, 310 S.E.2d 357 (1983).

**Counsel's failure to timely file the record on appeal** amounted to inadequate assistance of counsel, and the loss of one's only direct appeal because of counsel's neglect constitutes a serious deprivation. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

**Noncompliance Works Loss of Right of Appeal.** — A failure by appellant to meet the requirements of former Rule 11(e), or to comply with the mandate of subsection (a) of this rule, works a loss of the right of appeal. Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

**Failure to Settle Record.** — Appeal would be dismissed where appellants failed to settle the record on appeal prior to filing with the Court of Appeals. Higgins v. Town of China Grove, 102 N.C. App. 570, 402 S.E.2d 885 (1991).

**Time for Filing Record.** — Appellant was not entitled to use all the time less than 150 days and then file a record on appeal that had not been settled as required by N.C.R.A.P., Rule 11. McLeod v. Faust, 92 N.C. App. 370, 374 S.E.2d 417 (1988) (decided prior to 1989 amendment.)

**Failure to Respond to Defendants's Objections to Record Affected Time for Appeal.** — The court dismissed the appeal of plaintiffs, administratrix and relatives of deceased infant, who failed to file and settle the record within the time limit required by this rule, where although plaintiffs timely served the proposed record on appeal on defendants, they failed to respond to defendants's objections and proposed amendments or to make a request for judicial settlement. As a result, the proposed record on appeal, in conformity with defendants' objections and amendments, became the record on appeal 13 days later (10 days as per N.C.R. A. P., Rule 11(c) plus 3 days as per N.C.R. A. P., Rule 27(b)) since defendants served their objections and amendments by United States mail, and plaintiffs should have filed the record on appeal within fifteen days after that. Kellihan v. Thigpen, 140 N.C. App. 762, 538 S.E.2d 232 (2000).

**Failure to timely file the record on appeal was not excused by personal conflicts of class counsel** such as a district court hearing, a $ 1.4 million real estate closing, a mayoral debate, and a tight race for the office of mayor; class counsel also failed to file their motion for extension of time within the deadline prescribed for the record on appeal and their writ of certiorari was filed after the appel-

late court's first opinion in the case. Taylor v. City of Lenoir, 140 N.C. App. 337, 542 S.E.2d 222 (2001).

**Appellant bears the burden** of seeing that the record on appeal is properly settled and filed with the court. McLeod v. Faust, 92 N.C. App. 370, 374 S.E.2d 417 (1988).

**Settling the Record.** — Record on appeal was not settled until defendant signed a Stipulation and Settlement of the Record on Appeal. Forrest v. Pitt County Bd. of Educ., 100 N.C. App. 119, 394 S.E.2d 659, cert. denied, 327 N.C. 634, 399 S.E.2d 121 (1990), aff'd, 328 N.C. 327, 401 S.E.2d 366 (1991).

**Appeal would be dismissed where record on appeal was not filed in the appellate court within 150 days** from the giving of notice of appeal under this rule as it read prior to amendment effective July 1, 1989. Appellant's motion for a new trial or a modification of the judgment pursuant to § 1A-1, Rule 59, the court's order fixing the time for service of the record on appeal, and the court's orders denying appellant's § 1A-1, Rule 59 motion did not extend the time within which the appellant was required to file the record on appeal after giving notice of appeal from the judgment. C.C. Woods Constr. Co. v. Budd-Piper Roofing Co., 46 N.C. App. 634, 265 S.E.2d 506 (1980).

Dismissal of an earlier attempt to appeal was proper where plaintiff failed to file and docket the record in the appellate court within 150 days, under this rule as it read prior to amendment effective July 1, 1989. Lowder v. All Star Mills, Inc., 91 N.C. App. 621, 372 S.E.2d 739 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 234 (1989).

**Regardless of the time limits set by the trial court, plaintiff had no longer than 150 days** after giving notice of appeal to file the appeal record with the appellate court; the 150-day time limit may be extended only by an appropriate appellate court. Roberts v. Roberts, 97 N.C. App. 319, 388 S.E.2d 164 (1990) (decided prior to 1989 amendment).

**Order to Extend Time for Serving Record on Appeal Held Proper.** — Although counsel for the State erred in calculating the initial filing date, the judge properly entered his ex parte order extending the time for serving the proposed record on appeal where the State complied with N.C.R.A.P., Rule 27(c)(1) by giving oral and written notice of its motion to extend time to serve the proposed record on appeal, and it complied with the initial 15-day time limit specified in subdivision (a) of this rule, and with the outside time limit of 150 days in which to file the settled record on appeal from the time of oral notice of appeal. State ex rel. Thornburg v. Currency in Amount of $52,029.00 in U.S. Currency, 324 N.C. 276, 378 S.E.2d 1 (1989) (decided prior to 1989 amendment).

**Time of Docketing.** — Pursuant to subsection (b) an appeal is docketed upon the time of filing the record on appeal. Watson v. Watson, 118 N.C. App. 534, 455 S.E.2d 866 (1995).

**Applied** in Boone v. Fuller, 30 N.C. App. 107, 226 S.E.2d 191 (1976); In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976); Byrd v. Alexander, 32 N.C. App. 782, 233 S.E.2d 654 (1977); State v. Lesley, 33 N.C. App. 237, 234 S.E.2d 476 (1977); Indian Trace Co. v. Sanders, 33 N.C. App. 386, 235 S.E.2d 91 (1977); White v. Lawrence, 33 N.C. App. 631, 236 S.E.2d 30 (1977); City of Hickory v. Catawba Valley Mach. Co., 38 N.C. App. 387, 248 S.E.2d 71 (1978); State v. Crouch, 41 N.C. App. 612, 255 S.E.2d 192 (1979); State v. Brown, 42 N.C. App. 724, 257 S.E.2d 668 (1979); State v. Brown, 43 N.C. App. 532, 259 S.E.2d 309 (1979); In re Farmer, 52 N.C. App. 97, 277 S.E.2d 880 (1981); Piguerra v. Piguerra, 54 N.C. App. 188, 282 S.E.2d 567 (1981); Outlaw v. Outlaw, 89 N.C. App. 538, 366 S.E.2d 247 (1988); Hale v. Leisure, 100 N.C. App. 163, 394 S.E.2d 665 (1990).

**Quoted** in State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980); State v. Fletcher, 92 N.C. App. 50, 373 S.E.2d 681 (1988).

**Stated** in Coleman v. Arnette, 48 N.C. App. 733, 269 S.E.2d 755 (1980); Pacific Southbay Indus., Inc. v. Sure-Fire Distrib., Inc., 49 N.C. App. 172, 270 S.E.2d 515 (1980); Hailey v. Allgood Constr. Co., 95 N.C. App. 630, 383 S.E.2d 220 (1989); Richardson v. Bingham, 101 N.C. App. 687, 400 S.E.2d 757 (1991).

**Cited** in State v. McDiarmid, 36 N.C. App. 230, 243 S.E.2d 398 (1978); Black v. Clark, 36 N.C. App. 191, 243 S.E.2d 808 (1978); State v. Johnson, 38 N.C. App. 111, 247 S.E.2d 286 (1978); State v. Locklear, 50 N.C. App. 165, 272 S.E.2d 597 (1980); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); Davis v. Flynn, 57 N.C. App. 575, 291 S.E.2d 818 (1982); Broughton v. Baker, 537 F. Supp. 274 (E.D.N.C. 1982); State v. Bartlett, 64 N.C. App. 388, 307 S.E.2d 178 (1983); Broughton v. North Carolina, 717 F.2d 147 (4th Cir. 1983); In re Easement of Right of Way, 90 N.C. App. 303, 368 S.E.2d 639 (1988); Burlington Indus., Inc. v. Richmond County, DOT, 90 N.C. App. 577, 369 S.E.2d 119 (1988); Taylor v. Foy, 91 N.C. App. 82, 370 S.E.2d 442 (1988); Hall v. Simmons, 329 N.C. 779, 407 S.E.2d 816 (1991); State v. Allred, 131 N.C. App. 11, 505 S.E.2d 153 (1998).

## II. DECISIONS UNDER PRIOR LAW.

***Editor's note.*** — *The cases cited below were decided under former Rule 17, Rules of Practice in the Supreme Court of North Carolina, and under former Rule 5, Rules of Practice in the Court of Appeals of North Carolina.*

**This rule is mandatory,** not directory, and

must be uniformly enforced. State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

**Rule May Not Be Ignored or Dispensed with.** — Neither the judges, nor the solicitors, nor the attorneys, nor the parties have the right to ignore or dispense with the rule requiring docketing within the time prescribed. State v. Farrell, 3 N.C. App. 196, 164 S.E.2d 388 (1968); State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

**Rule Determines Time for Docketing Record on Appeal.** — The time for docketing the record on appeal in the Court of Appeals is determined by this rule and should not be confused with the time allowed for serving case on appeal and the time allowed for serving countercase or exceptions. The case on appeal, and the countercase or exceptions, and the settlement of case on appeal by the trial tribunal must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed under this rule. State v. Farrell, 3 N.C. App. 196, 164 S.E.2d 388 (1968); Ross v. Sampson, 4 N.C. App. 270, 166 S.E.2d 499 (1969); Reece v. Reece, 6 N.C. App. 606, 170 S.E.2d 546 (1969); State v. Fulk, 7 N.C. App. 68, 171 S.E.2d 81 (1969); State v. Brigman, 8 N.C. App. 316, 174 S.E.2d 48 (1970).

The case on appeal, and the countercase or exceptions, and the settlement of the case on appeal by the trial tribunal must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed under this rule. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

**Effect of Noncompliance.** — Where defendant fails to docket the record on appeal within the time provided by this rule, the appeal is subject to dismissal. State v. Farrell, 3 N.C. App. 196, 164 S.E.2d 388 (1968); State v. Garnett, 4 N.C. App. 367, 167 S.E.2d 63 (1969); State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969); Laws v. Palmer, 4 N.C. App. 510, 167 S.E.2d 49 (1969); North Carolina State Bar v. Temple, 6 N.C. App. 437, 170 S.E.2d 131 (1969), cert. denied, 397 U.S. 1023, 90 S. Ct. 1263, 25 L. Ed. 2d 532, rehearing denied, 397 U.S. 1081, 90 S. Ct. 1520, 25 L. Ed. 2d 820 (1970); Kurtz v. Allstate Ins. Co., 6 N.C. App. 625, 170 S.E.2d 496 (1969); Reece v. Reece, 6 N.C. App. 606, 170 S.E.2d 546 (1969); Dixon v. Dixon, 6 N.C. App. 623, 170 S.E.2d 561 (1969); State v. Fulk, 7 N.C. App. 68, 171 S.E.2d 81 (1969); Harrell v. Brinson, 7 N.C. App. 197, 171 S.E.2d 798 (1970); State v. Bocage, 8 N.C. App. 64, 173 S.E.2d 638 (1970); State v. Brigman, 8 N.C. App. 316, 174 S.E.2d 48 (1970); State v. Daughtry, 8 N.C. App. 318, 174 S.E.2d 76 (1970); State v. Gibbs, 8 N.C. App. 339, 174 S.E.2d 119 (1970).

Where the record on appeal was docketed in the Court of Appeals after the expiration of the time within which the appeal could be docketed in compliance with this rule, and there was no order extending the time for docketing, the Court of Appeals ex mero motu will dismiss the appeal for failure to comply with the rules. Young v. State Farm Mut. Auto. Ins. Co., 6 N.C. App. 443, 170 S.E.2d 90 (1969).

**Failure to Docket.** — When the appellant does not docket his appeal before the perusal of the docket of the district to which it belongs, the appellee is entitled, upon motion, to have the appeal docketed and dismissed. Rose v. Shaw, 105 N.C. 126, 10 S.E. 1055 (1890).

It is not discretionary with the Supreme Court to refuse to dismiss an appeal where appellant has failed to docket the case within the time required by this rule, but such refusal can only be based on sufficient legal excuse for the delay. Hewitt v. Beck, 152 N.C. 757, 67 S.E. 586 (1910); Carroll v. Victory Mfg. Co., 180 N.C. 660, 104 S.E. 528, aff'd, 180 N.C. 366, 104 S.E. 895 (1920).

An appeal from the conviction of a capital felony will be docketed and dismissed on motion of the Attorney General when not prosecuted as required by the rules of the Supreme Court regulating such matters, after an examination of the record of errors appearing on its face. State v. Taylor, 194 N.C. 738, 140 S.E. 728 (1927); State v. Thomas, 195 N.C. 458, 142 S.E. 474 (1928); State v. Clyburn, 195 N.C. 618, 143 S.E. 129 (1928); State v. Newsome, 196 N.C. 16, 144 S.E. 300 (1928); State v. Sentell, 208 N.C. 140, 179 S.E. 456 (1935); State v. Day, 215 N.C. 566, 2 S.E.2d 569 (1939); State v. Mayes, 216 N.C. 542, 5 S.E.2d 722 (1939); State v. Moore, 216 N.C. 543, 5 S.E.2d 719 (1939); State v. Mitchell, 216 N.C. 544, 5 S.E.2d 723 (1939); State v. Young, 216 N.C. 626, 5 S.E.2d 847 (1939); State v. Morrow, 220 N.C. 441, 17 S.E.2d 507 (1941); State v. Blue, 221 N.C. 36, 18 S.E.2d 697 (1942); State v. Wilfong, 222 N.C. 746, 24 S.E.2d 629 (1943). See State v. Alexander, 224 N.C. 478, 31 S.E.2d 357 (1944); State v. Taylor, 224 N.C. 479, 31 S.E.2d 367 (1944); State v. Buchanan, 224 N.C. 626, 31 S.E.2d 774 (1944); State v. Brooks, 224 N.C. 627, 31 S.E.2d 754 (1944).

**Extension of Time for Filing.** — To avoid dismissal, the appellant must get his appeal docketed within time, but the Supreme Court may, in its discretion, grant further time for filing the record if appellant filed the record proper in time and then moves for certiorari, showing delay was not attributable to him. Paris v. Carolina Portable Aggregates, Inc., 271 N.C. 471, 157 S.E.2d 131 (1967).

**Extension of Time for Docketing Record.** — The trial tribunal, upon motion by appellant, and upon a finding of good cause therefor, may enter an order extending the time for docketing the record on appeal in the Court

of Appeals. However, this cannot be accomplished by an order allowing additional time to serve case on appeal. State v. Farrell, 3 N.C. App. 196, 164 S.E.2d 388 (1968); Ross v. Sampson, 4 N.C. App. 270, 166 S.E.2d 499 (1969); Reece v. Reece, 6 N.C. App. 606, 170 S.E.2d 546 (1969); State v. Fulk, 7 N.C. App. 68, 171 S.E.2d 81 (1969); State v. Brigman, 8 N.C. App. 316, 174 S.E.2d 48 (1970).

An extension of time to docket the record on appeal cannot be accomplished by an extension of time to serve the case on appeal. Kurtz v. Allstate Ins. Co., 6 N.C. App. 625, 170 S.E.2d 496 (1969); State v. Brigman, 8 N.C. App. 316, 174 S.E.2d 48 (1970); State v. Gibbs, 8 N.C. App. 339, 174 S.E.2d 119 (1970).

**Appellee Must Obey Rules.** — A motion to dismiss an appeal upon the ground that the appellant did not cause the same to be docketed in accordance with this rule will not be granted where it appears that the appellee has also failed to comply with its requirements. One who seeks benefit under the rule must himself observe it. Barbee v. Green, 91 N.C. 158 (1884).

**When Motion to Dismiss May Be Made.** — A motion to docket and dismiss an appeal may be made at the beginning of the call of the district to which it belongs, or at any time thereafter during the term. In re Burwell's Will, 123 N.C. 125, 31 S.E. 382 (1898).

A motion to dismiss an appeal in the Supreme Court for failure of appellant to docket in the time required is in apt time when it is made during the term of court to which the appeal is returnable, and before the case is docketed. Standard Mirror Co. v. Philadelphia Cas. Co., 157 N.C. 28, 72 S.E. 826 (1911).

A motion by the appellee to docket and dismiss made before the docketing of the transcript, though not at the first opportunity, will be allowed. Worth v. City of Wilmington, 131 N.C. 532, 42 S.E. 964 (1902).

**When Motion Allowed in Capital Case.** — In a capital case, where the time for bringing up the case on appeal has expired, in the absence of any apparent error in the record before the court, the motion of the Attorney General to docket and dismiss, under this rule, is allowed. State v. Poole, 223 N.C. 394, 26 S.E.2d 858 (1943).

Where appellant did not docket the appeal or file transcript of the record on appeal within the time allowed, and failed to comply with mandatory rules of practice in the Supreme Court, the motion of the Attorney General to docket and dismiss will be allowed, but in a capital case this will be done only after a careful examination of the whole record fails to disclose error. State v. Scriven, 232 N.C. 198, 59 S.E.2d 428 (1950). See State v. Hall, 233 N.C. 310, 63 S.E.2d 636 (1951).

Where defendant fails to file statement of case on appeal or apply for writ of certiorari within the time allowed, the appeal will be dismissed on motion of the Attorney General, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to show error. State v. Garner, 230 N.C. 66, 51 S.E.2d 895 (1949); State v. Lewis, 230 N.C. 539, 53 S.E.2d 528 (1949).

Where a defendant convicted of a capital felony fails to file case on appeal in the superior court, the motion of the Attorney General to docket and dismiss, made after expiration of time agreed for perfecting the appeal and any extension of time which may have been granted, will be allowed after a careful inspection of the record proper fails to disclose error. State v. Nelson, 226 N.C. 529, 39 S.E.2d 391 (1946).

**Appellant Not Entitled to Notice of Dismissal Motion.** — An appellee entitled to move for the dismissal of an appeal because of appellants' failure to file transcript of record within the required time, is not required to give appellants notice of such motion. Johnston v. Whitehead, 109 N.C. 207, 13 S.E. 731 (1891); Kerr v. Drake, 182 N.C. 764, 108 S.E. 393 (1921).

**Duty of Clerk Where Judgment Stayed But Appeal Not Docketed.** — Even though execution of the judgment is stayed, unless the defendant shall proceed further and docket the appeal within the time prescribed, the clerk of the superior court wherein the case is tried should certify the facts to the Attorney General, to the end that he may move to docket and dismiss the appeal under this rule. State v. Watson, 208 N.C. 70, 179 S.E. 455 (1935).

**Case on Appeal Unnecessary.** — A motion to docket and dismiss an appeal will be allowed where no transcript has been docketed, and no case on appeal is necessary to entitle appellee to such dismissal. S.R. Fowle & Son v. Mitchell, 149 N.C. 581, 62 S.E. 311 (1908).

**Agreement of Parties.** — Where the parties have entered into a written agreement or an oral agreement not denied, that the appellee will not move to dismiss under this rule the Supreme Court will uphold the agreement and a motion to dismiss will be denied. McNeil v. Virginia-Carolina R.R., 173 N.C. 729, 92 S.E. 484 (1917).

**When Appellant Has Abandoned Appeal.** — When it appears from the record on file in the Supreme Court that the appellant has abandoned his appeal below, no motion to dismiss is necessary, and it will therefore be disallowed. Standard Mirror Co. v. Philadelphia Cas. Co., 157 N.C. 28, 72 S.E. 826 (1911).

**Withdrawal of Appeal.** — Defendant's motion to withdraw his appeal may be allowed by the Court of Appeals in its discretion. State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

The superior court had no authority to per-

mit or allow a defendant to withdraw an appeal to the Court of Appeals after the appeal is docketed here. State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

**Motion to Reinstate.** — Where an appeal has been dismissed under this rule, the appellant, applying for a reinstatement upon the ground that the trial judge has failed to settle the case, must show that he has had his record proper docketed in the Supreme Court, as required by the rules, or his motion will be denied. Caudle v. Morris, 158 N.C. 594, 74 S.E. 98, modified and aff'd, 160 N.C. 168, 76 S.E. 17 (1912).

A motion to reinstate a case on appeal must be denied when based on the same grounds upon which it was properly dismissed. McDowell v. J. S. Kent Co., 153 N.C. 555, 69 S.E. 626 (1910).

Where an appeal has been dismissed for failure to docket the transcript on appeal in proper time, it will not be reinstated upon the ground that appellant's counsel was prevented from appearing to settle the case before the trial judge on the days designated for the purpose, by other urgent business of his client, the appellant, requiring his presence elsewhere. Parker v. Southern Ry., 121 N.C. 501, 28 S.E. 347 (1897).

**A brief entitled "Reply to Argument of Appellees"** that was filed with the clerk of the Court of Appeals after argument in that court was not considered where appellant failed to obtain leave of the court as required by this rule. Roughton v. Jim Walter Corp., 8 N.C. App. 325, 174 S.E.2d 389 (1970).

## Rule 13. Filing and service of briefs.

(a) *Time for filing and service of briefs.*

(1) *Cases other than death penalty cases.* Within 30 days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. In civil appeals in forma pauperis, no printed record is created; accordingly, appellant's 30 days for filing and serving the brief shall run from the date of docketing the record on appeal in the appellate court. Within 30 days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

(2) *Death penalty cases.* Within 60 days after the Clerk of the Supreme Court has mailed the printed record to the parties, the defendant-appellant in a criminal appeal which includes a sentence of death shall file his brief in the office of the Clerk and serve copies thereof upon all other parties separately represented. Within 60 days after appellant's brief has been served, the State-appellee shall similarly file and serve copies of its brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 21 days after service of the brief of the State-appellee.

(b) *Copies reproduced by clerk.* A party need file but a single copy of his brief. At the time of filing the party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original brief shall also deliver to the clerk two legible photocopies thereof.

(c) *Consequence of failure to file and serve briefs.* If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court. (Adopted June 13, 1975; Amended October 7, 1980 — 13(a) — effective January 1, 1981; November 27, 1984 — 13(a) and (b) — effective February 1, 1985; June 30, 1988 — 13(a) — effective September 1, 1988; June 8, 1989 — 13(a) — effective September 1, 1989.)

CASE NOTES

**Applied** in In re Revocation of License to Operate Motor Vehicle of Church, 29 N.C. App. 511, 224 S.E.2d 697 (1976); Burris v. Shumate, 77 N.C. App. 209, 334 S.E.2d 514 (1985); Carolina Place Joint Venture v. Flamers Charburgers, Inc., — N.C. App. —, — S.E.2d —, 2001 N.C. App. LEXIS 731 (Aug. 21, 2001).

**Stated** in Aetna Cas. & Sur. Co. v. Continental Ins. Co., 110 N.C. App. 278, 429 S.E.2d 406 (1993).

**Cited** in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979); Davis v. City of Archdale, 81 N.C. App. 505, 344 S.E.2d 369 (1986); Taylor v. Walker, 84 N.C. App. 507, 353 S.E.2d 239 (1987); Fox v. Barrett, 90 N.C. App. 135, 367 S.E.2d 412 (1988); State v. Ellis, 100 N.C. App. 591, 397 S.E.2d 518 (1990); Alberti v. Manufactured Homes, Inc., 329 N.C. 727, 407 S.E.2d 819 (1991); United States Fid. & Guar. Co. v. Scott, 124 N.C. App. 224, 476 S.E.2d 404 (1996); Dare County Bd. of Educ. v. Sakaria, 127 N.C. App. 585, 492 S.E.2d 369 (1997); State v. Dayberry, 131 N.C. App. 406, 507 S.E.2d 587 (1998).

# ARTICLE III. REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

## Rule 14. Appeals of right from Court of Appeals to Supreme Court under G.S. 7A-30.

(a) *Notice of appeal; filing and service.* Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. For cases which arise from the Industrial Commission, a copy of the notice of appeal shall be served on the Chairman of the Industrial Commission. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

(b) *Content of notice of appeal.*

(1) *Appeal based upon dissent in court of appeals.* In an appeal which is based upon the existence of a dissenting opinion in the Court of Appeals the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under G.S. 7A-30; and shall state the issue or issues which are the basis of the dissenting opinion and which are to be presented to the Supreme Court for review.

(2) *Appeal presenting constitutional question.* In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the issue or issues which are the basis of the constitutional claim and which are to be presented to the Supreme Court for review; shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall

affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) *Record on appeal.*

(1) *Composition.* The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) *Transmission; Docketing; Copies.* Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction. In appeals in forma pauperis, the Clerk of the Court of Appeals will transmit with the original record on appeal the copies filed by the appellant in that Court under Rule 12(c).

(d) *Briefs.*

(1) *Filing and service; Copies.* Within 30 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within 30 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within 30 days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party may be required to pay to the Clerk a deposit fixed by the Clerk to cover the cost of reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the Clerk two legible copies thereof.

(2) *Failure to file or serve.* If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the Court. (Adopted June 13, 1975; amended January 31, 1977 — 14(d)(1); October 7, 1980 — 14(d)(1) — effective January 1, 1981; November 27, 1984 — 14(a), (b), and (d) — applicable to appeals in which the notice of appeal is filed on or after February 1, 1985; June 30, 1988 — 14(b)(2), (d)(1) — effective September 1, 1988; June 8, 1989 — 14(d)(1) — effective September 1, 1989; Amended July 1, 1997.)

**Editor's note.** — The 1981 amendment to Rule 28 eliminated the right to incorporate by reference any argument contained in a brief filed in the Court of Appeals, which was formerly contained in subsection (d) of that rule.

CASE NOTES

**Applied** in Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); Beck v. Carolina Power & Light Co., 307 N.C. 267, 297 S.E.2d 397 (1982); Higgins v. Simmons, 324 N.C. 100, 376 S.E.2d 449 (1989).

**Stated** in State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

**Cited** in Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981); State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982); Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 310 S.E.2d 338 (1984); G & S Bus. Servs., Inc. v. Fast Fare, Inc., 94 N.C. App. 483, 380 S.E.2d 792 (1989).

## Rule 15. Discretionary review on certification by Supreme Court under G.S. 7A-31.

(a) *Petition of party.* Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any grounds specified in G.S. 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the North Carolina State Bar, the Property Tax Commission, the Board of State Contract Appeals, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under G.S. Chap. 15A, Art. 89, or in valuation of exempt property under G.S. Chap. 1C.

(b) *Same; Filing and service.* A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chairman of the Industrial Commission. A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

(c) *Same; Content.* The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. 7A-31 for discretionary review. The petition shall state each question for which review is sought, and shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required; but supporting authorities may be set forth briefly in the petition.

(d) *Response.* A response to the petition may be filed by any other party within 10 days after service of the petition upon him. No supporting brief is required, but supporting authorities may be set forth briefly in the response. If, in the event that the Supreme Court certifies the case for review, the respondent would seek to present questions in addition to those presented by the petitioner, those additional questions shall be stated in the response. A motion for extension of time is not permitted.

(e) *Certification by Supreme Court; How determined and ordered.*

(1) *On petition of a party.* The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) *On initiative of the court.* The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to G.S. 7A-31 is made without prior notice to the parties and without oral argument.

(3) *Orders; Filing and service.* Any determination to certify for review and any determination not to certify made in response to petition will be recorded by the Supreme Court in a written order. The Clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the Clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the Clerk of the Supreme Court.

(f) *Record on appeal.*

(1) *Composition.* The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note *de novo* any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) *Filing; Copies.* When an order of certification is filed with the Clerk of the Court of Appeals, he will forthwith transmit the original record on appeal to the Clerk of the Supreme Court. The Clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the Clerk may require a deposit of the petitioner to cover the costs thereof.

(g) *Filing and service of briefs.*

(1) *Cases certified before determination by Court of Appeals.* When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed his brief in the Court of Appeals and served copies before the case is certified, the Clerk of the Court of Appeals shall forthwith transmit to the Clerk of the Supreme Court the original brief and any copies already reproduced by him for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed his brief in the Court of Appeals and served copies before the case is certified, he shall file his brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) *Cases certified for review of Court of Appeals determinations.* When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within 30 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 30 days after a copy of appellant's brief is served upon him. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

(3) *Copies.* A party need file or the Clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The Clerk of the Supreme Court will thereupon procure from the Court of Appeals or will himself reproduce copies for distribution as directed by the Supreme Court. The Clerk may require a deposit of any party to cover the costs of reproducing copies of his brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also

deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(4) *Failure to file or serve.* If an appellant fails to file and serve his brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the Court's own initiative. If an appellee fails to file and serve his brief within the time allowed by this Rule 15, he may not be heard in oral argument except by permission of the Court.

(h) *Discretionary review of interlocutory orders.* An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) *Appellant, appellee defined.* As used in this Rule 15, the terms "appellant" and "appellee" have the following meanings:

(1) With respect to the Supreme Court Review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means a party who appealed from the trial tribunal; "appellee," a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means the party aggrieved by the determination of the Court of Appeals; "appellee," the opposing party. Provided, that in its order of certification, the Supreme Court may designate either party appellant or appellee for purposes of proceeding under this Rule 15. (Adopted June 13, 1975; Amended October 7, 1980 — 15(g)(2) — effective January 1, 1981; November 18, 1981 — 15(a); June 30, 1988 — 15(a), (c), (d), (g)(2) — effective September 1, 1988; December 8, 1988 — 15(i)(2) — effective July 1, 1989; June 8, 1989 — 14(g)(2) — effective September 1, 1989; Amended July 1, 1997; Amended October 18, 2001.)

CASE NOTES

**Rules Similar to United States Supreme Court's.** — The rules and procedures of the North Carolina Supreme Court regarding writs of certiorari are substantially similar to those of the United States Supreme Court. Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990), cert. denied, 498 U.S. 1032, 111 S. Ct. 693, 112 L. Ed. 2d 683 (1991).

**Applied** in Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982); Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984); Higgins v. Simmons, 324 N.C. 100, 376 S.E.2d 449 (1989); Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994).

**Cited** in Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981); Henry v. Edmisten, 315 N.C. 474, 340 S.E.2d 720 (1986); Pearson v. Martin, 319 N.C. 449, 355 S.E.2d 496 (1987); State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989); State v. Wise, 326 N.C. 421, 390 S.E.2d 142 (1990).

## Rule 16. Scope of review of decisions of court of appeals.

(a) *How determined.* Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Except where the appeal is based solely upon the existence of a dissent in the Court of Appeals, review in the Supreme Court is limited to consideration of the questions stated in the notice of appeal filed pursuant to Rule 14(b)(2) or the petition for discretionary review and the response thereto filed pursuant to Rule 15(c) and (d), unless further limited by the Supreme Court, and properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

(b) *Scope of review in appeal based solely upon dissent.* Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those questions which are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review, pursuant to Rule 15, or by petition for writ of certiorari, pursuant to Rule 21.

(c) *Appellant, appellee defined.* As used in this Rule 16, the terms "appellant" and "appellee" have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, "appellant" means the petitioner, "appellee" means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, "appellant" means the party aggrieved by the decision of the Court of Appeals; "appellee" means the opposing party. Provided that in its order of certification the Supreme Court may designate either party "appellant" or "appellee" for purposes of proceeding under this Rule 16. (Adopted June 13, 1975; Amended November 3, 1983 — 16(a) and (b) — applicable to all notices of appeal filed in the Supreme Court on and after January 1, 1984; June 30, 1988 — 16(a) and (b) — effective September 1, 1988; July 26, 1990 — 16(a) — effective October 1, 1990.)

**Legal Periodicals.** — For 1984 survey of appellate procedure, "Appellate Rule 16(b) and New Requirements for Appeals of Right," see 63 N.C.L. Rev. 1074 (1985).

For a brief discussion of the scope of review under this section, see 22 Campbell L. Rev. 253 (2000).

## CASE NOTES

**Scope of Review Limited in Appeals of Right Based on Dissent.** — The intent of subsection (b) of this rule, effective with notices of appeal filed in the Supreme Court on and after January 1, 1984, is to further ensure that in appeals of right based solely upon dissent, review by the Supreme Court shall be limited to those questions on which there was division in the intermediate appellate court. Such review has never been intended for claims on which that court has rendered unanimous decisions. C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., 311 N.C. 170, 316 S.E.2d 298 (1984).

Where a plaintiff's appeal is based solely on the existence of a dissent in the Court of Appeals, the scope of the Supreme Court's review on the plaintiff's appeal is limited to the issues raised in that dissent. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

On appeal to the Supreme Court pursuant to § 7A-30(2) by defendant from a decision of the Court of Appeals, one judge dissenting, in which a majority of the panel found no error in defendant's convictions of felonious breaking and felonious larceny, where the dissent in the Court of Appeals disagreed only with the majority's treatment of the second question presented to that court, and defendant did not petition the Supreme Court for discretionary review of the other questions, only the second question was properly before the Supreme Court for review, notwithstanding defendant's attempt to bring forward other questions in his brief. State v. Reilly, 313 N.C. 499, 329 S.E.2d 381 (1985), considering also, however, the question of the sufficiency of the evidence on the question of guilt, in order to prevent manifest injustice.

Under § 7A-30(2), only the issue raised in the dissent is properly before the Supreme Court for review. This rule defines the permissible scope of review in such cases. Blumenthal v. Lynch, 315 N.C. 571, 340 S.E.2d 358 (1986), addressing, nevertheless, additional issues which arise frequently in the administration of estates and must often be determined by the Department of Revenue under the court's residual power or authority under N.C.R.A.P., Rule 2.

When an appeal is taken pursuant to § 7A-30(2), the scope of the Supreme Court's review is properly limited to the issue upon which the dissent in the Court of Appeals diverges from

the opinion of the majority. State v. Hooper, 318 N.C. 680, 351 S.E.2d 286 (1987).

Where appeal was before the Supreme Court pursuant to § 7A-30(2), review was limited to the issues raised in dissent. Medlin v. Bass, 327 N.C. 587, 398 S.E.2d 460 (1990).

**Issues Not Set Out in Dissent.** — Where an appeal of right is taken to the Supreme Court based solely on a dissent in the Court of Appeals, and the dissenter does not set out the issues upon which he bases his disagreement with the majority, the appellant has no issue properly before the court. Such appeals are subject to dismissal. C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., 311 N.C. 170, 316 S.E.2d 298 (1984).

**Petitioners whose cases come before the Supreme Court on discretionary review are limited by this rule** to those questions they have presented in their briefs to the Court of Appeals. Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 343 S.E.2d 174 (1986).

**This rule does not limit the state's right of appeal** to only the matters which are the basis of the dissent in the court of appeals. State v. Kaley, 343 N.C. 107, 468 S.E.2d 44 (1996).

**Questions Must First Be Presented in Court of Appeals.** — The potential scope of review by the Supreme Court is limited by the questions properly presented for first review in the Court of Appeals. The attempt to smuggle in new questions is not approved. Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977).

**Only Decision of Court of Appeals Is Before Supreme Court for Review.** — After there has been a determination by the Court of Appeals, review by the Supreme Court, whether by appeal of right or by discretionary review, is to determine whether there is any error of law in the decision of the Court of Appeals and only the decision of that court is before the Supreme Court for review. Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977).

**Effect of Equally Divided Supreme Court.** — Where one member of the Supreme Court does not participate in the consideration or decision of a case, and the remaining six justices are equally divided as to whether the decision of the Court of Appeals should be affirmed or reversed, the decision of the Court of Appeals is affirmed without becoming a precedent. Wayfaring Home, Inc. v. Ward, 301 N.C. 518, 272 S.E.2d 121 (1980); Greenhill v. Crabtree, 301 N.C. 520, 271 S.E.2d 908 (1980).

**Applied** in State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 240 S.E.2d 345 (1978); State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980); In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980); Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980); Harrell v. W.B. Lloyd Constr. Co., 300 N.C. 353, 266 S.E.2d 626 (1980); Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981); State v. Cox, 303 N.C. 75, 277 S.E.2d 376 (1981); Brown v. Fulford, 311 N.C. 205, 316 S.E.2d 220 (1984); In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984); State v. Holloway, 311 N.C. 573, 319 S.E.2d 261 (1984); Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 329 S.E.2d 350 (1985); State v. Parker, 316 N.C. 295, 341 S.E.2d 555 (1986); State v. Raines, 319 N.C. 258, 354 S.E.2d 486 (1987); Murrow v. Daniels, 321 N.C. 494, 364 S.E.2d 392 (1988); State v. Anderson, 322 N.C. 22, 366 S.E.2d 459 (1988); State v. Sturkie, 325 N.C. 225, 381 S.E.2d 462 (1989); Hill v. Bechtel, 336 N.C. 526, 444 S.E.2d 186 (1994); City of New Bern v. New Bern-Craven County Bd. of Educ., 338 N.C. 430, 450 S.E.2d 735 (1994); Gray v. North Carolina Ins. Underwriting Ass'n, 352 N.C. 61, 529 S.E.2d 676 (2000).

**Quoted** in Phelps v. Phelps, 337 N.C. 344, 446 S.E.2d 17 (1994).

**Stated** in State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397 (1985).

**Cited** in Cline v. Cline, 297 N.C. 336, 255 S.E.2d 399 (1979); Booker v. Duke Medical Ctr., 297 N.C. 458, 256 S.E.2d 189 (1979); State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981); Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981); Colonial Pipeline v. Weaver, 310 N.C. 93, 310 S.E.2d 338 (1984); State v. Atkins, 311 N.C. 272, 316 S.E.2d 306 (1984); Jones v. All Am. Life Ins. Co., 312 N.C. 725, 325 S.E.2d 237 (1985); Jackson v. Housing Auth., 316 N.C. 259, 341 S.E.2d 523 (1986); Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986); Forsyth County Bd. of Social Servs. v. Division of Social Servs., 317 N.C. 689, 346 S.E.2d 414 (1986); State v. Lilley, 318 N.C. 390, 348 S.E.2d 788 (1986); State v. Kimbrell, 320 N.C. 762, 360 S.E.2d 691 (1987); Campbell ex rel. McMillan v. Pitt County Mem. Hosp., 321 N.C. 260, 362 S.E.2d 273 (1987); United Labs., Inc. v. Kuykendall, 322 N.C. 643, 370 S.E.2d 375 (1988); Aronov v. Secretary of Revenue, 323 N.C. 132, 371 S.E.2d 468 (1988); McLean v. McLean, 323 N.C. 543, 374 S.E.2d 376 (1988).

## Rule 17. Appeal bond in appeals under G.S. §§ 7A-30, 7A-31.

(a) *Appeal of right.* In all appeals of right from the Court of Appeals to the Supreme Court in civil cases, the party who takes appeal shall, upon filing the

notice of appeal in the Supreme Court, file with the Clerk of that Court a written undertaking, with good and sufficient surety in the sum of $250, or deposit cash in lieu thereof, to the effect that he will pay all costs awarded against him on the appeal to the Supreme Court.

(b) *Discretionary review of Court of Appeals determination.* When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subdivision (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) *Discretionary review by Supreme Court before Court of Appeals determination.* When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) *Appeals in forma pauperis.* No undertakings for costs are required of a party appealing in forma pauperis. (Adopted June 13, 1975; Amended June 19, 1978, effective July 1, 1978; July 26, 1990 — 17(a) — effective October 1, 1990.)

**Note to July 1, 1978 Amendment.** — Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449, which provides, "In criminal cases no security for costs is required upon appeal to the appellate division." Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181, upon which Rule 7 was based. Chap. 711 became effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

## ARTICLE IV. DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO APPELLATE DIVISION

### Rule 18. Taking appeal; Record on appeal — Composition and settlement.

(a) *General.* Appeals of right from administrative agencies, boards, or commissions (hereinafter "agency") directly to the appellate division under G.S. 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as hereinafter provided in this Article.

(b) *Time and method for taking appeals.*

(1) The times and methods for taking appeals from an agency shall be as provided in this Rule 18 unless the statutes governing the agency provide otherwise, in which case those statutes shall control.

(2) Any party to the proceeding may appeal from a final agency determination to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within 30 days after receipt of a copy of the final order of the agency. The final order of the agency is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final agency determination from which appeal is taken and the court to which appeal is taken; and

shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(3) If a transcript of fact-finding proceedings is not made by the agency as part of the process leading up to the final agency determination, the appealing party may contract with the reporter for production of such parts of the proceedings not already on file as he deems necessary, pursuant to the procedures prescribed in Rule 7.

(c) *Composition of record on appeal.* The record on appeal in appeals from any agency shall contain:

(1) An index of the contents of the record, which shall appear as the first page thereof;

(2) A statement identifying the commission or agency from whose judgment, order or opinion appeal is taken, the session at which the judgment, order or opinion was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

(3) A copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a statement showing same;

(4) Copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency, including a Form 44 for all cases which originate from the Industrial Commission, to be filed with the agency to present and define the matter for determination;

(5) A copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the agency from which appeal was taken;

(6) So much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(7) Where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for an understanding of all errors assigned;

(8) Copies of all other papers filed and statements of all other proceedings had before the agency or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed pursuant to Rule 9(c)(2) and (3);

(9) A copy of the notice of appeal from the agency, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3); and

(10) assignments of error to the actions of the agency, set out as provided in Rule 10.

(11) a statement, where appropriate, that the record of proceedings was made with an electronic recording device.

(d) *Settling the record on appeal.* The record on appeal may be settled by any of the following methods:

(1) *By agreement.* Within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) *By appellee's approval of appellant's proposed record on appeal.* If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), file in the office of the agency head and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 30 days after service of the proposed record on appeal upon him, an appellee may file in the office of the agency head and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) *By conference or agency order; Failure to request settlement.* If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the agency head to convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the agency head, shall be served upon all other parties. Each party shall promptly provide to the agency head a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for agency conference or for settlement by order results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

Upon receipt of a request for settlement of the record on appeal, the agency head shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than 15 days after service of the request upon the agency head. The agency head or a delegate appointed in writing by the agency head shall settle the record on appeal by order entered not more than 20 days after service of the request for settlement upon the agency. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the agency head is a party to the appeal, the agency head shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these Rules and the appointing order.

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by agency order.

(e) *Further procedures.* Further procedures for perfecting and prosecuting the appeal shall be as provided by these Rules for appeals from the courts of the trial divisions.

(f) *Extensions of time.* The times provided in this Rule for taking any action may be extended in accordance with the provisions of Rule 27(c). (Adopted June 13, 1975; Amended June 21, 1977; October 7, 1980 — 18(d)(3) — effective January 1, 1981; February 27, 1985 — applicable to all appeals in which the notice of appeal is filed on or after March 15, 1985; July 26, 1990 — 18(b)(3),

(d)(1) and (d)(2) — effective October 1, 1990; March 6, 1997 —18(c) — effective July 1, 1997; November 21, 1997 — effective February 1, 1998.)

**Editor's note.** — The order of the Supreme Court of February 27, 1985, which amended this rule and Rule 20 and deleted Rule 19, provided that inasmuch as the rules affected make the procedures for direct appeals from administrative agencies to the appellate division consistent with the rules for bringing appeals from the courts of the trial division which were amended on November 27, 1984, to be effective February 1, 1985, the amendments of February 27, 1985, would be applicable to all appeals in which the notice of appeal was filed on or after March 15, 1985.

CASE NOTES

**A party may not circumvent the manner in which appeals are taken under § 105-345(a)** by relying on subdivision (b)(2) of this rule or other state or federal rules of civil procedure; therefore, the appropriate analysis for the time for taking such appeal lies in § 105-345, where the appealing party has 30 days after the entry of the final order or decision to file its notice of appeal and exceptions, not from a party's receipt of a copy of the final order. In re Gen. Tire, Inc., 102 N.C. App. 38, 401 S.E.2d 391 (1991).

**Record on appeal was not settled until** defendant signed a Stipulation and Settlement of the Record on Appeal. Forrest v. Pitt County Bd. of Educ., 100 N.C. App. 119, 394 S.E.2d 659 (1990), aff'd, 328 N.C. 327, 401 S.E.2d 366 (1991).

**Applied** in State v. Williams, 40 N.C. App. 178, 252 S.E.2d 245 (1979); State ex rel. Utils. Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838 (1980); Fisher v. E.I. Du Pont De Nemours, 54 N.C. App. 176, 282 S.E.2d 543 (1981); Paschall v. North Carolina Dep't of Cor., 88 N.C. App. 520, 364 S.E.2d 144 (1988); Hardin v. Venture Constr. Co., 107 N.C. App. 758, 421 S.E.2d 601 (1992); Crouse v. Flowers Baking Co., 123 N.C. App. 555, 473 S.E.2d 372 (1996).

**Stated** in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

**Cited** in Pittman v. Inco, Inc., 78 N.C. App. 134, 336 S.E.2d 637 (1985); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987); Rowan Health Properties, Inc. v. North Carolina Dep't of Human Resources, 89 N.C. App. 285, 365 S.E.2d 635 (1988); In re Barbour, 112 N.C. App. 368, 436 S.E.2d 169 (1993); Porter v. Fieldcrest Cannon, Inc., 133 N.C. App. 23, 514 S.E.2d 517 (1999).

OPINIONS OF ATTORNEY GENERAL

**Industrial Commission.** — The only specific authorities conferred on the chairman of the Industrial Commission are to settle records on appeal, certify in forma pauperis appeals, set appeal bonds, and designate deputies to sit on the Full Commission when necessary. See opinion of Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990).

## Rule 19. [Reserved].

**Editor's note.** — Rule 19 was repealed by order of February 27, 1985, effective March 15, 1985.

The order of the Supreme Court of February 27, 1985, which repealed this section and amended Rules 18 and 20, provided that inasmuch as these rules make the procedures for direct appeals from administrative agencies to the appellate division consistent with the rules for bringing appeals from the courts of the trial division which were amended on November 27, 1984, to be effective February 1, 1985, the amendments adopted February 27, 1985, would be applicable to all appeals in which the notice of appeal was filed on or after March 15, 1985.

## Rule 20. Miscellaneous provisions of law governing in agency appeals.

Specific provisions of law pertaining to stays pending appeals from any agency to the appellate division, to pauper appeals therein, and to the scope of review and permissible mandates of the Court of Appeals therein shall govern

the procedure in such appeals notwithstanding any provisions of these rules which may prescribe a different procedure. (Amended February 27, 1985, eff. March 15, 1985.)

**Editor's note.** — The order of the Supreme Court of February 27, 1985, which amended this rule and Rule 18 and repealed Rule 19, provided that inasmuch as the rules affected make the procedures for direct appeals from administrative agencies to the appellate division consistent with the rules for bringing appeals from the courts of the trial division which were amended on November 27, 1984, to be effective February 1, 1985, the amendments of February 27, 1985, would be applicable to all appeals in which the notice of appeal was filed on or after March 15, 1985.

CASE NOTES

**Applied** in North Carolina State Bar v. Nelson, 107 N.C. App. 543, 421 S.E.2d 163 (1992).

# ARTICLE V. EXTRAORDINARY WRITS

## Rule 21. Certiorari.

(a) *Scope of the writ.*

(1) *Review of the judgments and orders of trial tribunals.* The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(2) *Review of the judgments and orders of the Court of Appeals.* The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action; or for review of orders of the Court of Appeals when no right of appeal exists.

(b) *Petition for writ; To which appellate court addressed.* Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) *Same; Filing and service; Content.* The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chairman of the Industrial Commission. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) *Response; Determination by court.* Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be

made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) *Petition for writ in post conviction matters; To which appellate court addressed.* Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to life imprisonment or death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases.

(f) *Petition for writ in post conviction matters — Death penalty cases.* A petition for writ of certiorari to review orders of the trial court on motions for appropriate relief in death penalty cases shall be filed in the Supreme Court within 60 days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party. The responding party shall file its response within 30 days of service of the petition. (Adopted June 13, 1975; Amended November 18, 1981 — 21(a) and (e); November 27, 1984 — 21(a) — effective February 1, 1985; September 3, 1987 — 21(e) — effective for all judgments of the trial division entered on and after July 24, 1987; December 8, 1988 — 21(f) — applicable to all cases in which the trial division order is entered on or after July 1, 1989; Amended July 1, 1997.)

**Cross References.** — As to certiorari generally, see § 1-269 and notes thereto.

## CASE NOTES

I. In General.
II. Decisions Under Prior Law.

### I. IN GENERAL.

**Rules Similar to United States Supreme Court's.** — The rules and procedures of the North Carolina Supreme Court regarding writs of certiorari are substantially similar to those of the United States Supreme Court. Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990), cert. denied, 111 S. Ct. 693, 112 L. Ed. 2d 683 (1991).

**Habeas Corpus Proceedings for Prisoners Under Sentence of Death or Life Imprisonment.** — By analogy, subsection (b) of this rule and § 7A-27(a) and repealed § 15-180.2 were logically applicable to petitions for certiorari to review judgments in habeas corpus proceedings involving the restraint of prisoners under sentences of death or life imprisonment. State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977), decided prior to adoption of subsection (f) of this rule.

**The Court of Appeals has authority to issue writ of certiorari to review trial court order** "when no right of appeal from an interlocutory order exists." But where authority was exercised by another panel of the court with respect to the matters presented, its grant of certiorari is the law of the case and cannot be overruled by any panel of the Court of Appeals. Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984).

Construing Rules 3, 27(c) and 21(a)(1) together, the court concluded that Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner. Anderson v. Hollifield, 345 N.C. 480, 480 S.E.2d 661 (1997).

Although the trial court exceeded its authority and violated N.C.R. App. P. 27(c) when it entered an order on 12 September 1996 allowing defendant to appeal as of right from the judgments and sentences imposed on 16 June 1994, the Court of Appeals chose to suspend the Rules pursuant to subdivision (a)(1) of this rule and treat the otherwise untimely appeal as before them on a writ of certiorari. State v. White, 127 N.C. App. 565, 492 S.E.2d 48 (1997).

**The Court May Treat Appeal as Writ of Certiorari.** — Although the defendant, who was stripped of her jail credit for time in home detention, could not appeal under § 15A-1444, the court elected to treat her appeal as a petition for a writ of certiorari and granted it, pursuant to this section. State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875 (2000).

**Where the determination of the correct-**

**ness of the judge's denial of plaintiffs' motion to amend** was necessary to decide an appeal from a Rule 12(b)(6) dismissal, which motion was properly before the Court of Appeals, the court would treat the appeal of the denial of the motion to amend as a petition for certiorari under subdivision (a)(1) of this rule. Hoots v. Pryor, 106 N.C. App. 397, 417 S.E.2d 269, cert. denied, 332 N.C. 345, 421 S.E.2d 148 (1992).

**A writ of certiorari will only be issued upon a showing of appropriate circumstances in a civil case** where the right of appeal has been lost because of failure to take timely action or where no right to appeal from an interlocutory order exists. Graham v. Rogers, 121 N.C. App. 460, 466 S.E.2d 290 (1996).

**The court refused to grant a writ pursuant to this section** where the Attorney General's appeal was interlocutory and where he had no right to appeal in the first place from the court's denial of his challenge to class action attorneys' fees. Bailey v. North Carolina Dep't of Revenue, 353 N.C. 142, 540 S.E.2d 313 (2000).

**Where denial of Rule 60(b) motion was in the nature of an interlocutory order** because plaintiff's voluntary dismissal resulted in there being no action pending, and defendants would not suffer the loss of a substantial right absent an appeal, in the court's discretion pursuant to Rules 2 and 21 the appeal was treated as a writ of certiorari. Troy v. Tucker, 126 N.C. App. 213, 484 S.E.2d 98 (1997).

**Applied** in State v. Brown, 42 N.C. App. 724, 257 S.E.2d 668 (1979); Ziglar v. E.I. Du Pont De Nemours & Co., 53 N.C. App. 147, 280 S.E.2d 510 (1981); Harding v. North Carolina, 683 F.2d 850 (4th Cir. 1982); Latch v. Latch, 63 N.C. App. 498, 305 S.E.2d 564 (1983); Bumgarner v. Tomblin, 63 N.C. App. 636, 306 S.E.2d 178 (1983); Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984); Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984); Department of Social Servs. v. Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984); In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984); Coleman v. Interstate Cas. Ins. Co., 84 N.C. App. 268, 352 S.E.2d 249 (1987); Phelps v. Duke Power Co., 86 N.C. App. 455, 358 S.E.2d 89 (1987); Mack v. Moore, 91 N.C. App. 478, 372 S.E.2d 314 (1988); Garris v. Garris, 92 N.C. App. 467, 374 S.E.2d 638 (1988); Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176 (1991); State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830 (1993); Woodard v. North Carolina Local Governmental Employees' Retirement Sys., 110 N.C. App. 83, 428 S.E.2d 849 (1993); State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993); Baker v. Baker, 115 N.C. App. 337, 444 S.E.2d 478 (1994); Leandro v. State, 122 N.C. App. 1, 468 S.E.2d 543 (1996), cert. granted, — N.C. —, 472 S.E.2d 11 (1996), aff'd in part and rev'd in part, 346 N.C. 336, 488 S.E.2d 249 (1997); Mullis v. Sechrest, 126 N.C. App. 91, 484 S.E.2d 423 (1997), cert. granted, 346 N.C. 548, 488 S.E.2d 806 (1997), rev'd on other grounds, 347 N.C. 548, 495 S.E.2d 721 (1998); State v. Sexton, 141 N.C. App. 344, 539 S.E.2d 675 (2000).

**Quoted** in Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 251 S.E.2d 443 (1979); Burlington Indus., Inc. v. Richmond County, DOT, 90 N.C. App. 577, 369 S.E.2d 119 (1988).

**Stated** in Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980).

**Cited** in Black v. Clark, 36 N.C. App. 191, 243 S.E.2d 808 (1978); Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979); State v. Tate, 44 N.C. App. 567, 261 S.E.2d 506 (1980); Cauble v. City of Asheville, 45 N.C. App. 152, 263 S.E.2d 8 (1980); Pendley v. Ayers, 45 N.C. App. 692, 263 S.E.2d 833 (1980); State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980); Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980); Pacific Southbay Indus., Inc. v. Sure-Fire Distrib., Inc., 49 N.C. App. 172, 270 S.E.2d 515 (1980); Moore v. Moody, 304 N.C. 719, 285 S.E.2d 811 (1982); Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982); State v. Crews, 302 S.E.2d 457 (N.C. 1983); Rudder v. Lawton, 62 N.C. App. 277, 302 S.E.2d 487 (1983); State v. Milby, 305 S.E.2d 189 (N.C. 1983); State v. Pitts, 307 S.E.2d 172 (N.C. 1983); Industrotech Constructors, Inc. v. Duke Univ., 67 N.C. App. 741, 314 S.E.2d 272 (1984); State v. Couch, 325 S.E.2d 634 (N.C. 1985); State v. Moore, 315 N.C. 738, 340 S.E.2d 401 (1986); State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986); State v. Lowery, 318 N.C. 54, 347 S.E.2d 729 (1986); Leonard v. Hammond, 804 F.2d 838 (4th Cir. 1986); Clugh v. Lakewood Manor, 102 N.C. App. 757, 403 S.E.2d 534 (1991); Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420 (1993); Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993); Adams v. Jones, 114 N.C. App. 256, 441 S.E.2d 699 (1994); Onslow County v. Phillips, 123 N.C. App. 317, 473 S.E.2d 643 (1996), modified on other grounds, 346 N.C. 265, 485 S.E.2d 618 (1997); United States v. Howard, 115 F.3d 1151 (4th Cir. 1997); Ruff v. Parex, Inc., 131 N.C. App. 534, 508 S.E.2d 524 (1998); Lee v. Mutual Cmty. Sav. Bank, 136 N.C. App. 808, 525 S.E.2d 854 (2000); Hyde v. Chesney Glen Homeowners Ass'n, Inc., 137 N.C. App. 605, 529 S.E.2d 499 (2000); Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co., 141 N.C. App. 569, 541 S.E.2d 157 (2000), cert. denied, 353 N.C. 370, 547 S.E.2d 433 (2001); Gibson v.

Mena, — N.C. App. —, 548 S.E.2d 745, 2001 N.C. App. LEXIS 332 (2001).

## II. DECISIONS UNDER PRIOR LAW.

*Editor's note. — The cases cited below were decided under former Rule 34, Rules of Practice in the Supreme Court of North Carolina*

**Rule Strictly Applied.** — Failure to comply strictly with the regulations contained in this rule will result in a dismissal. In re McCoy, 233 F. Supp. 409 (E.D.N.C. 1964).

**When Certiorari Should Be Applied for.** — Where the appellant can show good and sufficient cause why his case on appeal had not been docketed in the Supreme Court in the time required by the rules, or that he was not at fault, he should file a transcript of the record proper and move for a certiorari for the statement of the case, which may be done at any time during the term before appellee moves to dismiss it. McNeil v. Virginia-Carolina R.R., 173 N.C. 729, 92 S.E. 484 (1917); Rose v. Rocky Mount, 184 N.C. 609, 113 S.E. 506 (1922).

**Further Time Not Matter of Right. —** Where the record of a case on appeal is not docketed in the Supreme Court at the time required, it will be dismissed, but the court may, in its discretion and not as a matter of right of the appellant, grant further time for the filing of the record, if the appellant files the record proper in apt time and thereupon moves for a certiorari, showing that the delay was not attributable to himself. State ex rel. Mills v. National Sur. Co., 192 N.C. 52, 133 S.E. 172 (1926); Pruitt v. Wood, 199 N.C. 788, 156 S.E. 126 (1930).

**Effect of Agreement for Extension of Time.** — Where the parties have agreed upon an extension of time for the service of their respective cases on appeal that the delay will cause the docketing of the case too late to come within the rule, the appellant having used his full time may not successfully move the Supreme Court for a certiorari upon the ground that the delay was caused by a loss of the papers in it, for which he was not responsible, without proof sufficient to overcome evidence in denial of the allegation. Baker v. Hare, 192 N.C. 788, 136 S.E. 113 (1926).

**Legal Excuse Decided by Supreme Court.** — Whether the appellant has legal excuse in not docketing his case on appeal in time for it to be regularly heard at the call of the district to which it belongs is a matter for the Supreme Court to determine upon his docketing the record proper and moving for a certiorari under the rule. State v. Johnson, 183 N.C. 730, 110 S.E. 782 (1922).

**Question of Laches May Be Heard.** — Where the appellant asserts that he is not in default in docketing his appeal in the time required by the rule, he may apply for a certiorari to bring up the transcript of the case, or the omitted part, and thus only have the question of his laches therein passed upon. Stone v. Ledbetter, 191 N.C. 777, 133 S.E. 162 (1926).

**Motion Too Late After Argument.** — Where the plaintiff's motion for a certiorari was disallowed at a former term of the Supreme Court without prejudice, for the purpose of allowing him to renew his motion after he had applied to the trial judge to correct the case, the plaintiff should again move the court for a writ before the call of the district to which the case belonged, and it comes too late after argument of the case. Todd v. Mackie, 160 N.C. 352, 76 S.E. 245 (1912).

**Motion Denied After Appeal Dismissed.** — A motion for a certiorari to bring up the case on appeal will be denied if made after the appellee has had it docketed and dismissed. Cox v. Kinston Carolina R.R. & Lumber Co., 177 N.C. 227, 98 S.E. 704 (1919).

**When Appellee Prevents Timely Docketing of Appeal.** — Where the appellant is prevented from docketing his appeal within the time prescribed, in consequence of the conduct of the appellee or his counsel, he is entitled to the writ of certiorari to bring up the case. Briggs v. Jervis, 98 N.C. 454, 4 S.E. 631 (1887).

**Appellant Must Docket All of Available Record.** — When the appeal is not docketed at or before the time prescribed, the appellant must docket all of the record proper, or so much thereof as he can obtain, with an affidavit, as to why the entire record cannot be docketed and move at that time for a certiorari. If he fails to do so, the appellee has the right to docket the certificate and have the appeal dismissed. Caudle v. Morris, 158 N.C. 594, 74 S.E. 98, modified and aff'd, 160 N.C. 168, 76 S.E. 17 (1912); State v. Johnson, 183 N.C. 730, 110 S.E. 782 (1922); Hardy v. Heath, 188 N.C. 271, 124 S.E. 564 (1924).

Appellant's motion for a writ of certiorari will be denied where the petition is not verified and no transcript of the record has been filed nor any good reason shown for failure to file it. Critz v. Sparger, 121 N.C. 283, 28 S.E. 365 (1897); Rothchild v. McNichol, 121 N.C. 284, 28 S.E. 364 (1897).

**Filing of Original Papers Insufficient.** — A transcript of the record proper should be filed by appellant in the Supreme Court to entitle him to move for a certiorari; and the filing of the original papers, which should remain in the office of the superior court, is insufficient. Lindsey v. Supreme Lodge of Knights of Honor, 172 N.C. 818, 90 S.E. 1013 (1916).

**When Case on Appeal Not Prepared.** — Where a case and counter-case are served within the time as extended by agreement, but neither is accepted, appellant must immediately request a settlement, file the record proper, and sue out certiorari; otherwise appel-

lee may move to docket and dismiss. Waynesville Transp. Co. v. Waynesville Lumber Co., 168 N.C. 60, 84 S.E. 54 (1915); Washam & Patterson Motor Co. v. Reep, 186 N.C. 509, 119 S.E. 821 (1923).

**Certiorari Denied When Case Unsettled in Agreed Time.** — Where the parties to an action have agreed, or the judge at their request has allowed an extension of time for service of case and counter-case, etc., that will prevent its being docketed in the time, and consequently no case has been settled by the trial judge, appellant's motion in the Supreme Court for a writ of certiorari will be denied. Waller v. Dudley, 193 N.C. 354, 137 S.E. 149 (1927).

**Appeal by Person Without Counsel Treated as Petition for Certiorari.** — Where plaintiff, appearing in propria persona because of an asserted inability to employ counsel, fails to comply with the rules of court governing appeals, the Supreme Court, in the exercise of its supervisory jurisdiction, may treat the purported appeal as a petition for certiorari. Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963), cert. denied, 379 U.S. 850, 85 S. Ct. 93, 13 L. Ed. 2d 53, rehearing denied, 379 U.S. 925, 85 S. Ct. 279, 13 L. Ed. 2d 328 (1964).

**Failure to Pay Clerk's Fees.** — The failure of the clerk below to send up the transcript after the case on appeal had been filed in his office will not excuse appellant's failure to have the transcript or case on appeal filed, where there is no allegation that the appellant had tendered the fees for such transcript and was otherwise free from laches. Critz v. Sparger, 121 N.C. 283, 28 S.E. 365 (1897).

**Extent of Waiver by Consent.** — The parties to an appeal, without the consent of the court, cannot waive the rule of the Supreme Court requiring that a transcript of the record proper, or all thereof that may be had, shall be filed therein as the basis for the motion for a certiorari; but they may, by written agreement, consent that the appeal may be docketed at the next ensuing term of the Supreme Court. Murphy v. Carolina Elec. Co., 174 N.C. 782, 93 S.E. 456 (1917).

**Application for Certiorari in Criminal Case.** — Where the appellant in a criminal action has failed to have his case docketed in the time required by the rules in the Supreme Court, in order to preserve his right to appeal it is required that he file an application for a certiorari, addressed to the sound discretion of the Supreme Court, and show a good and sufficient reason for granting his motion therefor, and where this has not been done the appeal will be dismissed upon motion of the State. State v. Harris, 199 N.C. 377, 154 S.E. 628 (1930).

## Rule 22. Mandamus and prohibition.

(a) *Petition for writ; To which appellate court addressed.* Applications for the writs of mandamus or prohibition directed to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) *Same; Filing and service; Content.* The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk shall docket the petition.

(c) *Response; Determination by court.* Within 10 days after service upon him of the petition the respondent or any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

CASE NOTES

**The failure of the trial court to enter an order** is not a matter to be addressed on an appeal from that inaction, but instead is to be addressed through a writ of mandamus filed with the Court of Appeals. Stevens v. Guzman, 140 N.C. App. 780, 538 S.E.2d 590 (2000), cert. granted, 353 N.C. 397, 547 S.E.2d 437 (2001).

**Applied** in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

**Cited** in State ex rel. Comm'r of Ins. v. North Carolina Fire Ins. Rating Bureau, 291 N.C. 55, 229 S.E.2d 268 (1976); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

## Rule 23. Supersedeas.

(a) *Pending review of trial tribunal judgments and orders.*

(1) *Application — When appropriate.* Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and (i) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (ii) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) *Same — How and to which appellate court made.* Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except where an appeal from a superior court is initially docketed in the Supreme Court no petition will be entertained by the Supreme Court unless application has been first made to the Court of Appeals and by that court denied.

(b) *Pending review by Supreme Court of Court of Appeals decisions.* Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) *Petition: Filing and service; Content.* The petition shall be filed with the clerk of the court to which application is being made, and shall be accompanied by proof of service upon all other parties. The petition shall be verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which issuance of the writ is sought and by that court denied or vacated, or of facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain: (1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and (2) a statement of reasons why the writ should issue in justice to the applicant. The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under G.S. § 7A-31, or in a petition to either appellate court for certiorari, mandamus or prohibition.

(d) *Response; Determination by court.* Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be

accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting papers. No briefs or oral arguments will be received or allowed unless ordered by the court upon its own initiative.

(e) *Temporary stay.* Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by separate paper, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by separate paper, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte. In capital cases, such stay, if granted shall remain in effect until the period for filing a petition for certiorari in the United States Supreme Court has passed without a petition being filed, or until certiorari on a timely filed petition has been denied by that Court. At that time, the stay shall automatically dissolve. (Amended January 1, 1981; July 1, 1997.)

CASE NOTES

**Quoted** in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

**Cited** in North Carolina Fire Ins. Rating Bureau v. Ingram, 29 N.C. App. 338, 224 S.E.2d 229 (1976); Green v. Duke Power Co., 305 N.C. 603, 290 S.E.2d 593 (1982); In re Burgess, 57 N.C. App. 268, 291 S.E.2d 323 (1982); Leonard v. Hammond, 804 F.2d 838 (4th Cir. 1986); Edward Valves, Inc. v. Wake County, 343 N.C. 426, 471 S.E.2d 342 (1996), cert. denied, 519 U.S. 1112, 117 S. Ct. 952, 136 L. Ed. 2d 839 (1997); Southern Furn. Hdwe., Inc. v. Branch Banking & Trust Co., 136 N.C. App. 695, 526 S.E.2d 197 (2000); Buncombe County ex rel. Blair v. Jackson, 138 N.C. App. 284, 531 S.E.2d 240 (2000).

### Rule 24. Form of papers: Copies.

A party need file with the appellate court but a single copy of any paper required to be filed in connection with applications for extraordinary writs. The court may direct that additional copies be filed. The clerk will not reproduce copies.

CASE NOTES

**Cited** in Curry v. First Fed. Savs. & Loan Ass'n, 125 N.C. App. 108, 479 S.E.2d 286 (1996), cert. denied, 346 N.C. 278, 487 S.E.2d 544 (1997).

## ARTICLE VI. GENERAL PROVISIONS

### Rule 25. Penalties for failure to comply with rules.

(a) *Failure of appellant to take timely action.* If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

Motions heard under this rule to courts of the trial divisions may be heard and determined by any judge of the particular court specified in Rule 36 of these rules; motions made under this rule to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner. The procedure in all motions made under this rule to trial tribunals shall be that provided for motion practice by the N. C. Rules of Civil Procedure; in all motions made under this rule to courts of the appellate division, shall be that provided by Rule 37 of these rules.

(b) *Sanctions for failure to comply with rules.* A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these appellate rules. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals. (Adopted June 13, 1975; Amended December 8, 1988 — effective July 1, 1989; Amended March 6, 1997.)

**Legal Periodicals.** — For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

## CASE NOTES

I. In General.
II. Decisions Under Prior Law.

### I. IN GENERAL.

**Construction of Second Sentence.** — The title and first and third sentences of what is now subsection (a) of this rule clearly indicate that the motions described in the second sentence are only those for failure to comply with the Rules of Appellate Procedure or with court orders requiring action to perfect the appeal. The commentary makes this interpretation even clearer. Notably absent from the commentary is any suggestion that the drafters intended to alter existing case law. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Taken out of context, the second sentence of what is now subsection (a) of this rule might provide the trial court with authority to dismiss interlocutory appeals. However, elementary principles of construction require that words and phrases be interpreted contextually and in harmony with the underlying purposes of the whole. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

**The court lacks discretion under this rule to permit the notice of appeal to be served after the expiration of 10 (now 30) days** following the entry of judgment. Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

**The Rules of Appellate Procedure are mandatory** and a party's failure to comply with them frustrates the review process and subjects the party to sanctions, which may include dismissal of the appeal. Dillingham v. North Carolina Dep't of Human Resources, 132 N.C. App. 704, 513 S.E.2d 823 (1999).

**The trial division possesses limited authority to dismiss appeals** under this rule. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

**Tolling of Time for Appeal.** — In order for the exception to the 30-day requirement under N.C.R.A.P., Rule 3 to have any effect, when a party makes a motion enumerated in the rule, the opposing party's time for appeal is tolled. If the motion is withdrawn, the opposing party has 30 days from the withdrawal to file an appeal. Landingham Plumbing & Heating of N.C., Inc. v. Funnell, 102 N.C. App. 814, 403 S.E.2d 604 (1991).

**Extension of Time to Serve Proposed Record on Appeal.** — The Court of Appeals would not allow plaintiffs' appeal to go forward, where the court previously had denied the plaintiffs' motion to extend the time within which to serve its proposed record on appeal, and permitting appeal would be tantamount to a retroactive grant of such extension. Webb v. McKeel, 132 N.C. App. 816, 513 S.E.2d 596 (1999).

**Failure to Comply May Result in Dismissal.** — Plaintiff's appeal, which stated three separate errors in one assignment, failed to state the statutory authority exceeded, the procedure violated and the error of law committed, and failed to provide "clear and specific record or transcript references" relating to each alleged error, violated the Rules of Appellate Procedure, and would be dismissed. Bowen v.

North Carolina Dep't of Health & Human Servs., 135 N.C. App. 122, 519 S.E.2d 60 (1999).

**Dismissal Upheld.** — Dismissal of an earlier attempt to appeal was proper where plaintiff failed to file and docket the record in the appellate court within 150 days. Lowder v. All Star Mills, Inc., 91 N.C. App. 621, 372 S.E.2d 739 (1988), cert. denied, 324 N.C 113, 377 S.E.2d 234 (1989), decided prior to the amendments to the rules effective July 1, 1989.

Appeal would be dismissed where appellants failed to settle the record on appeal prior to filing with the Court of Appeals. Higgins v. Town of China Grove, 102 N.C. App. 570, 402 S.E.2d 885 (1991).

Court would not address the merits of plaintiff's argument regarding alleged fraudulent conveyances because she violated N.C.R.A.P., Rule 28(b)(5), in that she failed to reference in her brief the assignment of error supporting the argument. Therefore, this part of plaintiff's appeal would be dismissed. Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

**Dismissal Denied.** — Judge properly denied school board's motion to dismiss appeal under this rule; sufficient good cause was shown to allow appeal to proceed where judge stated that he had heard arguments and considered material in the case file, and the proposed record on appeal, among other things, presented no factual dispute and only two questions of law. State ex rel. Thornburg v. Currency in Amount of $52,029.00, 324 N.C. 276, 378 S.E.2d 1 (1989).

**Motions to dismiss appeal are made to the court from which the appeal was taken** until the appeal has been docketed in the appellate court; where plaintiff's appeal was docketed in court of appeals on May 20, 1993, defendant's motion to dismiss filed over five months earlier, on December 2, 1992, was properly directed to the trial court. Dodd v. Steele, 114 N.C. App. 632, 442 S.E.2d 363 (1994).

**Length of Brief.** — Where appellate brief was 42 pages in length, thereby exceeding the 35 page limit, and counsel proffered minimal justification for the rule violation, the court imposed a fine and reimbursement for copying expenses to be paid by counsel personally. State v. Hudson, 123 N.C. App. 336, 473 S.E.2d 415 (1996), rev'd on other grounds, 345 N.C. 729, 483 S.E.2d 436 (1997).

Although violations of appellate rules regarding the type size and page length of briefs subjected the appeal to dismissal, the appellate court elected to hear the appeal, but sanctioned both parties' attorneys by taxing one-half of the printing costs to each of them. Howell v. Morton, 131 N.C. App. 626, 508 S.E.2d 804 (1998).

**Applied** in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979); State v. Evans, 46 N.C. App. 327, 264 S.E.2d 766 (1980); McLeod v. Faust, 92 N.C. App. 370, 374 S.E.2d 417 (1988); Richardson v. Bingham, 101 N.C. App. 687, 400 S.E.2d 757 (1991); Aetna Cas. & Sur. Co. v. Continental Ins. Co., 110 N.C. App. 278, 429 S.E.2d 406 (1993); King v. King, 112 N.C. App. 92, 434 S.E.2d 669 (1993); Whitfield v. Todd, 116 N.C. App. 335, 447 S.E.2d 796 (1994); Hearndon v. Hearndon, 132 N.C. App. 98, 510 S.E.2d 183 (1999).

**Quoted** in Lockert v. Lockert, 116 N.C. App. 73, 446 S.E.2d 606 (1994); Long v. Harris, 137 N.C. App. 461, 528 S.E.2d 633 (2000); Kellihan v. Thigpen, 140 N.C. App. 762, 538 S.E.2d 232 (2000); Taylor v. City of Lenoir, 140 N.C. App. 337, 542 S.E.2d 222 (2001).

**Stated** in Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981); Hailey v. Allgood Constr. Co., 95 N.C. App. 630, 383 S.E.2d 220 (1989); Herring v. Branch Banking & Trust Co., 108 N.C. App. 780, 424 S.E.2d 925 (1993); Hixson v. Krebs, 136 N.C. App. 183, 523 S.E.2d 684 (1999).

**Cited** in Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979); Rowan Health Properties, Inc. v. North Carolina Dep't of Human Resources, 89 N.C. App. 285, 365 S.E.2d 635 (1988); Williams v. Hillhaven Corp., 91 N.C. App. 35, 370 S.E.2d 423 (1988); State v. Easter, 101 N.C. App. 36, 398 S.E.2d 619 (1990); In re Barbour, 112 N.C. App. 368, 436 S.E.2d 169 (1993); Tate Terrace Realty Investors, Inc. v. Currituck County, 127 N.C. App. 212, 488 S.E.2d 845 (1997), cert. denied, 347 N.C. 409, 496 S.E.2d 394 (1997); Paris v. Woolard, 128 N.C. App. 416, 497 S.E.2d 283 (1998), cert. denied, 348 N.C. 283, 502 S.E.2d 843 (1998); State v. Lee, 348 N.C. 474, 501 S.E.2d 334 (1998); State v. Hill, 132 N.C. App. 209, 510 S.E.2d 413 (1999); Fickley v. Greystone Enters., 140 N.C. App. 258, 536 S.E.2d 331 (2000); Zenobile v. McKecuen, — N.C. App. —, 548 S.E.2d 756, 2001 N.C. App. LEXIS 328 (2001).

## II. DECISIONS UNDER PRIOR LAW.

***Editor's note.*** — *The cases cited below were decided under former Rule 48, Rules of Practice in the Court of Appeals of North Carolina.*

**For failure to docket record on appeal within the time prescribed** by the rules, the appeal should be dismissed ex mero motu. State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969); State v. Garnett, 4 N.C. App. 367, 167 S.E.2d 63 (1969), overruled on other grounds, State v. Baines, 324 N.C. 539, 380 S.E.2d 118 (1989).

Where the record on appeal was docketed in the Court of Appeals after the expiration of the time within which the appeal could be docketed, and there was no order extending the time for docketing, the Court of Appeals ex mero

motu will dismiss the appeal for failure to comply with the rules. Young v. State Farm Mut. Auto. Ins. Co., 6 N.C. App. 443, 170 S.E.2d 90 (1969).

Pursuant to this rule, an appeal will be dismissed ex mero motu for failure to docket within the time prescribed. North Carolina State Bar v. Temple, 6 N.C. App. 437, 170 S.E.2d 131 (1969), cert. denied, 397 U.S. 1023, 90 S. Ct. 1263, 25 L. Ed. 2d 532, rehearing denied, 397 U.S. 1081, 90 S. Ct. 1520, 25 L. Ed. 2d 820 (1970).

An appeal is dismissed by the Court of Appeals ex mero motu where the record on appeal is docketed more than the allowed time after the date of judgment appealed from and the record contains no order extending the time for docketing the record on appeal, an order allowing defendant additional time within which to prepare and serve the case on appeal being insufficient to extend the time for docketing the record on appeal. State v. Fulk, 7 N.C. App. 68, 171 S.E.2d 81 (1969).

A defendant's appeal to the Court of Appeals is subject to dismissal for failure to docket the record on appeal within the time allowed. State v. Bocage, 8 N.C. App. 64, 173 S.E.2d 638 (1970); State v. Brigman, 8 N.C. App. 316, 174 S.E.2d 48 (1970).

## Rule 26. Filing and service.

(a) *Filing.* Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail or by electronic means as set forth in this Rule.

(1) *Filing by mail:* Filing may be accomplished by mail addressed to the clerk, but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service, if first class mail is utilized.

(2) *Filing by electronic means:* Filing in the appellate courts may be accomplished by electronic means by the use of the electronic filing site at www.ncappellatecourts.org. All documents may be filed electronically through the use of this site. A document filed by use of the official electronic web site is deemed filed as of the time that the document is received electronically.

Responses and motions may be filed by facsimile machines, if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court.

In all cases where a document has been filed by facsimile machine pursuant to this rule, counsel must forward the following items by first class mail, contemporaneously with the transmission: the original signed document, the electronic transmission fee, and the applicable filing fee for the document, if any. The party filing a document by electronic means shall be responsible for all costs of the transmission and neither they nor the electronic transmission fee may be recovered as costs of the appeal. When a document is filed to the electronic filing site at www.ncappellatecourts.org, counsel may either have their account drafted electronically by following the procedures described at the electronic filing site, or they must forward the applicable filing fee for their document by first class mail, contemporaneously with the transmission.

(b) *Service of all papers required.* Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) *Manner of service.* Service may be made in the manner provided for service and return of process in Rule 4 of the N. C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid,

properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail. When a document is filed electronically to the official web site, service also may be accomplished electronically by use of the other counsel(s)'s correct and current electronic mail address(es) or service may be accomplished in the manner described previously in this subsection.

(d) *Proof of service.* Papers presented for filing shall contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) *Joint appellants and appellees.* Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) *Numerous parties to appeal proceeding separately.* When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) *Form of papers; Copies.* Papers presented to either appellate court for filing shall be letter size (8½ x 11″) with the exception of wills and exhibits. All printed matter must appear in at least 12 point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 10 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and text books cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record. If the document has been filed electronically by use of the official web site at www.ncappellatecourts.org, the manuscript signature of counsel of record is not required. (Adopted June 13, 1975; Amended May 5, 1981 — 26(g) — effective for all appeals arising from cases filed in the court of original jurisdiction after July 1, 1982; February 11, 1982 — 26(c); December 7, 1982 — 26(g) — effective for documents filed on and after March 1, 1983; November 27, 1984 — 26(a) — effective for documents filed on and after February 1, 1985; June 30, 1988 — 26(a) and (g) — effective September 1, 1988; July 26, 1990 — 26(a) — effective October 1, 1990; amended July 1, 1997; effective November 15, 1999; Amended October 18, 2001.)

**Legal Periodicals.** — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

CASE NOTES

**Requirements Jurisdictional.** — The requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements of § 1-279, N.C.R.A.P., Rule 3 and this rule are met, the appeal must be dismissed. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979), cert. denied, 299 N.C. 122, 262 S.E.2d 6 (1980).

**When Papers Must Be Served.** — This rule is interpreted as requiring that the papers referred to therein be served on all other parties to the appeal on the day of or before the day of filing; therefore, service of notice of appeal on plaintiff's counsel was timely where service was made by depositing the notice in the mail on the same day, though several hours later, that notice was filed with the clerk of court. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979), cert. denied, 299 N.C. 122, 262 S.E.2d 6 (1980).

**Notice of appeal must be served on opposing party either before the notice is filed or on the same day** the notice is filed. Shaw v. Hudson, 49 N.C. App. 457, 271 S.E.2d 560 (1980).

**Waiver of Service.** — Failure to serve the notice of appeal was a defect in the record analogous to failure to serve process. Therefore, a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal. Hale v. Afro-American Arts Int'l, Inc., 335 N.C. App. 231, 436 S.E.2d 588 (1993).

**Service on Appointed Special Advocate for State.** — Where, at a mental health hearing session, the State was represented by an appointed special advocate, which special advocate was present at the hearing, had knowledge of the evidence offered, and was qualified to determine for the State if the proposed record on appeal was accurate, he alone was the "attorney of record" within the meaning of this rule, and the proposed record on appeal should be served on him as special advocate rather than the Attorney General. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312, vacated on other grounds, 300 N.C. 747, 268 S.E.2d 221 (1980).

**Unauthorized Change to Papers.** — In filing the record on appeal, an attorney for the Department of Revenue made an unauthorized change in the caption of the case in violation of this rule. State v. Sneed, 112 N.C. App. 361, 435 S.E.2d 579 (1993).

**Type Size.** — This rule requires all type to be "at least 11 point," while Appendix B specifies "10-12 point type." To the extent that Appendix B conflicts with this rule, this rule governs and no brief shall be submitted in less than eleven point type. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

A brief presented in eleven point type will contain no more than three lines of double spaced text in a single, vertical inch, or twenty-seven (27) lines of double-spaced text on a properly formatted 8.5 by 11 inch page. The numbering of the pages, as provided in Appendix B, is not included in the text of the page and shall be centered in the one-inch margin at the top of the page. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

Under this rule, all printed matter in briefs must appear in at least 11 point type, or the appeal is subject to dismissal. H.B.S. Contractors v. Cumberland County Bd. of Educ., 122 N.C. App. 49, 468 S.E.2d 517 (1996), discretionary review improvidently allowed, 345 N.C. 178, 477 S.E.2d 926 (1996).

Appellate rules governing the size of type to be used and the limitation on the number of pages to be included in appellate briefs prevent unfair advantage to any litigant and insure a level playing field for all parties on appeal. Howell v. Morton, 131 N.C. App. 626, 508 S.E.2d 804 (1998).

An appellate brief may not contain more than 65 characters and spaces per line, nor more than 27 lines of double-spaced text per page. Barnard v. Rowland, 132 N.C. App. 416, 512 S.E.2d 458 (1999).

A brief submitted in 11 point type will contain not more than 65 characters and spaces per line, and no more than 27 lines of double-spaced text per page. Howell v. Morton, 131 N.C. App. 626, 508 S.E.2d 804 (1998).

An appellate brief may be presented in the same type-setting as used by the Court of Appeals in its slip opinions - Courier 10 cpi - which insures no more than 65 characters per line and 27 lines per page, and Courier 10 cpi may be achieved in computer and word processing technology by using not smaller than size 12 Courier or Courier New font. Barnard v. Rowland, 132 N.C. App. 416, 512 S.E.2d 458 (1999).

Where all appellate briefs contained in excess of 91 characters per line in violation of APP-26(g), double costs would be assessed, with the first set to be shared equally among all parties, and the second to be paid in equal share by counsel for the parties. Barnard v. Rowland, 132 N.C. App. 416, 512 S.E.2d 458 (1999).

**Improper Type Size.** — Where petitioner submitted a brief utilizing 14 characters per inch type size instead of the ten characters mandated by subsection (g) double costs of the appeal were imposed. Tate Terrace Realty In-

vestors, Inc. v. Currituck County, 127 N.C. App. 212, 488 S.E.2d 845 (1997), cert. denied, 347 N.C. 409, 496 S.E.2d 394 (1997).

**Characters per Inch.** — Characters per inch, referred to in some modern word processing systems as "cpi," is not equivalent to point size and defines only the width or "set" size of a character, which includes spaces, punctuation, and letters. This rule does not speak in terms of characters per inch; however, in order to provide a uniform construction of this rule and prevent unfair advantage to any litigant, it is necessary to provide for a limit on the characters per inch. Ten characters per inch is the standard used in the slip opinions of the Court of Appeals and the Supreme Court and the standard that will be applied to the briefs filed with the Court of Appeals. Using this standard, a properly formatted 8.5 by 11 inch page will contain no more than 65 characters per line. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

**Double Spacing.** — Dismissal of an appeal was proper, where the appellant failed to double space the text of her brief and failed to set out in her brief references to the assignments of error upon which her presented issues and arguments were based. Steingress v. Steingress, 350 N.C. 64, 511 S.E.2d 298 (1999).

**Prospective Application of Construction of Rule.** — Where the point size in defendants' appellate brief did not comply with this rule, but neither the rule nor the Court of Appeals had previously construed this rule, the court would consider the arguments presented in defendants' brief. This rule, as construed in this case, will be applied by the Court to briefs, petitions, notices of appeal, responses and motions filed after the date of this opinion. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

**Appeal Dismissed.** — The defendants' numerous, flagrant violations of the Rules of Appellate Procedure warranted dismissal of the appeal, where the defendants did not provide a listing of assignments of error, they included as appendices to their brief certain documents that were excluded by an earlier order, they failed to include other required material, and they used incorrect point type and spacing. Duke Univ. v. Bishop, 131 N.C. App. 545, 507 S.E.2d 904 (1998).

**Applied** in Edwards v. West, 128 N.C. App. 570, 495 S.E.2d 920 (1998), cert. denied, 348 N.C. 282, 501 S.E.2d 918 (1998).

**Stated** in Hixson v. Krebs, 136 N.C. App. 183, 523 S.E.2d 684 (1999).

**Quoted** in Cato v. Cato, 118 N.C. App. 569, 455 S.E.2d 918 (1995).

**Cited** in Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976); Swilling v. Swilling, 99 N.C. App. 551, 393 S.E.2d 303 (1990); Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990); Munn v. Munn, 112 N.C. App. 151, 435 S.E.2d 74 (1993); National Fruit Prod. Co. v. Justus, 112 N.C. App. 495, 436 S.E.2d 156 (1993); Partin v. Dalton Property Assocs., 112 N.C. App. 807, 436 S.E.2d 903 (1993); Dockery v. North Carolina Dep't of Human Resources, 120 N.C. App. 827, 463 S.E.2d 580 (1995); Thompson v. Town of Warsaw, 120 N.C. App. 471, 462 S.E.2d 691 (1995); Webster Enters., Inc. v. Selective Ins. Co., 125 N.C. App. 36, 479 S.E.2d 243 (1996); Ferebee v. Hardison, 126 N.C. App. 230, 484 S.E.2d 857 (1997), rev'd in part, 347 N.C. 346, 492 S.E.2d 354 (1997); Paris v. Woolard, 128 N.C. App. 416, 497 S.E.2d 283 (1998), cert. denied, 348 N.C. 283, 502 S.E.2d 843 (1998); Matthews v. Food Lion, Inc., 135 N.C. App. 784, 522 S.E.2d 587 (1999).

## Rule 27. Computation and extension of time.

(a) *Computation of time.* In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) *Additional time after service by mail.* Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(c) *Extensions of time; By which court granted.* Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing or the responses thereto prescribed by these rules or by law.

(1) *Motions for extension of time in the trial division.* The trial tribunal for good cause shown by the appellant may extend once for no more than 30 days the time permitted by Rule 11 or Rule 18 for the service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state.

Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner.

(2) *Motions for extension of time in the appellate division.* All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may only be made to the appellate court to which appeal has been taken.

(d) *Motions for extension of time; How determined.* Motions for extension of time made in any court may be determined *ex parte,* but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time. Provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard. (Adopted June 13, 1975; Amended March 7, 1978 — 27(c); October 4, 1978 — 27(c) — effective January 1, 1979; November 27, 1984 — 27(a) and (c) — effective February 1, 1985; December 8, 1988 — 27(c) — effective for all judgments of the trial tribunal entered on or after July 1, 1989; July 26, 1990 — 27(c) and (d) — effective October 1, 1990; Amended October 18, 2001.)

**Legal Periodicals.** — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

## CASE NOTES

**Construction with Other Rules.** — Construing Rules 3, 27(c) and 21(a)(1) together, the court concluded that Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner. Anderson v. Hollifield, 345 N.C. 480, 480 S.E.2d 661 (1997).

**The time for taking an appeal may not be enlarged by the appellate courts.** — O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

**In calculating whether notice of appeal is timely given,** the 10th (now 30th) day is not considered if it is a Saturday, Sunday, or legal holiday. In such case, the 10 (now 30) day period runs at the end of the next day that is not a Saturday, Sunday, or legal holiday. Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984).

**Appeal was dismissed where record on appeal was not filed in appellate court within 150 days from giving of notice of appeal.** — Appellant's motion for a new trial or a modification of the judgment pursuant to § 1A-1, Rule 59, the court's order fixing the time for service of the record on appeal, and the court's orders denying appellant's § 1A-1, Rule 59 motion did not extend the time within which the appellant was required to file the record on appeal after giving notice of appeal from the judgment. C.C. Woods Constr. Co. v. Budd-Piper Roofing Co., 46 N.C. App. 634, 265 S.E.2d 506 (1980), decided prior to amendments to the rules effective July 1, 1989.

**Failure to Respond to Defendants's Objections to Record Affected Time for Appeal.** — The court dismissed the appeal of plaintiffs, administratrix and relatives of deceased infant, who failed to file and settle the record within the time limit required by this rule, where although plaintiffs timely served the proposed record on appeal on defendants, they failed to respond to defendants's objections and proposed amendments or to make a request for judicial settlement. As a result, the proposed record on appeal, in conformity with defendants' objections and amendments, became the record on appeal 13 days later (10 days as per N.C.R. A. P., Rule 11(c) plus 3 days

as per N.C.R. A. P., Rule 27(b)) since defendants served their objections and amendments by United States mail, and plaintiffs should have filed the record on appeal within 15 days after that. Kellihan v. Thigpen, 140 N.C. App. 762, 538 S.E.2d 232 (2000).

**Notice of Appeal Held Timely.** — Notice of appeal filed on July 5, 1983, was timely, where the 10th day fell on Sunday, July 3, 1983, and the next day, July 4, 1983, was a legal holiday. Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984), decided prior to amendments to the rules effective July 1, 1989.

**Notice Provision Contained in N.C.R.A.P., Rule 12 Is Jurisdictional.** — The provisions of N.C.R.A.P., Rule 12, as it read prior to amendment effective July 1, 1989, requiring that "no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken" was jurisdictional and it imposed a limit on the aggrieved party's right to appeal. Only the appropriate appellate court could extend this 150-day time limit. State v. Ward, 61 N.C. App. 747, 301 S.E.2d 507, cert. denied, 309 N.C. 825, 310 S.E.2d 357 (1983).

Regardless of the time limits set by the trial court, plaintiff had no longer than 150 days after giving notice of appeal to file the appeal record with the appellate court; the 150-day time limit may be extended only by an appropriate appellate court. Roberts v. Roberts, 97 N.C. App. 319, 388 S.E.2d 164 (1990), decided under the rules as they read prior to 1989 amendments.

**Motion to Extend Time.** — All motions made to extend time, except for motions to extend the time for service of the proposed record on appeal subdivision (c)(1) of this rule, and motions to extend the time to produce the transcript under N.C.R. App. P. 7(b)(1), must be made to the court to which appeal has been taken. Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997), rev'd on other grounds, 347 N.C. 672, 500 S.E.2d 88 (1998).

**Order to Extend Time for Serving Record on Appeal Held Proper.** — Although counsel for the State erred in calculating the initial filing date, the judge properly entered his ex parte order extending the time for serving the proposed record on appeal where the State complied with subdivision (c)(1) of this rule by giving oral and written notice of its motion to extend time to serve the proposed record on appeal, and it complied with the initial 15-day time limit specified in N.C.R.A.P., Rule 12(a), and the outside time limit of 150 days in which to file the settled record on appeal from the time of oral notice of appeal. State ex rel. Thornburg v. Currency in Amount of $52,029.00 in U.S. Currency, 324 N.C. 276, 378 S.E.2d 1 (1989).

**Order to Extend Time for Serving Record on Appeal Held Ineffective.** — Trial court's order extending the time during which plaintiffs could serve proposed record on appeal was ineffective where it was made after the expiration of the 35-day period during which plaintiffs were required by N.C.R.A.P., Rule 11(b) to serve the proposed record on appeal, it was made upon plaintiffs' oral motion in violation of N.C.R.A.P., Rule 27(c)(1), and the record did not reflect the other parties, the defendant and third-party defendant, were given notice or an opportunity to be heard as required by N.C.R.A.P., Rule 27(c)(1). Richardson v. Bingham, 101 N.C. App. 687, 400 S.E.2d 757 (1991).

**Dismissal for Failure to Comply.** — Where the trial court's purported extension of time to file the records on appeal was ineffective, and where the records on appeal were not filed within the times mandated by the Rules of Appellate Procedure, each parties' appeals were dismissed for failure to comply with the rules. Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997), rev'd on other grounds, 347 N.C. 672, 500 S.E.2d 88 (1998).

**Applied** in Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976); State v. Brown, 42 N.C. App. 724, 257 S.E.2d 668 (1979); State v. Brown, 43 N.C. App. 532, 259 S.E.2d 309 (1979); Phillips v. Texfi Indus., Inc., 44 N.C. App. 66, 259 S.E.2d 769 (1979); McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980); Piguerra v. Piguerra, 54 N.C. App. 188, 282 S.E.2d 567 (1981); In re Wheeler, 85 N.C. App. 150, 354 S.E.2d 374 (1987); Outlaw v. Outlaw, 89 N.C. App. 538, 366 S.E.2d 247 (1988); Hale v. Leisure, 100 N.C. App. 163, 394 S.E.2d 665 (1990); Taylor v. City of Lenoir, 140 N.C. App. 337, 542 S.E.2d 222 (2001).

**Quoted** in Herring v. Branch Banking & Trust Co., 108 N.C. App. 780, 424 S.E.2d 925 (1993).

**Stated** in Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

**Cited** in In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976); State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980); State v. Locklear, 50 N.C. App. 165, 272 S.E.2d 597 (1980); Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981); West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 302 S.E.2d 645 (1983); Taylor v. Walker, 84 N.C. App. 507, 353 S.E.2d 239 (1987); Woods v. Shelton, 93 N.C. App. 649, 379 S.E.2d 45 (1989); Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996); McAllister v. Ha, 347 N.C. 638, 496 S.E.2d 577 (1998); Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998); Bell v. Jarvis, 198 F.3d 432 (4th Cir. 1999); Groves v. Community Hous. Corp. of Haywood County, — N.C. App. —, 548 S.E.2d 535, 2001 N.C. App. LEXIS 345 (2001).

**Rule 28. Briefs: Function and content.**

(a) *Function.* The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then stated in the notice of appeal or the petition, accepted by the Supreme Court for review, and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

(b) *Content of appellant's brief.* An appellant's brief in any appeal shall contain, under appropriate headings, and in the form prescribed by Rule 26(g) and the Appendixes to these rules, in the following order:

(1) A cover page, followed by a subject index and table of authorities required by Rule 26(g).

(2) A statement of the questions presented for review.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) *A statement of the grounds for appellate review.* Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

(5) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(6) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

The body of the argument shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

(7) A short conclusion stating the precise relief sought.

(8) Identification of counsel by signature, typed name, office address and telephone number.

(9) The proof of service required by Rule 26(d).

(10) The appendix required by Rule 28(d).

(c) *Content of appellee's brief; Presentation of additional questions.* An appellee's brief in any appeal shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel and proof of service in the form provided in Rule 28(b) for an

appellant's brief, and any appendix as may be required by Rule 28(d). It need contain no statement of the questions presented, statement of the procedural history of the case, statement of the grounds for appellate review, or statement of the facts, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant.

Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment *n.o.v.* awarded to the appellant when the latter relief is sought on appeal by the appellant.

If the appellee is entitled to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate.

(d) *Appendixes to briefs.* Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) *When appendixes to appellant's brief are required.* Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any question presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when a question presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine questions presented in the brief.

(2) *When appendixes to appellant's brief are not required.* Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an assignment of error:

a. whenever the portion of the transcript necessary to understand a question presented in the brief is reproduced verbatim in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand a question presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) *When appendixes to appellee's brief are required.* Appellee must reproduce appendixes to his brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript he believes to be necessary to understand the question.

b. Whenever the appellee presents a new or additional question in his brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript as if he were the appellant with respect to each such new or additional question.

(4) *Format of appendixes.* The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages which have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered and an index to the appendix shall be placed at its beginning.

(e) *References in briefs to the record.* References in the briefs to assignments of error shall be by their numbers and to the pages of the printed record on appeal or of the transcript of proceedings, or both, as the case may be, at which they appear. Reference to parts of the printed record on appeal and to the verbatim transcript or documentary exhibits shall be to the pages where the parts appear.

(f) *Joinder of multiple parties in briefs.* Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief although they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) *Additional authorities.* Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and 14 copies of the memorandum.

(h) *Reply briefs.* Unless the court, upon its own initiative, orders a reply brief to be filed and served, none will be received or considered by the court, except as herein provided:

(1) If the appellee has presented in its brief new or additional questions as permitted by Rule 28(c), an appellant may, within 14 days after service of such brief, file and serve a reply brief limited to those new or additional questions.

(2) If the parties are notified under Rule 30(f) that the case will be submitted without oral argument on the record and briefs, an appellant may, within 14 days after service of such notification, file and serve a reply brief limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief or in a reply brief filed pursuant to Rule 28(h)(1).

(i) *Amicus curiae briefs.* A brief of an *amicus curiae* may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that Court on its own initiative.

A person desiring to file an *amicus curiae* brief shall present to the Court a motion for leave to file, served upon all parties, within ten days after the printed record is mailed by the Clerk and ten days after the record is docketed in pauper cases. The motion shall state concisely the nature of the applicant's interest, the reasons why an *amicus curiae* brief is believed desirable, the questions of law to be addressed in the *amicus curiae* brief and the applicant's position on those questions. The proposed *amicus curiae* brief may be conditionally filed with the motion for leave. Unless otherwise ordered by the Court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the Court permitting the brief, the *amicus curiae* shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. Reply briefs of the parties to an *amicus curiae* brief will be limited to points or authorities presented in the *amicus curiae* brief which are not presented in the main briefs of the parties. No reply brief of an *amicus curiae* will be received.

A motion of an *amicus curiae* to participate in oral argument will be allowed only for extraordinary reasons.

(j) *Page limitations applicable to briefs filed in the Court of Appeals.* Principal briefs filed in the North Carolina Court of Appeals, whether filed by appellant, appellee, or *amicus curiae,* formatted according to Rule 26 and the Appendixes to these Rules, shall be limited to 35 pages of text, exclusive of tables and contents, tables of authorities, and appendixes. Reply briefs, if permitted by this Rule shall be limited to 15 pages of text. (Adopted June 13, 1975; Amended January 27, 1981 — repealed 28(d) — effective July 1, 1981; June 10, 1981 — 28(b) and (c) — effective October 1, 1981; January 12, 1982 — 28(b)(4) — effective March 15, 1982; December 7, 1982 — 28(i) — effective January 1, 1983; November 27, 1984 — 28(b), (c), (d), (e), (g), and (h) — effective February 1, 1985; June 30, 1988 — 28(a), (b), (c), (d), (e), (h), and (i) — effective September 1, 1988; June 8, 1989 — 28(h) and (j) — effective September 1, 1989; July 26, 1990 — 28(h)(2) — effective October 1, 1990; Amended October 18, 2001.)

**Legal Periodicals.** — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

## CASE NOTES

I. In General.
II. Decisions Under Prior Law.

### I. IN GENERAL.

***Editor's note.*** *— Many of the cases below were decided prior to amendments of the rules effective July 1, 1989, deleting references to exceptions.*

**Compliance Universally Mandatory.** — Since appellate rules apply to everyone, the court would dismiss the appeal of pro se defendant who failed to comply with N.C.R.A.P., Rules 9(a)(1)(c), 9(a)(1)(k), 9(b)(3), 10(c)(1), 12(a), and 28(b)(5). Bledsoe v. County of Wilkes, 135 N.C. App. 124, 519 S.E.2d 316 (1999).

**The Rules of Appellate Procedure are mandatory** and failure to follow the rules subjects an appeal to dismissal. Wiseman v. Wiseman, 68 N.C. App. 252, 314 S.E.2d 566 (1984).

**Appellant's failure to observe the mandatory Rules of Appellate Procedure** frustrated the process of the appellate review, but did not cause the court to dismiss the case. May v. City of Durham, 136 N.C. App. 578, 525 S.E.2d 223 (2000).

**Under this rule, appellate review is limited to the arguments upon which the parties rely in their briefs.** — Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580 (1976); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

The proviso to N.C.R.A.P., Rule 10(a) allows review of the questions, without exceptions or assignments of error, which were reviewed under the old rules by the appeal itself or an exception to the judgment (such as the legal sufficiency of the indictment, subject matter jurisdiction, the plea, the jury verdict and the judgment) but this proviso does not negate the requirement of this rule that a question must be presented and argued in the brief in order to obtain appellate review of it. State v. Brothers, 33 N.C. App. 233, 234 S.E.2d 652, cert. denied, 293 N.C. 160, 236 S.E.2d 704 (1977); Stanley v. Stanley, 51 N.C. App. 172, 275 S.E.2d 546, cert. denied, 303 N.C. 182, 280 S.E.2d 454, appeal dismissed and cert. denied, 454 U.S. 959, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981).

This rule requires that a question be presented and argued in the brief in order to obtain appellate review. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

**The purpose of subsection (c)** of this rule is to permit an appellee who obtains relief at trial to seek a new trial because of trial errors material to the claim upon which relief was granted, in lieu of having judgment n.o.v. entered on appeal when such relief is sought by the appellant. Potter v. Homestead Preservation Ass'n, 330 N.C. 569, 412 S.E.2d 1 (1992).

**Two Ways to Preserve Exceptions in Brief.** — Under this subsection, an appeal may be abandoned in two ways: (1) assignments of error are not set out in the appellant's brief, or (2) in support of which no reason or argument is stated or authority cited. Strader v. Sunstates Corp., 129 N.C. App. 562, 500 S.E.2d 752 (1998), cert. denied, 349 N.C. 240, 514 S.E.2d 274 (1998).

**Three Ways to Preserve Exceptions in Brief.** — Provision in subdivision (b)(5) of this rule that exceptions not set out in the appel-

lant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned, is to be read in the disjunctive. It gives appellant at least three means of preserving exceptions in his or her brief; it does not require appellant to cite authority for every proposition put forward on appeal. State v. Watson, 80 N.C. App. 103, 341 S.E.2d 366 (1986).

**Review Confined to Exceptions Pertaining to Argument Presented.** — The Rules of Appellate Procedure require that review be confined to those exceptions which pertain to the argument presented. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, modified on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

**Incorporation by reference of arguments contained in briefs before the Court of Appeals is not permitted** under the present Rules of Appellate Procedure. Fortner v. J.K. Holding Co., 319 N.C. 640, 357 S.E.2d 167 (1987).

**Questions Must Be Presented in Brief.** — A question purportedly raised by an assignment of error or exception must be presented and argued in the brief in order to obtain appellate review. In re Envtl. Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588, cert. denied, 317 N.C. 334, 346 S.E.2d 139 (1986).

**Questions raised by assignments of error but not presented in party's brief** are deemed abandoned. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

Under former Rule 28 (Rules of Practice in Court of Appeals), assignments of error not brought forward and argued in the brief are deemed abandoned. State v. Robinson, 26 N.C. App. 620, 216 S.E.2d 497 (1975).

On appeal, where defendant brings forward in his brief fewer arguments than there are assignments of error, the remaining assignments of error are deemed abandoned. State v. Ledford, 41 N.C. App. 213, 254 S.E.2d 780 (1979).

Where appellant did not bring forth exceptions to certain findings of the trial court in his brief, he was deemed to have abandoned them. Baker v. Log Sys., 75 N.C. App. 347, 330 S.E.2d 632 (1985).

**An Unsupported Assertion of Plain Error Will Fail.** — The right and requirement to specifically and distinctly contend that an error amounts to plain error does not obviate the requirement that a party provide argument supporting the contention that the trial court's instruction amounted to plain error, as required by subsections (a) and (b)(5) of this rule. State v. Cummings, 352 N.C. 600, 536 S.E.2d 36 (2000), cert denied, — U.S. —, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

**Argument in Brief Did Not Correspond to Assignment of Error.** — Where defendant's objection and assignment of error were directed to the witness's purported "unresponsive answer" but the accompanying argument in the brief concerned the leading nature of the question by the prosecutor, the argument in the brief did not correspond to the assignment of error; therefore, that assignment was deemed abandoned under this rule. State v. Purdie, 93 N.C. App. 269, 377 S.E.2d 789 (1989).

The defendant waived his right to appellate review of the admissibility of hearsay evidence under § 8C-1, Rule 803(3) where he only argued erroneous admission under § 8C-1, Rule 804(b)(5). State v. Parker, — N.C. App. —, — S.E.2d —, 2000 N.C. App. LEXIS 1107 (Oct. 3, 2000).

**One assignment of error is enough to raise one question of law** under N.C.R.A.P., Rule 10(c) and subsection (b) of this rule, even when it questions the correctness of many rulings of the trial court. Pate v. Thomas, 89 N.C. App. 312, 365 S.E.2d 704, cert. denied, 322 N.C. 482, 370 S.E.2d 227 (1988).

**Constitutional arguments presented in the briefs filed in another case** not yet decided by the Court of Appeals were not properly before the court, inasmuch as former subsection (d) of this rule, which permitted incorporation of such material, was repealed in 1981, and the material sought to be incorporated was not submitted as part of the record of the case at hand on appeal. State v. Watson, 88 N.C. App. 624, 364 S.E.2d 683, cert. denied, 322 N.C. 485, 370 S.E.2d 235 (1988).

**Abandonment of Assignments of Error.** — Where defendant failed to attach pertinent portions of the court transcript or to include verbatim reproduction of materials he wanted court to review as required by this rule or to advance any argument or cite any authority to support his assignments of error, he waived these assignments of error. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

In termination of parental rights case, three of four assignments of error on appeal, relating to respondent/father, were deemed abandoned because respondents/parents failed to argue them in their brief or to cite any authority supporting them. In re Leftwich, 135 N.C. App. 67, 518 S.E.2d 799 (1999).

The propriety of directed verdicts with respect to plaintiffs' claims against all defendants for securities fraud and against one defendant for negligent misrepresentation were not briefed as required by this rule and were, thus, deemed abandoned. Jay Group, Ltd. v. Glasgow, 139 N.C. App. 595, 534 S.E.2d 233 (2000), cert. denied, 353 N.C. 265, 546 S.E.2d 100 (2000).

**Abandonment of Issue.** — Where defendant failed to argue in his brief an alleged error made by the trial court, the issue was deemed abandoned. State v. Davis, 68 N.C. App. 238, 314 S.E.2d 828 (1984).

Although defendant assigned error to the sufficiency of evidence to support the court's findings, it was determined that he abandoned the issue on appeal by not presenting argument in his brief. State v. Rhyne, 124 N.C. App. 84, 478 S.E.2d 789 (1996).

Plaintiffs abandoned their appeal from the directed verdict dismissing their claim for negligent infliction of emotional distress by failing to argue it on appeal. Bailey v. Gitt, 135 N.C. App. 119, 518 S.E.2d 794 (1999).

Where defendant contended that trial court erred in excluding evidence concerning his accomplice's conduct, but failed to refer to any specific ruling of the trial court and to provide any citations to the record or transcript, he was deemed to have abandoned his argument. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545 (1999), cert. denied, 530 U.S. 1245, 120 S. Ct. 2694, 147 L. Ed. 2d 965 (2000).

Defendant's contention that an instruction on voluntary manslaughter should have been given in addition to ones on first-degree murder by poisoning and attempted first-degree murder by poisoning was not raised in any assignment of error and was, therefore, abandoned. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000), cert. denied, 531 U.S. 862, 121 S. Ct. 151, 148 L. Ed. 2d 100 (2000).

Defendant's failure to assign error to trial court's admission of inculpatory statements by his daughter, which tended to show that the defendant had tried to throw the blame for the poisoning of the family on the mother, resulted in his abandoning it pursuant to this section. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000), cert. denied, 531 U.S. 862, 121 S. Ct. 151, 148 L. Ed. 2d 100 (2000).

Assignment of error relating to concurring acts of negligence was abandoned where plaintiffs failed to cite any legal authority or make an argument for extension of the law in support of their argument. Benton v. Hillcrest Foods, Inc., 136 N.C. App. 42, 524S.E.2d 53 (1999).

**Failure to Meet Requirements of Subdivision (b)(5).** — Defendant's assignment of error concerning the court's denial of his motion to dismiss for insufficient evidence was considered abandoned where defendant failed to make any supporting argument or give any citation of supporting authority. State v. Hatcher, 136 N.C. App. 524, 524 S.E.2d 815 (2000).

**Reply Brief.** — A reply brief is intended to be a vehicle for responding to matters raised in the appellees' brief and is not intended to be — and may not serve as — a means for raising entirely new matters. Newsome v. North Carolina State Bd. of Elections, 105 N.C. App. 499, 415 S.E.2d 201 (1992).

**Reply brief could not revive assignments of error** which plaintiff had previously abandoned where plaintiff's brief in chief failed to state any reason, argument or authority in support of its contention that summary judgment was improperly granted on particular claims. Trull v. Central Carolina Bank & Trust Co., 117 N.C. App. 220, 450 S.E.2d 542 (1994).

**The bar may not use a memorandum of additional authority as a reply brief or for additional argument.** Whitaker v. Akers, 137 N.C.App. 274, 527 S.E.2d 721 (2000).

**Appellant Must Except to Each Finding or Conclusion Separately.** — On appeal from a judgment containing findings of fact and conclusions of law, the appellant must except and assign error separately to each finding or conclusion that he or she contends is not supported by the evidence, and then state which assignments support which questions in the brief. Failure to do so will result in waiver of the right to challenge the sufficiency of the evidence to support particular findings of fact. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

**Reduction of Appeal to Broadside Attack.** — Where defendant properly excepted to a large number of the court's findings of fact and the resulting conclusions of law, and correctly assigned error individually to each excepted finding and conclusion, but then, rather than direct the Court of Appeals to the particular findings he challenged, he instead argued the general denial of his Rule 41(b) motion, he thereby reduced his appeal relative to the sufficiency of the evidence to a single broadside attack. Therefore the only question presented was whether the findings of fact supported the conclusions of law and the conclusions supported the judgment. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

**The Court of Appeals will not "fish out" an appellant's exceptions which are not referred to by the proper printed page number.** — Lee v. Capitol Tire Co., 40 N.C. App. 150, 252 S.E.2d 252, cert. denied, 297 N.C. 454, 256 S.E.2d 807 (1979); S.J. Groves & Sons & Co. v. State, 50 N.C. App. 1, 273 S.E.2d 465 (1980), cert. denied, 302 N.C. 396, 279 S.E.2d 353 (1981).

**Failure to Identify Page Held Not to Require Dismissal.** — Although defendant did not identify the record page on which each exception appeared as required under N.C.R.A.P., Rule 10(c) and subdivision (b)(5) of this rule, these omissions were not so egregious as to invoke dismissal. Symons Corp. v. Insurance Co. of N. Am., 94 N.C. App. 541, 380 S.E.2d 550 (1989).

**The State is not required by section (c) to state the facts unless there is some disagreement.** — State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

**Incorporating Material by Reference.** — For case construing former subsection (d), repealed in 1981, see State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

**Materials Relating to Similar Case.** — This rule does not prohibit a party from including in an appendix to a brief copies of a motion, order and portions of a transcript showing the court's reasoning in a similar case. Gibbons v. CIT Group/Sales Fin., Inc., 101 N.C. App. 502, 400 S.E.2d 104 (1991).

**Relief as Matter of Appellate Grace.** — Plaintiff's failure to present and argue in its brief to the Court of Appeals the propriety of the trial court's judgment as to attorney fees precluded plaintiff from obtaining relief on this point in the Court of Appeals as a matter of right; however, the Court of Appeals, in the exercise of its general supervisory powers under § 7A-32(c) or pursuant to N.C.R.A.P., Rule 2, could consider on its own initiative the question of the attorney fees award and give relief as a matter of appellate grace. Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Although juvenile's brief appealing order to turn him over to South Carolina authorities did not refer to assignments of error and exceptions pertinent to the question, nor contain a statement of the questions for review, the Court of Appeals would consider the juvenile's appeal and suspend the requirements of subsection (b) of this rule, as authorized by N.C.R.A.P., Rule 2, because it was an important case of first impression in this state and to prevent any injustice to the juvenile. In re Teague, 91 N.C. App. 242, 371 S.E.2d 510, cert. denied, 323 N.C. 624, 374 S.E.2d 588 (1988).

**Failure to Cite Authority Abandons Argument.** — Where the defendant properly included in its brief the assignments of error and exceptions to the findings of fact from the trial court but completely failed to afford the appellate court any citations of authority or the portions of the record upon which it relied to support its argument, its argument was deemed abandoned under subdivision (b)(3) of this rule. S.J. Groves & Sons & Co. v. State, 50 N.C. App. 1, 273 S.E.2d 465 (1980), cert. denied, 302 N.C. 396, 279 S.E.2d 353 (1981).

Where plaintiff failed to cite authority in support of assignment of error, such assignment would be deemed to be abandoned. Byrne v. Bordeaux, 85 N.C. App. 262, 354 S.E.2d 277 (1987).

Where plaintiff contended that he produced sufficient evidence to establish a prima facie case of defamation in the form of slander and libel but did not state any reason or argument nor cite any authority for support of the contention that there was sufficient evidence of libel, he abandoned his assignment of error with respect to the libel claim. Smith v. Carolina Coach Co., 120 N.C. App. 106, 461 S.E.2d 362 (1995).

Where defendant failed to cite any authority in support of its contention the trial court erroneously instructed the jury, the court declined to consider the issue. Markham v. Nationwide Mut. Fire Ins. Co., 125 N.C. App. 443, 481 S.E.2d 349 (1997), cert. denied, 346 N.C. 281, 487 S.E.2d 551 (1997).

Husband's assignments of error regarding the constitutionality of the domestic violence statute were deemed abandoned since he failed to cite any authority to support his arguments. Wilson v. Wilson, 134 N.C. App. 642, 518 S.E.2d 255 (1999).

Defendant's assignment of error was dismissed where he failed to cite any authority in support of his contention that "a plea must be accepted by the State as well as the Court before a judgment can be entered." State v. Stevenson, 136 N.C. App. 235, 523 S.E.2d 734 (1999), cert. denied, 351 N.C. 368, 543 S.E.2d 144 (2000).

The court refused to address defendant's argument pursuant to this section where defendant failed to cite authority to support the contention that admittance of testimony of a witness who is offered immunity violates a defendant's constitutional rights. State v. McNeill, 140 N.C. App. 450, 537 S.E.2d 518 (2000).

**Failure to Relate Cases to Assignment of Error.** — Where plaintiff, in his brief, has listed several cases but has made no attempt to relate the cases cited to his one assignment of error or to any argument advanced in support thereof, his brief is clearly not in accordance with this rule. Brown v. Boney, 41 N.C. App. 636, 255 S.E.2d 784, cert. denied, 298 N.C. 294, 259 S.E.2d 910 (1979).

Where an argument in the appellant's brief did not deal with the assignment of error, it was deemed abandoned. Raleigh-Durham Airport Auth. v. King, 75 N.C. App. 57, 330 S.E.2d 622 (1985).

**Failure to Discuss Assignment of Error in Brief.** — Where plaintiff failed to discuss in its brief the trial court's denial of its motion for a new trial, the question raised by plaintiff's assignment of error on that issue was deemed abandoned. Wachovia Bank & Trust Co. v. Southeast Airmotive, Inc., 91 N.C. App. 417, 371 S.E.2d 768 (1988), cert. denied, 323 N.C. 706, 377 S.E.2d 230 (1989).

Defendant abandoned four out of five assignments of error on appeal by failing to bring them forward in his brief. State v. Clapp, 135 N.C. App. 52, 519 S.E.2d 90 (1999).

**Failure to refer to the assignments of error or exceptions following the statement of the questions presented** could result in abandonment of all of appellant's questions on appeal and consequently result in

dismissal of the appeal. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981), appeal dismissed and cert. denied, 305 N.C. 306, 290 S.E.2d 707 (1982).

Court would not address the merits of plaintiff's argument regarding alleged fraudulent conveyances where she violated subdivision (b)(5) of this rule in that she failed to reference in her brief the assignment of error supporting the argument. Therefore, this part of plaintiff's appeal would be dismissed. Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

Dismissal of an appeal was proper, where the appellant failed to double space the text of her brief and failed to set out in her brief references to the assignments of error upon which her presented issues and arguments were based. Steingress v. Steingress, 350 N.C. 64, 511 S.E.2d 298 (1999).

**Multiple Errors in Brief.** — Defendant in murder case did not identify the specific questions or answers which he wanted the Supreme Court to review, did not include the portions of the transcripts containing those questions or answers in the appendix, and did not include a verbatim recitation of those questions or answers in his brief. Therefore, the assignments of error were dismissed. State v. Glenn, 333 N.C. 296, 425 S.E.2d 688 (1993).

**Although appellant failed to identify the various exceptions upon which its assignments of errors were based,** as required by subsection (b)(5) of this rule, the court deemed it appropriate, pursuant to N.C.R.A.P., Rule 2, to dispose of the appeal on the merits. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

**Codefendant Deemed to Have Abandoned Assignment.** — Where codefendants object to the introduction of evidence, but the assignment of error based on this exception is brought forward and discussed in the brief of only one of the codefendants, the assignment is deemed abandoned by the other codefendants. State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976).

**An exception to the trial judge's signing of the judgment upon verdict of guilty raises nothing for review** under this rule. State v. Womble, 292 N.C. 455, 233 S.E.2d 534 (1977).

**It is the better practice for the appellee's brief to use the same numbering system for the questions presented as the appellant's brief.** — State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

**Question Not Raised at Trial or on Appeal May Not Be Attacked by Collateral Review.** — Where the defendant in a prosecution for second-degree murder failed to raise at trial, on direct appeal or in a subsequent petition for post-conviction relief, the question of the trial judge's alleged error in instructing the jury that the burden was on the defendant to disprove malice to reduce the killing to voluntary manslaughter and to prove that he killed in self-defense, the defendant could not seek collateral review of the alleged error. State v. Locklear, 39 N.C. App. 671, 251 S.E.2d 638, cert. denied, 296 N.C. 739, 254 S.E.2d 180 (1979), decided under former Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

**Subdivision (b)(4) serves the same function as N.C.R.A.P., Rule 9(c)(1) serves** with respect to records filed wherein the evidence is narrated; it assures that the court will have before it the evidence necessary to answer the questions presented, and that such evidence is in a condensed and readily available form. State v. Briley, 59 N.C. App. 335, 296 S.E.2d 501 (1982).

**Subdivision (b)(4) Must Be Followed When Stenographic Transcript Used.** — It is imperative that defendants using the stenographic transcript alternative allowed by N.C.R.A.P., Rule 9(c)(1) carefully follow the requirements of subdivision (b)(4) of this rule in order that appellate courts not be left the time-consuming and burdensome task of searching through the transcript for the pertinent pages. The omission of the pertinent transcript pages requires that the transcript be circulated among all the judges on the panel, requiring each of them to go through this time-consuming and burdensome task and is grounds for dismissal of the appeal. State v. Wilson, 58 N.C. App. 818, 294 S.E.2d 780 (1982), cert. denied without prejudice, — N.C. —, 342 S.E.2d 907 (1986).

**Failure to observe the requirements of subdivision (b)(4)** of this rule constitutes a substantial impediment to the capacity of the appellate court to perform its functions. Williams v. East Coast Sales, Inc., 59 N.C. App. 700, 298 S.E.2d 80 (1982).

**Only Portions of Transcript Necessary to Determine Question Need Be Set Out.** — Subdivision (b)(4) of this rule only requires setting out the verbatim portions of the transcript necessary for an understanding of each question presented. The rule does not require the appellant to include all of the evidence necessary for a determination of the questions presented. State v. Nickerson, 308 N.C. 376, 302 S.E.2d 221 (1983).

**N.C.R.A.P., Rule 9(c) provides for an alternative to narrating the evidence into the record;** that is, the filing of a complete stenographic transcript with the clerk of the court in which the appeal is docketed. Whichever method is chosen (N.C.R.A.P., Rule 9 or this rule), the result must be the same: to-wit, to provide the reviewing court with all the information necessary to understand each question presented. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

**When Appendix Required.** — An appendix is not contemplated for each question that requires a verbatim reproduction of a part of the transcript in order to understand that question. Instead, subdivision (b)(4) of this rule is designed to ensure that verbatim reproductions appear either in the brief itself or in an appendix to the brief. The appendix method should be employed when the question presented requires long verbatim reproductions of the transcript. Placing such reproductions in an appendix serves the dual purpose of providing the reviewing court with all the information necessary in order to make an informed determination while preserving the clarity and directness of the argument. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

This rule only requires the inclusion of the portions of the transcript necessary to understand, not decide, the question. Any other interpretation would require many appellants, especially those who question the sufficiency of the evidence, to include a verbatim copy of the entire transcript in the appendix to the brief. This interpretation should not encourage appellants to use less than due diligence in following the rules. Indeed, it is usually the safer and wiser course to do more than meet the minimum requirements. State v. Nickerson, 308 N.C. 376, 302 S.E.2d 221 (1983).

Although a complete stenographic transcript contains all the evidence in a case, it is too time consuming and too burdensome a task to expect each member of the reviewing court to search through pages of the transcript in order to find those passages necessary to the understanding of each question presented. Therefore, it is imperative that whenever a stenographic transcript is used in lieu of narrating the evidence into the record, all relevant portions of the transcript must be reproduced in either the brief or its appendix. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

**Improper Documents in Appendix.** — It is improper for a party to attach a document not in the record and not permitted under this rule in an appendix to its brief. Horton v. New South Ins. Co., 122 N.C. App. 265, 468 S.E.2d 856 (1996), cert. denied, — N.C. —, 472 S.E.2d 8 (1996).

The defendants' numerous, flagrant violations of the Rules of Appellate Procedure warranted dismissal of the appeal, where they did not provide a listing of assignments of error, they included as appendices to their brief certain documents that were excluded by an earlier order, they failed to include other required material, and they used incorrect point type and spacing. Duke Univ. v. Bishop, 131 N.C. App. 545, 507 S.E.2d 904 (1998).

**Type Size.** — N.C.R.A.P., Rule 26 requires all type to be "at least 11 point," while Appendix B specifies "10-12 point type." To the extent that Appendix B conflicts with Rule 26, Rule 26 governs and no brief shall be submitted in less than eleven point type. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

A brief presented in eleven point type will contain no more than three lines of double spaced text in a single, vertical inch, or twenty-seven (27) lines of double-spaced text on a properly formatted 8.5 by 11 inch page. The numbering of the pages, as provided in Appendix B., is not included in the text of the page and shall be centered in the one-inch margin at the top of the page. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

**Characters per Inch.** — Characters per inch, referred to in some modern word processing systems as "cpi," is not equivalent to point size and defines only the width or "set" size of a character, which includes spaces, punctuation, and letters. N.C.R.A.P., Rule 26 does not speak in terms of characters per inch; however, in order to provide a uniform construction of this rule and prevent unfair advantage to any litigant, it is necessary to provide for a limit on the characters per inch. Ten characters per inch is the standard used in the slip opinions of the Court of Appeals and the Supreme Court and the standard we will apply to the briefs filed with the Court of Appeals. Using this standard, a properly formatted 8.5 by 11 inch page will contain no more than 65 characters per line. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

**Prospective Application of Construction of Rule.** — Where the point size in defendants' appellate brief did not comply with N.C.R.A.P., Rule 26, but neither the rule nor the Court of Appeals had previously construed Rule 26, the court would consider the arguments presented in defendants' brief. Rule 26, as construed in this case, will be applied by the Court to briefs, petitions, notices of appeal, responses and motions filed after the date of this opinion. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

**Page Limitation.** — Appellate rules governing the size of type and the number of pages to be included in appellate briefs prevent unfair advantage to any litigant and insure a level playing field for all parties on appeal. Howell v. Morton, 131 N.C. App. 626, 508 S.E.2d 804 (1998).

**Sanction for Lengthy Brief.** — Where an appellant submitted a 75-page brief, in clear violation of the 35-page limit of subsection (j) of this rule, which put forth precisely the same argument as in his previous motion to dismiss and in previous appeals, under N.C.R.A.P., Rule 34 the Court of Appeals was authorized to impose a sanction against that party. Lowder v.

All Star Mills, Inc., 103 N.C. App. 500, 405 S.E.2d 774 (1991), cert. denied, 332 N.C. 484, 421 S.E.2d 349 (1992).

Where appellate brief was 42 pages in length, thereby exceeding the 35 page limit, and counsel proffered minimal justification for the rule violation, the court imposed a fine and reimbursement for copying expenses to be paid by counsel personally. State v. Hudson, 123 N.C. App. 336, 473 S.E.2d 415 (1996), rev'd on other grounds, 345 N.C. 729, 483 S.E.2d 436 (1997).

**Noncompliance Resulting in Sanctions Against Plaintiff's Attorneys.** — Given plaintiff's attorneys' willful disobedience of the trial court's explicit order and their substantial noncompliance with N.C.R.A.P., Rules 9, 28, and 37, the court would impose sanctions against plaintiff's attorneys in the form of costs associated with the appeal. Coiner v. Cales, 135 N.C. App. 343, 520 S.E.2d 61 (1999).

**Costs Attributable to Too Long Brief Assessed Against Attorney.** — Where former attorney for plaintiffs filed a brief of 80 single-spaced pages of arguments, a gross violation of subsection (j) of this rule, the portion of the costs of the appeal attributable to plaintiff appellant's excessively long brief were assessed against said attorney, with plaintiffs bearing the remainder of the costs of the appeal. North Buncombe Ass'n of Concerned Citizens v. Rhodes, 100 N.C. App. 24, 394 S.E.2d 462, cert. denied, 327 N.C. 484, 397 S.E.2d 215 (1990).

**Amicus Brief Accepted under N.C.R.A.P., Rule 2.** — Where in spite of the fact that appellee and estate purported to have settled their differences, and in spite of the fact that appellee was no longer represented by attorneys, such attorneys filed a brief opposing appellant, titled "Appellee's Brief," appellate court would use N.C.R.A.P., Rule 2 to treat this brief as an amicus brief because of the extraordinary procedural posture of the case. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. denied, 331 N.C. 749, 417 S.E.2d 236 (1992).

**The scope of appellate review is limited to the issues presented by assignments of error** set out in the record on appeal, and where the issue presented in the appellant's brief does not correspond to a proper assignment of error, the matter is not properly considered by the appellate court. Bustle v. Rice, 116 N.C. App. 658, 449 S.E.2d 10 (1994).

**Briefs Held to Violate Rule.** — An appellate brief in a capital murder case violated this rule, where it set forth several arguments with a cluster of assignments referred to after each such argument, with each such argument also including many subheadings in which separate questions were stated without reference to any assignment of error. State v. Williams, 350 N.C. 1, 510 S.E.2d 626 (1999), cert. denied 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999).

**Applied** in State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976); State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976); State v. Cawthorne, 290 N.C. 639, 227 S.E.2d 528 (1976); State v. Duncan, 290 N.C. 741, 228 S.E.2d 237 (1976); State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976); State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976); State v. Greene, 30 N.C. App. 507, 227 S.E.2d 154 (1976); In re Salem, 31 N.C. App. 57, 228 S.E.2d 649 (1976); State v. Davis, 31 N.C. App. 590, 230 S.E.2d 203 (1976); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); State v. Manuel, 291 N.C. 705, 231 S.E.2d 588 (1977); Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977); Community Bank v. McKenzie, 32 N.C. App. 68, 230 S.E.2d 788 (1977); Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977); State v. Musumeci, 33 N.C. App. 88, 234 S.E.2d 31 (1977); State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977); State v. Witherspoon, 293 N.C. 321, 237 S.E.2d 822 (1977); State v. Jones, 293 N.C. 413, 238 S.E.2d 482 (1977); State v. Alston, 293 N.C. 553, 238 S.E.2d 505 (1977); State v. Lockett, 33 N.C. App. 401, 235 S.E.2d 73 (1977); State v. Tuttle, 33 N.C. App. 465, 235 S.E.2d 412 (1977); State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977); White v. Lawrence, 33 N.C. App. 631, 236 S.E.2d 30 (1977); Streeter v. Streeter, 33 N.C. App. 679, 236 S.E.2d 185 (1977); State v. Looney, 294 N.C. 1, 240 S.E.2d 612 (1978); State v. Martin, 294 N.C. 253, 240 S.E.2d 415 (1978); Burkhimer v. Coble, 35 N.C. App. 127, 239 S.E.2d 852 (1978); State v. Warren, 35 N.C. App. 468, 241 S.E.2d 854 (1978); State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978); State v. Saults, 294 N.C. 722, 242 S.E.2d 801 (1978); State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978); Smith v. State, 36 N.C. App. 307, 244 S.E.2d 161 (1978); State v. Burke, 36 N.C. App. 577, 244 S.E.2d 477 (1978); State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); State v. Bailey, 36 N.C. App. 728, 245 S.E.2d 97 (1978); Siedlecki v. Powell, 36 N.C. App. 690, 245 S.E.2d 417 (1978); State v. Davis, 37 N.C. App. 173, 245 S.E.2d 583 (1978); Triplett v. Triplett, 37 N.C. App. 283, 245 S.E.2d 812 (1978); State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152 (1978); Spencer v. Spencer, 37 N.C. App. 481, 246 S.E.2d 805 (1978); Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978); In re Robinson, 39 N.C. App. 345, 250 S.E.2d 79 (1979); State v. Henley, 296 N.C. 547, 251 S.E.2d 463 (1979); State v. Hopkins, 296 N.C. 673, 252 S.E.2d 755 (1979); Fungaroli v. Fungaroli, 40 N.C. App. 397, 252 S.E.2d 849 (1979); State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979); King v. Demo, 40 N.C. App. 661, 253 S.E.2d 616 (1979); State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979);

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## II. DECISIONS UNDER PRIOR LAW.

***Editor's note.*** *— The cases cited below were decided under former Rules 27 and 28, Rules of Practice in the Supreme Court of North Carolina, and under former Rule 28, Rules of Practice in the Court of Appeals of North Carolina.*

**Rules Mandatory.** — The rules of practice of the Supreme Court are mandatory. Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963).

**A failure to comply with this rule** results in a failure to present for review the questions sought to be presented. State v. Black, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

**Brief Not in Accordance with Rules.** — An appeal will be dismissed where there is a failure to print the record and briefs in accordance with the rules of the Supreme Court. Bradshaw v. Stansberry, 164 N.C. 356, 79 S.E. 302 (1913).

**Failure to File in Time.** — Where appellant fails to file his brief within the time prescribed, and the case on appeal contains no assignments of error or grouped exceptions, as required by the rules of the Supreme Court, a motion by appellee to dismiss will be granted. Rosemond v. McPherson, 156 N.C. 593, 72 S.E. 570 (1911); In re Bailey, 180 N.C. 300, 103 S.E. 896 (1920).

Where an appellant knows that his brief must be prepared, printed, and filed by noon of a certain day, and he takes no steps to this end, a motion to dismiss the appeal will be granted. Truelove v. Norris, 152 N.C. 755, 67 S.E. 487 (1910).

**Late filing of appellant's brief works an abandonment of the assignments of error,** except those appearing on the face of the record, which are cognizable ex mero motu. State v. Lynn, 251 N.C. 703, 111 S.E.2d 866 (1960).

**When Cause Docketed Too Late for Hearing.** — Where a cause was docketed too late for hearing at a term of the Supreme Court, a motion to dismiss for failure to file printed briefs must be denied. Gupton v. Sledge, 161 N.C. 213, 76 S.E. 527 (1912); Bumgarner v. Thornton Light & Power Co., 76 S.E. 528 (1912); McLean v. McDonald, 175 N.C. 418, 95 S.E. 769 (1918).

**When No Brief Filed.** — Where the appellant has not filed a brief in the Supreme Court, under the rule the judgment appealed from will be affirmed on appellee's motion, if upon examination of the records proper no error appears. Rowe v. Campbell, 76 S.E. 474 (1912); Cumberland County v. R.S. Dickson & Co., 190 N.C. 330, 129 S.E. 726 (1925).

Where an appellant failed to file a brief in the Supreme Court, as required by this rule, upon motion of the Attorney General the appeal of the appellant was held properly dismissed. State v. Kinyon, 210 N.C. 294, 186 S.E. 368 (1936); State v. Pelley, 222 N.C. 684, 24 S.E.2d 635 (1943).

The failure to file a brief as required by this rule works an abandonment of the assignments of error, except those appearing upon the face of the record, which are cognizable ex mero motu. Dillard v. Brown, 233 N.C. 551, 64 S.E.2d 843 (1951); Land v. Land, 4 N.C. App. 115, 165 S.E.2d 692 (1969).

Where appellant does not file a brief, his appeal will be dismissed. Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947).

Appellant's exceptions and assignments of error are deemed abandoned where appellant fails to file a brief as required by this rule. In re Maxwell, 7 N.C. App. 59, 171 S.E.2d 20 (1969).

An appeal is subject to dismissal for failure of claimants to file their brief within the time allowed by the rules of the Court of Appeals. Fetherbay v. Sharpe Motor Lines, 8 N.C. App. 58, 173 S.E.2d 589 (1970).

**In Capital Felony Cases.** — An appeal will be dismissed upon motion of the Attorney General for failure of defendant to file a brief, but when defendant has been convicted of a capital felony, this will be done only after a careful examination of the record fails to disclose material defect. State v. Peele, 220 N.C. 83, 16 S.E.2d 449 (1941); State v. Sturdivant, 220 N.C. 535, 17 S.E.2d 661 (1941).

Although exceptions, in support of which no reason or argument is stated or authority cited, will be taken as abandoned in accordance with the provisions of this rule, nevertheless in the case of a capital felony, the Supreme Court will examine the matters to which those exceptions relate in its search for prejudicial error. State v. Roman, 235 N.C. 627, 70 S.E.2d 857 (1952).

**Briefs which merely state with reference to the exceptions taken of record,** "Exceptions No. 1. This question and answer are incompetent," etc., afford no assistance to the court. They are merely pass briefs, and do not conform to the rules. Jones v. Southern Ry., 164 N.C. 392, 80 S.E. 408 (1913); State v. Gibson, 221 N.C. 252, 20 S.E.2d 51 (1942).

**Exceptions Not Discussed Deemed Abandoned.** — It is necessary that exceptions appearing in the record on appeal be mentioned in appellant's brief, with reason or argument to support them, to entitle them to be considered by the court, for otherwise they are taken as abandoned. Gray v. Cartwright, 174 N.C. 49, 93 S.E. 432 (1917); State v. Barnhill, 186 N.C. 446, 119 S.E. 894 (1923); Austin v. Crisp, 186 N.C. 616, 120 S.E. 199 (1923); In re Will of Fuller, 189 N.C. 509, 127 S.E. 549 (1925); Hyatt v. McCoy, 194 N.C. 760, 140 S.E. 807 (1927); Ludford v. Combs, 195 N.C. 851, 141 S.E. 541 (1928); Grant v. Tallassee Power Co., 196 N.C. 617, 146 S.E. 531 (1929); Andrews Music Store v. Boone, 197 N.C. 174, 148 S.E. 39 (1929); State v. Wells, 209 N.C. 358, 183 S.E. 282 (1936); Stephenson v. Honeycutt, 209 N.C. 701, 184 S.E. 482 (1936); Sparks v. Holland, 209 N.C. 705, 184 S.E. 552 (1936); Hicks v. Nivens, 210 N.C. 44, 185 S.E. 469 (1936); Taylor v. Rierson, 210 N.C. 185, 185 S.E. 627 (1936); Texas Co. v. City of Elizabeth City, 210 N.C. 454, 187 S.E. 551 (1936); State v. Tate, 210 N.C. 613, 188 S.E. 91 (1936); Wilson v. Williams, 215 N.C. 407, 2 S.E.2d 19 (1939); In re Escoffery, 216 N.C. 19, 3 S.E.2d 425 (1939); State v. Cox, 217 N.C. 177, 7 S.E.2d 473 (1940); Rose v. Bank of Wadesboro, 217 N.C. 600, 9 S.E.2d 2 (1940); State v. Howley, 220 N.C. 113, 16 S.E.2d 705 (1941); Bank of Pilot Mt. v. Snow, 221 N.C. 14, 18 S.E.2d 711 (1942); State v. Gibson, 221 N.C. 252, 20 S.E.2d 51 (1942); Brown v. Ward, 221 N.C. 344, 20 S.E.2d 324 (1942); Moyle v. Hopkins, 222 N.C. 33, 21 S.E.2d 826 (1942); Amick v. Coble, 222 N.C. 484, 23 S.E.2d 854 (1943); Wingler v. Miller, 223 N.C. 15, 25 S.E.2d 160 (1943); State v. Hunt, 223 N.C. 173, 25 S.E.2d 598 (1943); State v. Smith, 223 N.C. 457, 27 S.E.2d 114 (1943); Gillis v. Great Atl. & Pac. Tea Co., 223 N.C. 470, 27 S.E.2d 283 (1943); State v. Epps, 223 N.C. 741, 28 S.E.2d 219 (1943); Hopkins v. Colonial Stores, Inc., 224 N.C. 137, 29 S.E.2d 455 (1944); Merchant v. Lassiter, 224 N.C. 343, 30 S.E.2d 217 (1944); State v. Thompson, 224 N.C. 661, 32 S.E.2d 24

(1944); State v. Hill, 225 N.C. 74, 33 S.E.2d 470 (1945); State v. Britt, 225 N.C. 364, 34 S.E.2d 408 (1945); Troitino v. Goodman, 225 N.C. 406, 35 S.E.2d 277 (1945); State v. Hightower, 226 N.C. 62, 36 S.E.2d 649 (1946); State v. Stone, 226 N.C. 97, 36 S.E.2d 704 (1946); State v. Hart, 226 N.C. 200, 37 S.E.2d 487 (1946); Clark v. Cagle, 226 N.C. 230, 37 S.E.2d 672 (1946); State v. Carroll, 226 N.C. 237, 37 S.E.2d 688 (1946); State v. Malpass, 226 N.C. 403, 38 S.E.2d 156 (1946); State v. Cogdale, 227 N.C. 59, 40 S.E.2d 467 (1946); State v. Jones, 227 N.C. 94, 40 S.E.2d 700 (1946); State v. Fairley, 227 N.C. 134, 41 S.E.2d 88 (1947); Bell v. Brown, 227 N.C. 319, 42 S.E.2d 92 (1947); Randle v. Grady, 228 N.C. 159, 45 S.E.2d 35 (1947); State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947); Penny v. Stone, 228 N.C. 295, 45 S.E.2d 362 (1947); State v. Frye, 229 N.C. 581, 50 S.E.2d 895 (1948); State v. Muse, 230 N.C. 495, 53 S.E.2d 529 (1949); State v. Reid, 230 N.C. 561, 53 S.E.2d 849, cert. denied, 338 U.S. 876, 70 S. Ct. 138, 94 L. Ed. 539 (1949); Williams v. Williams, 231 N.C. 33, 56 S.E.2d 20 (1949); State v. Wiggins, 232 N.C. 619, 61 S.E.2d 611 (1950); Weaver v. Morgan, 232 N.C. 642, 61 S.E.2d 916 (1950); State v. Brown, 233 N.C. 202, 63 S.E.2d 99 (1951); State v. Avery, 236 N.C. 276, 72 S.E.2d 670 (1952); Edgewood Knoll Apts. v. Braswell, 239 N.C. 560, 80 S.E.2d 653, rehearing denied and appeal dismissed, 240 N.C. 760, 83 S.E.2d 797 (1954); Reynolds v. Earley, 241 N.C. 521, 85 S.E.2d 904 (1955); State v. Cole, 241 N.C. 576, 86 S.E.2d 203 (1955); State v. Faulkner, 241 N.C. 609, 86 S.E.2d 81 (1955); Peek v. Wachovia Bank & Trust Co., 242 N.C. 1, 86 S.E.2d 745 (1955); Ammons v. Layton, 242 N.C. 122, 86 S.E.2d 915 (1955); Rhodes v. Raxter, 242 N.C. 206, 87 S.E.2d 265 (1955); State v. Atkins, 242 N.C. 294, 87 S.E.2d 507 (1955); Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955); Ford v. Blythe Bros. Co., 242 N.C. 347, 87 S.E.2d 879 (1955); Hatcher v. Clayton, 242 N.C. 450, 88 S.E.2d 104 (1955); Elliott v. Killian, 242 N.C. 471, 87 S.E.2d 903 (1955); State v. Thomas, 244 N.C. 212, 93 S.E.2d 63 (1956); Waddell v. Carson, 245 N.C. 669, 97 S.E.2d 222 (1957); J.A. Jones Constr. Co. v. Local 755, 246 N.C. 481, 98 S.E.2d 852 (1957); In re Will of Knight, 250 N.C. 634, 109 S.E.2d 470 (1959); State v. Newton, 251 N.C. 151, 110 S.E.2d 810 (1959); Henderson Cotton Mills v. Local 584, 251 N.C. 234, 111 S.E.2d 476 (1959); Henderson Cotton Mills v. Local 584, 251 N.C. 240, 111 S.E.2d 471 (1959); State v. Rose, 251 N.C. 281, 111 S.E.2d 311 (1959); Evans v. Queen City Coach Co., 251 N.C. 324, 111 S.E.2d 187 (1959); Friday v. Adams, 251 N.C. 540, 111 S.E.2d 893 (1960); State v. Coleman, 253 N.C. 799, 117 S.E.2d 742 (1961); State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961); State v. Williams, 255 N.C. 82, 120 S.E.2d 442 (1961); State v. Coffey, 255 N.C. 293, 121 S.E.2d 736 (1961); Little v. Power Brake Co., 255 N.C. 451, 121 S.E.2d 889 (1961); State v. Hart, 256 N.C. 645, 124 S.E.2d 816 (1962); State v. Pearson, 258 N.C. 188, 128 S.E.2d 251 (1962); Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962); Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962); State v. Woolard, 260 N.C. 133, 132 S.E.2d 364 (1963); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Textile Motor Freight, Inc. v. DuBose, 260 N.C. 497, 133 S.E.2d 129 (1963); White v. Cothran, 260 N.C. 510, 133 S.E.2d 132 (1963); State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, cert. denied, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964); State v. Anderson, 263 N.C. 124, 139 S.E.2d 6 (1964); State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965); Young v. Lowie, 265 N.C. 456, 144 S.E.2d 204 (1965); Martin v. Underhill, 265 N.C. 669, 144 S.E.2d 872 (1965); State v. Stubbs, 266 N.C. 295, 145 S.E.2d 899 (1966); Moore v. New York Life Ins. Co., 266 N.C. 440, 146 S.E.2d 492 (1966); State v. Stafford, 267 N.C. 201, 147 S.E.2d 925 (1966); Long v. Thompson, 267 N.C. 310, 148 S.E.2d 127 (1966); Mathis v. Siskin, 268 N.C. 119, 150 S.E.2d 24 (1966); State v. Majors, 268 N.C. 146, 150 S.E.2d 35 (1966); McDonald v. Moore Sheet Metal & Heating Co., 268 N.C. 496, 151 S.E.2d 27 (1966); Pendergrass v. Massengill, 269 N.C. 364, 152 S.E.2d 657 (1967); Chalmers v. Womack, 269 N.C. 433, 152 S.E.2d 505 (1967); State v. Withers, 271 N.C. 364, 156 S.E.2d 733 (1967); State v. Feaganes, 272 N.C. 246, 158 S.E.2d 89 (1967); King Homes, Inc. v. Bryson, 273 N.C. 84, 159 S.E.2d 329 (1968); State v. Peele, 274 N.C. 106, 161 S.E.2d 568 (1968), cert. denied, 393 U.S. 1042, 89 S. Ct. 669, 21 L. Ed. 2d 590 (1969); Freeman v. City of Charlotte, 273 N.C. 113, 159 S.E.2d 327 (1968); Somerset v. Somerset, 3 N.C. App. 473, 165 S.E.2d 33 (1969); State v. Pulley, 5 N.C. App. 285, 168 S.E.2d 62 (1969); State v. Johnson, 5 N.C. App. 469, 168 S.E.2d 709 (1969); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970); State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970); State v. Kirby, 7 N.C. App. 366, 172 S.E.2d 93 (1970); State v. Brown, 7 N.C. App. 372, 172 S.E.2d 99 (1970); State v. Gaiten, 8 N.C. App. 66, 173 S.E.2d 646, aff'd, 277 N.C. 236, 176 S.E.2d 778 (1970); In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971); State v. Norman, 8 N.C. App. 239, 174 S.E.2d 41, aff'd, 9 N.C. App. 706, 177 S.E.2d 449 (1970).

In the absence of a showing, by statement of reason or argument or citation of authority, that the statute of limitations pleaded is relevant as a defense, error in striking this defense did not appear. Dunn v. Dunn, 242 N.C. 234, 87 S.E.2d 308 (1955).

Mere reference to exceptions of record made

in the brief, without argument or citation of authority, is not a compliance with this rule. Ingle v. Southern Ry., 167 N.C. 636, 83 S.E. 744 (1914).

Exceptions and assignments of error not brought forward in the brief are deemed abandoned. Reliable Trucking Co. v. Payne, 233 N.C. 637, 65 S.E.2d 132 (1951); Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962); Smith v. Simpson, 260 N.C. 601, 133 S.E.2d 474 (1963); Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964); Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965); Martin v. Underhill, 265 N.C. 669, 144 S.E.2d 872 (1965); State v. Covington, 267 N.C. 292, 148 S.E.2d 138 (1966); Branch v. State, 269 N.C. 642, 153 S.E.2d 343 (1967); State v. Battle, 271 N.C. 594, 157 S.E.2d 14 (1967); State v. Wyatt, 271 N.C. 596, 157 S.E.2d 96 (1967); State v. Pardon, 272 N.C. 72, 157 S.E.2d 698 (1967); State v. Williams, 272 N.C. 273, 158 S.E.2d 85 (1967); State v. Davis, 272 N.C. 469, 158 S.E.2d 630 (1968); Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968); Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968); State v. Covington, 273 N.C. 690, 161 S.E.2d 140 (1968); Goldston v. Lynch, 2 N.C. App. 291, 163 S.E.2d 26 (1968); State v. Bass, 5 N.C. App. 429, 168 S.E.2d 424 (1969); Brantley v. Sawyer, 5 N.C. App. 557, 169 S.E.2d 55 (1969); State v. Paschal, 6 N.C. App. 334, 170 S.E.2d 95 (1969); State v. Clontz, 6 N.C. App. 587, 170 S.E.2d 624 (1969); State v. Corn, 6 N.C. App. 613, 170 S.E.2d 544 (1969); Atkins v. Parker, 7 N.C. App. 446, 173 S.E.2d 38 (1970); Moody v. Lundy Packing Co., 7 N.C. App. 463, 172 S.E.2d 905 (1970); Tickle v. Standard Insulating Co., 8 N.C. App. 5, 173 S.E.2d 491 (1970); State v. Tipton, 8 N.C. App. 53, 173 S.E.2d 527 (1970); State v. Chisholm, 8 N.C. App. 80, 173 S.E.2d 635 (1970); State v. Jordan, 8 N.C. App. 203, 174 S.E.2d 112, aff'd, 277 N.C. 341, 177 S.E.2d 289 (1970); State v. Eaton, 8 N.C. App. 321, 174 S.E.2d 24 (1970).

Exceptions set out in the record, and not preserved as required by this rule, are to be considered as abandoned. Higgins v. Higgins, 223 N.C. 453, 27 S.E.2d 128 (1943).

Statements made in appellant's brief, that he has ten assignments of error and insists upon them all, do not come within this rule, and they will not be considered; the requirements being that there must be some reason or argument in their support set out in the brief. Watkins v. Lawson, 166 N.C. 216, 81 S.E. 623 (1914).

**Assignments of Error.** — The purported assignments of error will not be considered by the court where they do not throw the slightest light on the questions the court is asked to pass upon and do not comply with this rule. Tillis v. Calvine Cotton Mills, Inc., 244 N.C. 587, 94 S.E.2d 600 (1956).

**Where the record and brief contain no assignments of error** as required by this rule, only the face of the record proper is presented for review. Bumgarner & Bowman Bldg., Inc. v. Hollar, 7 N.C. App. 14, 171 S.E.2d 60 (1969).

An appeal is subject to dismissal where both the record on appeal and the appellant's brief contain no assignments of error but list or refer only to the exceptions. In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

**Where briefs do not contain the exceptions and assignments of error, properly numbered,** with references to the printed record, they do not conform to the rules. It is impossible to determine just what exceptions or assignments of error are referred to. State v. Newton, 207 N.C. 323, 177 S.E. 184 (1934).

Defendant's brief should designate the assignments of error discussed by number with reference to the printed pages of the transcript, and authorities relied on should be classified under each of the assignments. State v. Abernethy, 220 N.C. 226, 17 S.E.2d 25 (1941).

**Effect of Failure to Set Forth Exceptions and Assignments of Error.** — The exceptions and assignments of error were not set forth in defendant appellant's brief. This is tantamount to the admission that the evidence was sufficient to be submitted to the jury. State v. Walls, 211 N.C. 487, 191 S.E. 232, appeal dismissed and cert. denied, 302 U.S. 635, 58 S. Ct. 18, 82 L. Ed. 494 (1937).

**A broadside reference to the errors assigned** by counsel does not conform with this rule. Seibold v. Mutual Benefit Health & Accident Ass'n, 8 N.C. App. 277, 174 S.E.2d 25 (1970).

**Exception Too General.** — An exception simply to the general failure of the judge to state in a plain and correct manner the evidence and declare and explain the law arising thereon is too general and cannot be sustained. Ellis v. Wellons, 224 N.C. 269, 29 S.E.2d 884 (1944).

**Question Discussed in Oral Argument.** — A question on oral argument, but not embraced in the assignments of error referred to in the brief, will not be considered. Mitchem v. Mitchem, 169 N.C. 48, 85 S.E. 146 (1915).

**Statement of Case.** — A fair and succinct statement of the case should be made at the beginning of the brief, so that the Supreme Court may understand the issues and more expeditiously hear the argument and decide the case. Balfour Quarry Co. v. West Constr. Co., 151 N.C. 345, 66 S.E. 217 (1909).

**Strict Numerical Order Not Essential.** — It is not essential that the assignments of error be argued in the brief in strict numerical order, but certainly counsel should indicate which

assignment of error he proposes that the argument supports. In re Will of Head, 1 N.C. App. 575, 162 S.E.2d 137 (1968).

**Citation of Cases.** — The grouping of cases cited in a brief does not authorize the use of the names of such cases throughout the brief without giving the citation of such cases. Weaver v. Morgan, 232 N.C. 642, 61 S.E.2d 916 (1950).

**Failure to Furnish Appellee with Copy of Brief.** — The appellee may not successfully move in the Supreme Court to have the case dismissed for the failure of the appellant to furnish him a copy of his briefs when the brief was duly filed with the clerk under the rule, and he could have obtained one in the time prescribed by applying to the clerk, who is not under duty to either notify him or supply him a copy except at his request. Turnage v. Dunn, 196 N.C. 105, 144 S.E. 521 (1928).

**When Appellant Must Discuss Appellees' Exceptions.** — On an appeal from an order of a trial judge setting aside a verdict of the jury in favor of the plaintiff because of error committed against the defendant, the brief of appellant must refer to exceptions taken by defendant. Powers v. City of Wilmington, 177 N.C. 361, 99 S.E. 102 (1919).

## Rule 29. Sessions of courts; Calendar of hearings.

(a) *Sessions of court.*

(1) *Supreme Court.* The Supreme Court shall be in continuous session for the transaction of business. Unless otherwise scheduled by the Court, hearings in appeals will be held during the week beginning the second Monday in the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

(2) *Court of Appeals.* Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) *Calendaring of cases for hearing.* Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or the court's own initiative, no appeal will be calendared for hearing at a time less than 30 days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar. (Adopted June 13, 1975; Amended March 3, 1982 — 29(a)(1); September 3, 1987 — 29(a)(1); July 26, 1990 — 29(b) — effective October 1, 1990.)

***Editor's note.*** *— The cases cited below were decided under former Rule 13, Rules of Practice in the Supreme Court of North Carolina.*

**Title to Public Office.** — Where an action involving title to public office is begun after the term of the Supreme Court, and on appeal has come to such term of the Supreme Court after the call of the district to which the cause belongs, the court can, under this rule, set the same down for argument, though it was not entitled to be heard as of right. Caldwell v. Wilson, 121 N.C. 423, 28 S.E. 363 (1897).

**Enjoining Issue of County Bonds.** — An injunction suit to restrain a county from issuing bonds for the payment of certain county indebtedness will not be advanced for hearing because a certain portion of such indebtedness is due to the board of education for borrowed money. Black v. Commissioners of Buncombe County, 129 N.C. 121, 39 S.E. 818 (1901).

## Rule 30. Oral argument.

(a) *Order and content of argument.* The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(b) *Time allowed for argument.*

(1) *In general.* Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for such an extension. The court of its own initiative may direct argument on specific points outside the times limited. Counsel is not obliged to use all the time allowed, and the court may terminate argument whenever it considers further argument unnecessary.

(2) *Numerous counsel.* Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation of argument on the same points shall be avoided unless specifically directed by the court.

(c) *Non-appearance of parties.* If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) *Submission on written briefs.* By agreement of the parties, a case may be submitted for decision on the written briefs; but the court may nevertheless order oral argument prior to deciding the case.

(e) *Decision of appeal without publication of an opinion.*

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion on every decided case. If the panel which hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) Decisions without published opinion shall be reported only by listing the case and the decision in the Advance Sheets and the bound volumes of the Court of Appeals Reports.

(3) A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered.

(f) *Pre-argument review; Decision of appeal without oral argument.*

(1) At anytime that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on record and briefs. Counsel will be notified not to appear for oral argument. (Amended December 18, 1975; May 3, 1976; February 5, 1979; July 1, 1981.)

**CASE NOTES**

**This section prohibits the citation of unpublished opinions** and use thereof as precedent. State v. Taylor, 141 N.C. App. 321, 541 S.E.2d 199 (2000).

**Applied** in United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985); In re Greene, 340 N.C. 251, 456 S.E.2d 516 (1995).

**Quoted** in Harris v. Duke Power Co., 83 N.C. App. 195, 349 S.E.2d 394 (1986); Long v. Harris, 137 N.C. App. 461, 528 S.E.2d 633 (2000).

**Cited** in In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980); State v. McGraw, 306 N.C. 372, 293 S.E.2d 161 (1982); State v. Bates, 313 N.C. 591, 330 S.E.2d 204 (1985); State v. Allison, 319 N.C. 92, 352 S.E.2d 420 (1987); State v. Weathers, 322 N.C. 97, 366 S.E.2d 471 (1988); State v. Taylor, 322 N.C. 280, 367 S.E.2d 664 (1988); North Carolina State Bar v. Randolph, 325 N.C. 699, 386 S.E.2d 185 (1989); State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991); State v. Rainey, 331 N.C. 259, 415 S.E.2d 337 (1992); United Servs. Auto. Ass'n v. Simpson, 126 N.C. App. 393, 485 S.E.2d 337 (1997).

## Rule 31. Petition for rehearing.

(a) *Time for filing; Content.* A petition for rehearing may be filed in a civil action within 15 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) *How addressed; Filed.* A petition for rehearing shall be addressed to the court which issued the opinion sought to be reconsidered.

(c) *How determined.* Within 30 days after the petition is filed, the court will either grant or deny the petition. Determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party; and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or less than all points suggested in the petition. When the petition is denied the clerk shall forthwith notify all parties.

(d) *Procedure when granted.* Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted. The case will be reconsidered solely upon the record on appeal, the petition to rehear, new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within 30 days after the case is certified for rehearing, and the opposing party's brief, within 30 days after petitioner's brief is served upon him. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13. No reply brief shall be received on rehearing. If the court has ordered oral argument, the clerk shall give notice of the time set therefor, which time shall be not less than 30 days after the filing of the petitioner's brief on rehearing.

(e) *Stay of execution.* When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided for stays pending appeal by Rule 8 of these rules.

(f) *Waiver by appeal from court of appeals.* The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) *No petition in criminal cases.* The courts will not entertain petitions for rehearing in criminal actions. (Adopted June 13, 1975; Amended November 27, 1984 — 31(a) — effective February 1, 1985; September 3, 1987 — 31(d) — effective for all appeals in which the notice of appeal is filed on or after October 1, 1987; December 8, 1988 — 31(b) and (d) — effective January 1, 1989; Amended October 18, 2001.)

## CASE NOTES

I. In General.
II. Decisions Under Prior Law.

### I. IN GENERAL.

**Applied** in Siders v. Gibbs, 31 N.C. App. 481, 229 S.E.2d 811 (1976); Drummond v. Cordell, 73 N.C. App. 438, 326 S.E.2d 292 (1985).

**Stated** in Smith v. Nationwide Mut. Ins. Co., 72 N.C. App. 400, 324 S.E.2d 868 (1985).

**Cited** in State v. Fayetteville St. Christian School, 299 N.C. 731, 265 S.E.2d 387 (1980); Housing Inc. v. Weaver, 305 N.C. 428, 290 S.E.2d 642 (1982); Penuel v. Hiatt, 100 N.C. App. 268, 396 S.E.2d 85 (1990); Wilson v. Sutton, 124 N.C. App. 170, 476 S.E.2d 467 (1996).

### II. DECISIONS UNDER PRIOR LAW.

***Editor's note.*** *— The cases cited below were decided under former Rules 31 and 44, Rules of Practice in the Supreme Court of North Carolina.*

**Rule Mandatory.** — The requirement that a petition for a rehearing be filed within so many days after the filing of the opinion in the case is mandatory upon all litigants alike, and will be rigidly enforced. Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922).

**This rule prescribes the procedure for the correction of errors** by the Supreme Court. Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959).

**Time of Filing Affidavit in Support of Petition.** — Where the Supreme Court, on appeal, has allowed a motion for a new trial for newly discovered evidence after having fixed a time in which the parties may file their affidavit in support of the motion and per contra, the court will not thereafter allow a motion retaining the case on its docket for the purpose of correcting the amount of the judgment. Moore v. Tidwell, 194 N.C. 186, 138 S.E. 541 (1927).

**When Time Begins to Run.** — The time begins to run against a petition to rehear in the Supreme Court from the time the opinion was filed in the office of the clerk of that court. McGeorge v. Nicola, 173 N.C. 733, 92 S.E. 610 (1917).

**Distinction Between Filing and Docketing.** — The petition is said to be filed when it is received by the clerk, and this must be done within the requisite days after the filing of the opinion; it is docketed when the clerk enters it upon the records at the order of the justice, who grants the rehearing. Bird v. Gilliam, 123 N.C. 63, 31 S.E. 267 (1898).

**Rehearing a Matter of Discretion.** — Unlike an appeal, a petition to rehear is a matter in the discretion of the Supreme Court to be exercised under the rules prescribed by it. Moore v. Harkins, 179 N.C. 525, 103 S.E. 12 (1920).

**Presumption in Favor of Judgment.** — Rehearings of decisions of cases of the Supreme Court are granted only in exceptional cases, and, when granted, every presumption is in favor of the judgment already rendered. Weisel v. Cobb, 122 N.C. 67, 30 S.E. 312 (1898).

**Rehearing by Means of Second Appeal Not Allowed.** — A second appeal on matters determined by a decision on a former appeal will not be considered, the procedure being by a petition to rehear. Gainesville & Alachua County Hosp. Ass'n v. Atlantic Coast Line R.R., 157 N.C. 460, 73 S.E. 242 (1911); LaRoque v. Kennedy, 161 N.C. 459, 77 S.E. 695 (1913).

**Same Facts Will Not Warrant Second Appeal.** — A party to an action may not have the decision of the Supreme Court again reviewed by it, upon a second appeal, upon the same state of facts, the former decision having become the law of the case. Strunks v. Southern Ry., 188 N.C. 567, 125 S.E. 182 (1924).

**No Rehearing on Motion to Modify.** — A rehearing will not be granted upon a summary motion to modify a final judgment of this court. Ruffin v. Harrison, 91 N.C. 398 (1884).

**When Rehearing Allowed.** — No case will be reviewed upon petition to rehear, unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the court. Haywood v. Daves, 81 N.C. 8 (1879); Mullen v. Norfolk & N.C. Canal Co., 115 N.C. 15, 20 S.E. 167 (1894).

The petition to rehear having been fully and carefully considered, and it appearing that the errors assigned have already been passed upon in well considered opinions of this court, and no new fact has been called to the attention of the court, or new case or authority cited, or new position assumed, the petition is dismissed. Weston v. John L. Roper Lumber Co., 168 N.C. 98, 83 S.E. 693 (1914).

**Only Points Certified as Erroneous Considered.** — Upon a rehearing, the Supreme Court will not consider any point not certified as erroneous by counsel making the certificate. Kerr v. Hicks, 133 N.C. 175, 45 S.E. 529 (1903).

**When Conclusion Assigned as Error.** — It is unnecessary to consider a broadside assignment of error in a petition to rehear, "for that, granting the correctness of every legal proposition laid down by the court, and that its findings and inferences of fact were supported by the record, yet the conclusion reached by the

court in its opinion is erroneous." Bunn v. Braswell, 142 N.C. 113, 55 S.E. 85 (1906).

**When Petitioner Guilty of Laches.** — A petition to rehear a case in the Supreme Court will not be granted when the alleged error is attributable solely to the petitioner's own laches or want of attention in looking after his case or he has neglected to follow the rules of procedure necessary to a proper presentment thereof, and especially when there is nothing to warrant the assurance that substantial relief would otherwise be afforded him. Battle v. Mercer, 188 N.C. 116, 123 S.E. 258 (1924).

**Immaterial Assumption.** — It is no ground for the rehearing of a case that the defendant was assumed to be a citizen of North Carolina, whereas, in fact, he was not, when the place of his residence is immaterial. Blackwell v. Wright, 74 N.C. 733 (1876).

**When Everything Considered on First Hearing.** — Where neither the record nor the briefs on the rehearing of a case disclose anything that was not apparently considered on the first hearing, the former judgment will not be disturbed. Weisel v. Cobb, 122 N.C. 67, 30 S.E. 312 (1898).

**New Trial for Newly Discovered Evidence.** — A motion for a new trial, in the Supreme Court, upon the ground of newly discovered evidence, is a matter for the full court, and will not be entertained after the case has been certified down, nor will an ungranted petition to rehear, made at the same time to the justices of the court, under the rule, put the case in the Supreme Court. Smith v. Moore, 150 N.C. 158, 63 S.E. 735 (1909).

**Contents of Supporting Affidavit.** — It is required for the granting of a motion for a new trial upon the ground of newly discovered evidence, that it should appear by affidavit that the desired testimony will be given upon the new trial; that it is probably true, competent, and material; that there has been no laches, but that the movant had used diligence and means to procure the evidence in due time at the trial; that the evidence is not cumulative and does not tend only to contradict, impeach, or discredit a witness who has testified, and is of such a nature as to show that probably a different result will be reached on another trial, so that right will prevail. Johnson v. Seaboard Air Line R.R., 163 N.C. 431, 79 S.E. 690, 1915B Ann. Cas. 598 (1913).

**When Petitioner Erroneously Deprived of Property.** — Upon a petition to rehear, the case will be corrected when it appears that the petitioner has thereby been erroneously deprived of its property. State ex rel. Lee v. Martin, 188 N.C. 119, 123 S.E. 631 (1924).

**Court May Order Reargument.** — It is the duty of parties to see that their causes are fully argued in the Supreme Court, and where this has not been — especially where the record is voluminous and assignments of error indefinite — the court will require it to be reargued. Lenoir v. Valley River Mining Co., 104 N.C. 490, 10 S.E. 525 (1889).

**Without New Petition Being Filed.** — Where a new trial is granted without passing upon certain exceptions, and, upon a rehearing of the exceptions upon which new trial was granted, is reversed, the Supreme Court may order a reargument of the exceptions not passed upon, without a petition for the same being filed. Fleming v. Southern Ry., 132 N.C. 714, 44 S.E. 551 (1903).

**Omission of Questions Not Discussed in Brief.** — A petition to rehear in the Supreme Court will be denied when founded upon the ground that a certain question was not mentioned in the opinion, when it had not been discussed in movant's brief and he has not appealed from the judgment. Greene v. Lyles, 187 N.C. 598, 122 S.E. 297 (1924).

**When No Error Assigned.** — Where no exception is taken in trial court to a ruling, and no error is assigned upon rehearing, the Supreme Court will not review the ruling. Faison v. Grandy, 128 N.C. 438, 38 S.E. 897 (1901).

**Section Petition to Rehear.** — Where a petition to rehear a case in the Supreme Court has been allowed, the opposing party only may petition for a second rehearing thereof. Moore v. Harkins, 179 N.C. 525, 103 S.E. 12 (1920).

A party whose application for a rehearing of the case has been denied may not successfully petition for a rehearing, though additional reasons are given in the denial of the former petition by the court in reaching the same conclusion. Moore v. Harkins, 179 N.C. 525, 103 S.E. 12 (1920).

**Costs When New Trial Granted.** — Where, upon a rehearing, the court grants a new trial, which was refused on the former hearing, all the costs of the appeal, including those of the rehearing, are properly taxed against the appellee. Waldo v. Wilson, 174 N.C. 767, 94 S.E. 715 (1917).

**Reasons for Denying Petition Not Usually Set Out.** — The reasons of denying a petition to rehear in the Supreme Court are not usually set out. Crowell v. Crowell, 181 N.C. 66, 106 S.E. 149 (1921).

**When Petition Will Be Dismissed.** — Petitions to rehear will be dismissed where the grounds of error assigned are substantially the same as on the former hearing, and no new facts appear, no new authorities cited, and no new positions assumed. Montgomery v. Blades, 223 N.C. 331, 26 S.E.2d 567 (1943).

## Rule 32. Mandates of the courts.

(a) *In general.* Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The mandate is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.

(b) *Time of issuance.* Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court 20 days after the written opinion of the court has been filed with the clerk. (Amended February 1, 1985.)

### CASE NOTES

**Quoted** in West v. G.D. Reddick, Inc., 302 N.C. 201, 274 S.E.2d 221 (1981).

## Rule 33. Attorneys.

(a) *Appearances.* An attorney will not be recognized as appearing in any case unless he is entered as counsel of record therein. The signature of an attorney on a record on appeal, motion, brief, or other document permitted by these rules to be filed in a court of the appellate division constitutes entry of the attorney as counsel of record for the parties designated and a certification that he represents such parties. The signature of a member or associate in a firm's name constitutes entry of the firm as counsel of record for the parties designated. Counsel of record may not withdraw from a case except by leave of court. Only those counsel of record who have personally signed the brief prior to oral argument may be heard in argument.

(b) *Signatures on electronically filed documents.* If more than one attorney is listed as being an attorney for the party(ies) on an electronically filed document, it is the responsibility of the attorney actually filing the document from his or her computer to (1) list his or her name first on the document, and (2) place on the document under his or her signature line the following statement: "I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it." (Amended October 18, 2001.)

### CASE NOTES

I. In General.
II. Decisions Under Prior Law.

#### I. IN GENERAL.

**Subsection (a) of this rule is not applicable in criminal cases involving court-appointed counsel.** — State v. Carter, 66 N.C. App. 21, 311 S.E.2d 5, cert. denied, 310 N.C. 745, 315 S.E.2d 705 (1984).

#### II. DECISIONS UNDER PRIOR LAW.

***Editor's note.*** *— The cases cited below were decided under former Rule 32, Rules of Practice in the Supreme Court of North Carolina.*

**Verbal Agreements Not Considered When Denied.** — The Supreme Court will not consider appellant's alleged verbal agreement between the parties when such is denied. Standard Mirror Co. v. Philadelphia Cas. Co., 157 N.C. 28, 72 S.E. 826 (1911); Brewer v. Mineola Mfg. Co., 161 N.C. 211, 76 S.E. 237 (1912); McNeil v. Virginia-Carolina R.R., 173 N.C. 729, 92 S.E. 484 (1917).

When it appears in the Supreme Court that appellant has not served his case on appeal in time, no agreement for further extension thereof will be considered, unless it is in writing or appears by an entry on the record. Standard Mirror Co. v. Philadelphia Cas. Co., 157 N.C. 28, 72 S.E. 826 (1911); State v. Black, 162 N.C. 637, 78 S.E. 210 (1913).

**Rule 33A. Secure Leave Periods for Attorneys.**

(A) *Purpose, Authorization.* In order to secure for the parties to actions and proceedings pending in the Appellate Division, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this Rule.

(B) *Length, Number.* A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's secure leave periods pursuant to this Rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts shall not exceed, in the aggregate, three calendar weeks.

(C) *Designation, Effect.* To designate a secure leave period an attorney shall file a written designation containing the information required by subsection (D), with the official specified in subsection (E), and within the time provided in subsection (F). Upon such filing, the secure leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any argument or other in-court proceeding in the Appellate Division during that secure leave period.

(D) *Content of Designation.* The designation shall contain the following information:

(1) the attorney's name, address, telephone number and state bar number,

(2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end,

(3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts,

(4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering with the timely disposition of any matter in any pending action or proceeding, and

(5) a statement that no argument or other in-court proceeding has been scheduled during the designated secure leave period in any matter pending in the Appellate Division in which the attorney has entered an appearance.

(E) *Where to File Designation.* The designation shall be filed as follows:

(1) if the attorney has entered an appearance in the Supreme Court, in the office of the Clerk of the Supreme Court;

(2) if the attorney has entered an appearance in the Court of Appeals, in the office of the Clerk of Court of Appeals.

(F) *When to File Designation.* To be effective, the designation shall be filed:

(1) no later than ninety (90) days before the beginning of the secure leave period, and

(2) before any argument or other in-court proceeding has been scheduled for a time during the designated secure leave period. (Adopted May 6, 1999, effective January 1, 2000.)

**Editor's note.** — The order adopting this Rule provides that the Rule applies to all actions and proceedings pending in the Appellate Division on and after January 1, 2000.

**Rule 34. Frivolous appeals; Sanctions.**

(a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other paper filed in the appeal was so grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

(b) A court of the appellate division may impose one or more of the following sanctions:

(1) dismissal of the appeal;

(2) monetary damages including, but not limited to,

a. single or double costs,

b. damages occasioned by delay,

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

(c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under (b)(2) or (b)(3) of this rule.

(d) If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division. (Adopted June 13, 1975; Amended December 8, 1988 — effective July 1, 1989; Amended April 14, 1999.)

**CASE NOTES**

**The appellate division possesses sufficient authority to dispose of interlocutory appeals** which do not affect a substantial right by dismissal. It has express authority to do so under this rule on motion of the parties if the appeal is frivolous or taken solely for purposes of delay. Or it may exercise its general authority in response to motions filed under the general motions provision (N.C.R.A.P., Rule 37). Or the appellate division may dismiss upon its own motion as part of its general duty to apply the laws governing the right to appeal. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

**Motions to dismiss appeals from being interlocutory** should properly be filed after the record on appeal is filed in the appellate court. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

**Where plaintiff had appealed nearly every order entered by the trial court, the appeal at hand being the thirteenth appeal** to the appellate division in the case and related cases, not including requests for extraordinary writs, and for the most part plaintiff had merely reasserted issues previously ruled upon by the appellate division, the appeal would be dismissed, with costs to be taxed to plaintiff individually. Lowder v. All Star Mills, Inc., 91 N.C. App. 621, 372 S.E.2d 739 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 234 (1989).

**Where an appellant submitted a 75-page brief, in clear violation of the 35-page limit of N.C.R.A.P., Rule 28(j),** in which he put forth precisely the same argument as in his previous motion to dismiss and in previous appeals, under this rule the Court of Appeals is authorized to impose a sanction against that party. Lowder v. All Star Mills, Inc., 103 N.C. App. 500, 405 S.E.2d 774 (1991), cert. denied, 332 N.C. 484, 421 S.E.2d 349 (1992).

Upon review of the more than twenty appeals brought to the Court of Appeals in one case, the court concluded that a hearing pursuant to this rule would be in order and would give notice to appellant pursuant to this rule, that, following receipt of briefs and an oral hearing, it would consider the imposition of one or more of the sanctions enumerated under subdivision (b). Lowder v. All Star Mills, Inc., 103 N.C. App. 500, 405 S.E.2d 774 (1991), cert. denied, 332 N.C. 484, 421 S.E.2d 349 (1992).

The court imposed sanctions against plaintiff and awarded damages to the estate for plaintiff's frivolous appeal disputing the value of a stock certificate. Long v. Long, 119 N.C. App. 500, 459 S.E.2d 58 (1995).

**Double Costs Assessed.** — Where all appellate briefs contained in excess of 91 characters

per line in violation of Appellate Rule 26(g), double costs would be assessed, with the first set to be shared equally among all parties, and the second to be paid in equal share by counsel for the parties. Barnard v. Rowland, 132 N.C. App. 416, 512 S.E.2d 458 (1999).

**Real Estate Broker's Appeal Was Frivolous.** — A real estate broker's appeal was frivolous, where the broker appealed a grant of summary judgment in its suit seeking brokers' commissions and introductory fees, because the case presented the same issues between the same parties or their privies as were decided in a prior case. McGowan v. Argo Travel, Inc., 131 N.C. App. 694, 507 S.E.2d 601 (1998).

**Materials Outside the Record.** — The costs of an appeal were taxed to defense counsel, where counsel successfully challenged a non-statutory aggravating factor imposed by the sentencing judge, but counsel's appellate brief contained materials outside the record and gratuitous comments about the trial judge. State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998).

**Dismissal of Appeal.** — Plaintiff's appeal, which stated three separate errors in one assignment, failed to state the statutory authority exceeded, the procedure violated and the error of law committed, and failed to provide "clear and specific record or transcript references" relating to each alleged error, violated the Rules of Appellate Procedure, and would be dismissed. Bowen v. North Carolina Dep't of Health & Human Servs., 135 N.C. App. 122, 519 S.E.2d 60 (1999).

**Applied** in K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989); Lowder v. All Star Mills, Inc., 100 N.C. App. 322, 396 S.E.2d 95 (1990); State v. Bennett, 102 N.C. App. 797, 404 S.E.2d 4 (1991); Lowder v. Lowder, 107 N.C. App. 115, 418 S.E.2d 713 (1992).

**Quoted** in Howerton v. Grace Hosp., 124 N.C. App. 199, 476 S.E.2d 440 (1996); State v. Hill, 132 N.C. App. 209, 510 S.E.2d 413 (1999).

**Cited** in Brown v. Rhyne Floral Supply Mfg. Co., 89 N.C. App. 717, 366 S.E.2d 894 (1988); T.H. Blake Contracting Co. v. Sorrells, 109 N.C. App. 119, 426 S.E.2d 85 (1993); State v. Dayberry, 131 N.C. App. 406, 507 S.E.2d 587 (1998); Hearndon v. Hearndon, 132 N.C. App. 98, 510 S.E.2d 183 (1999); Fickley v. Greystone Enters., 140 N.C. App. 258, 536 S.E.2d 331 (2000).

## Rule 35. Costs.

(a) *To whom allowed.* Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered by the court; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed in part, reversed in part, or modified in any way, costs shall be allowed as directed by the court.

(b) *Direction as to costs in mandate.* The clerk shall include in the mandate of the court an itemized statement of costs taxed in the appellate court and designate the party against whom taxed.

(c) *Costs of appeal taxable in trial tribunals.* Any costs of an appeal which are assessable in the trial tribunal shall upon receipt of the mandate be taxed as directed therein, and may be collected by execution of the trial tribunal.

(d) *Execution to collect costs in appellate courts.* Costs taxed in the courts of the appellate division may be made the subject of execution issuing from the court where taxed. Such execution may be directed by the clerk of the court to the proper officers of any county of the State; may be issued at any time after the mandate of the court has been issued; and may be made returnable on any day named. Any officer to whom such execution is directed is amenable to the penalties prescribed by law for failure to make due and proper return.

### CASE NOTES

**Where plaintiff had appealed nearly every order entered by the trial court, the appeal at hand being the thirteenth appeal** to the appellate division in the case and related cases, not including requests for extraordinary writs, and for the most part plaintiff had merely reasserted issues previously ruled upon by the appellate division, the appeal would be dismissed, with costs to be taxed to plaintiff individually. Lowder v. All Star Mills, Inc., 91 N.C. App. 621, 372 S.E.2d 739 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 234 (1989).

**Costs Attributable to Excessively Long**

**Brief Assessed Against Attorney.** — Where former attorney for plaintiffs filed a brief of 80 single-spaced pages of arguments, a gross violation of N.C.R.A.P., Rule 28(j), the portion of the costs of the appeal attributable to plaintiff appellant's excessively long brief were assessed against said attorney, with plaintiffs bearing the remainder of the costs of the appeal. North Buncombe Ass'n of Concerned Citizens v. Rhodes, 100 N.C. App. 24, 394 S.E.2d 462, appeal dismissed, 327 N.C. 484, 397 S.E.2d 215 (1990).

**Costs Assessed on Attorney.** — Because Rule 7 of the Rules of Appellate Procedure was violated, in that a timely written request for the transcript was not made, the cost of appeal was assessed on upon plaintiffs' attorney personally, pursuant to this rule. Thompson v. Town of Warsaw, 120 N.C. App. 471, 462 S.E.2d 691 (1995).

**Where all appellate briefs contained in excess** of 91 charactes per line in violation of Appellate Rule 26(g), double costs would be assessed, with the first set to be shared equally among all parties, and the second to be paid in equal share by counsel for the parties. Barnard v. Rowland, 132 N.C. App. 416, 512 S.E.2d 458 (1999).

The costs of an appeal were taxed to defense counsel, where counsel successfully challenged a non-statutory aggravating factor imposed by the sentencing judge, but counsel's appellate brief contained materials outside the record and gratuitous comments about the trial judge. State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998).

**Applied** in City of Wilmington v. Camera's Eye, Inc., 43 N.C. App. 558, 259 S.E.2d 589 (1979); State v. Bennett, 102 N.C. App. 797, 404 S.E.2d 4 (1991); Lowder v. Lowder, 107 N.C. App. 115, 418 S.E.2d 713 (1992); Fox v. Fox, 114 N.C. App. 125, 441 S.E.2d 613 (1994).

**Cited** in Brown v. Rhyne Floral Supply Mfg. Co., 89 N.C. App. 717, 366 S.E.2d 894 (1988); Holland Group, Inc. v. North Carolina Dep't of Admin., 130 N.C. App. 721, 504 S.E.2d 300 (1998).

## Rule 36. Trial judges authorized to enter orders under these rules.

(a) *When particular judge not specified by rule.* When by these rules a trial court or a judge thereof is permitted or required to enter an order or to take some other judicial action with respect to a pending appeal and the rule does not specify the particular judge with authority to do so, the following judges of the respective courts have such authority with respect to causes docketed in their respective divisions:

(1) Superior court: the judge who entered the judgment, order, or other determination from which appeal was taken, and any regular or special judge resident in the district or assigned to hold courts in the district wherein the cause is docketed;

(2) District court: the judge who entered the judgment, order, or other determination from which appeal was taken; the chief district judge of the district wherein the cause is docketed; and any judge designated by such chief district judge to enter interlocutory orders under G.S. § 7A-192.

(b) *Upon death, incapacity, or absence of particular judge authorized.* When by these rules the authority to enter an order or to take other judicial action is limited to a particular judge and that judge is unavailable for the purpose by reason of death, mental or physical incapacity, or absence from the state, the Chief Justice will upon motion of any party designate another judge to act in the matter. Such designation will be by order entered ex parte, copies of which will be mailed forthwith by the Clerk of the Supreme Court to the judge designated and to all parties.

### CASE NOTES

**Quoted** in von Hagel v. Blue Cross & Blue Shield, 91 N.C. App. 58, 370 S.E.2d 695 (1988).

## Rule 37. Motions in appellate courts.

(a) *Time; Content of motions; Response.* An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of

the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. Within 10 days after a motion is served upon him or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the motion, which may be supported by affidavits, briefs, or other papers in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) *Determination.* Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties, and without awaiting a response thereto. A party who has not received actual notice of such a motion or who has not filed a response at the time such action is taken, and who is adversely affected by the action may request reconsideration, vacation or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

## CASE NOTES

I. In General.
II. Decisions Under Prior Law.

### I. IN GENERAL.

**The appellate division possesses sufficient authority to dispose of interlocutory appeals** which do not affect a substantial right by dismissal. It has express authority to do so under N.C.R.A.P., Rule 34 on motion of the parties if the appeal is frivolous or taken solely for purposes of delay. Or it may exercise its general authority in response to motions filed under the general motions provision (this rule). Or the appellate division may dismiss upon its own motion as part of its general duty to apply the laws governing the right to appeal. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

**Motions to dismiss appeals as being interlocutory** should properly be filed after the record on appeal is filed in the appellate court. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

**Defendant's motion to dismiss plaintiff's appeal should have been filed in accordance with this rule,** not raised for the first time in his brief. Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996).

**Motions to an appellate court may not be made in a brief,** but must be made in accordance with this rule. Horton v. New South Ins. Co., 122 N.C. App. 265, 468 S.E.2d 856 (1996), cert. denied, — N.C. —, 472 S.E.2d 8 (1996).

**Where the record on appeal contained no motion to dismiss filed in accordance with this rule,** the Court of Appeals would not address the motion as presented in defendant's brief. Morris v. Morris, 92 N.C. App. 359, 374 S.E.2d 441 (1988).

**Noncompliance Resulting in Sanctions Against Plaintiff's Attorneys.** — Given plaintiff's attorneys' willful disobedience of the trial court's explicit order and their substantial noncompliance with N.C.R.A.P., Rules 9, 28, and 37, the court would impose sanctions against plaintiff's attorneys in the form of costs associated with the appeal. Coiner v. Cales, 135 N.C. App. 343, 520 S.E.2d 61 (1999).

**Applied** in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

**Cited** in State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976); State v. Easter, 101 N.C. App. 36, 398 S.E.2d 619 (1990); Smith v. Smith, 336 N.C. 575, 444 S.E.2d 420 (1994); Bell v. Jarvis, 198 F.3d 432 (4th Cir. 1999); In re Southeastern Baptist Theological Seminary, Inc., 135 N.C. App. 247, 520 S.E.2d 302 (1999).

### II. DECISIONS UNDER PRIOR LAW.

***Editor's note.*** *— The cases cited below were decided under former Rule 36, Rules of Practice in the Supreme Court of North Carolina.*

**Only Motions in Writing Entertained.** — The Supreme Court will not entertain any motion, unless reduced to writing. McCoy v. Lassiter, 94 N.C. 131 (1886); Hoyle v. Bagby, 253 N.C. 778, 117 S.E.2d 760 (1961).

## Rule 38. Substitution of parties.

(a) *Death of a party.* No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives. If a party acting in an individual capacity dies after appeal is taken from any tribunal, the personal representative of the deceased party in a personal action, or the successor in interest of the deceased party in a real action may be substituted as a party on motion filed by the representative or the successor in interest or by any other party with the clerk of the court in which the action is then docketed. A motion to substitute made by a party shall be served upon the personal representative or successor in interest in addition to all other parties. If such a deceased party in a personal action has no personal representative, any party may in writing notify the court of the death, and the court in which the action is then docketed shall direct the proceedings to be had in order to substitute a personal representative.

If a party against whom an appeal may be taken dies after entry of a judgment or order but before appeal is taken, any party entitled to appeal therefrom may proceed as appellant as if death had not occurred; and after appeal is taken, substitution may then be effected in accordance with this subdivision. If a party entitled to appeal dies before filing a notice of appeal, appeal may be taken by his personal representative, or, if he has no personal representative, by his attorney of record within the time and in the manner prescribed in these rules; and after appeal is taken, substitution may then be effected in accordance with this rule.

(b) *Substitution for other causes.* If substitution of a party to an appeal is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) *Public officers; Death or separation from office.* When a person is a party to an appeal in an official or representative capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Prior to the qualification of a successor, the attorney of record for the former party may take any action required by these rules to be taken. An order of substitution may be made, but neither failure to enter such an order nor any misnomer in the name of a substituted party shall affect the substitution unless it be shown that the same affected the substantial rights of a party.

### CASE NOTES

I. In General.
II. Decisions Under Prior Law.

### I. IN GENERAL.

**Appeal Where Plaintiff Died Before Entitled to Appeal** — The court used N.C.A.P., Rule 2 to vary the requirements of this rule so as to allow an appeal by the decedent's attorney where the plaintiff died before she was entitled to an appeal. Brown v. Brown, 353 N.C. 220, 539 S.E.2d 621 (2000).

**Cited** in Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977); Brown v. Fulford, 311 N.C. 205, 316 S.E.2d 220 (1984); Smith v. State, 349 N.C. 332, 507 S.E.2d 28 (1998).

### II. DECISIONS UNDER PRIOR LAW.

***Editor's note.*** — *The cases cited below were decided under former Rule 37, Rules of Practice in the Supreme Court of North Carolina.*

**Death of Party Pending Appeal.** — Where a party dies pending appeal, his personal representative will be made a party by order of the court. First & Citizens Nat'l Bank v. Toxey, 210 N.C. 470, 187 S.E. 553 (1936).

When a party dies pending appeal, his administratrix will be substituted as a party upon motion. Peterson v. McLamb, 221 N.C. 538, 19 S.E.2d 488 (1942).

**Rule 39. Duties of clerks; When offices open.**

(a) *General provisions.* The clerks of the courts of the appellate division shall take the oaths and give the bonds required by law. The courts shall be deemed always open for the purpose of filing any proper paper and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) *Records to be kept.* The clerk of each of the courts of the appellate division shall keep and maintain the records of that court, on paper, microform, or electronic media, or any combination thereof. The records kept by the clerk shall include indexed listings of all cases docketed in that court, whether by appeal, petition, or motion and a notation of the dispositions attendant thereto; a listing of final judgments on appeals before the court, indexed by title, docket number, and parties, containing a brief memorandum of the judgment of the court and the party against whom costs were adjudicated; and records of the proceedings and ceremonies of the court. (Adopted June 13, 1975; Amended December 8, 1988 — 39(b) — effective January 1, 1989.)

**Rule 40. Consolidation of actions on appeal.**

Two or more actions which involve common questions of law may be consolidated for hearing upon motion of a party to any of the actions made to the appellate court wherein all are docketed, or upon the initiative of that court. Actions so consolidated will be calendared and heard as a single case. Upon consolidation, the parties may set the course of argument, within the times permitted by App. R. 30(b), by written agreement filed with the court prior to oral argument. This agreement shall control unless modified by the court.

CASE NOTES

**Applied** in King v. North Carolina State Bd. of Sanitarian Exmrs., 82 N.C. App. 409, 346 S.E.2d 300 (1986); Sam Stockton Grading Co. v. Hall, 111 N.C. App. 630, 433 S.E.2d 7 (1993); Hunt v. Hunt, 112 N.C. App. 722, 436 S.E.2d 856 (1993).

**Quoted** in Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601 (2000).

**Stated** in Richmond County v. North Carolina Low-level Radioactive Waste Mgt. Auth., 108 N.C. App. 700, 425 S.E.2d 468 (1993).

**Cited** in State v. Garren, 117 N.C. App. 393, 451 S.E.2d 315 (1994); Curry v. First Fed. Savs. & Loan Ass'n, 125 N.C. App. 108, 479 S.E.2d 286 (1996), cert. denied, 346 N.C. 278, 487 S.E.2d 544 (1997); Cox v. Cox, 133 N.C. App. 221, 515 S.E.2d 61 (1999); Davis v. J.M.X., Inc., 137 N.C. App. 267, 528 S.E.2d 56 (2000), aff'd, 352 N.C. 662, 535 S.E.2d 356 (2000).

**Rule 41. Appeal information statement.**

(a) The Court of Appeals has adopted an APPEAL INFORMATION STATEMENT which will be revised from time to time. The purpose of the APPEAL INFORMATION STATEMENT is to provide the Court the substance of an appeal and the information needed by the Court for effective case management.

(b) Each appellant shall complete, file and serve the APPEAL INFORMATION STATEMENT as set out in this Rule.

(1) The Clerk of the Court of Appeals shall furnish an APPEAL INFORMATION STATEMENT form to all parties to the appeal when the record on appeal is docketed in the Court of Appeals.

(2) Each appellant shall complete and file the APPEAL INFORMATION STATEMENT with the Clerk of the Court of Appeals at or before the time his or her appellant's brief is due and shall serve a copy of the statement upon all other parties to the appeal pursuant to Rule 26. The APPEAL INFORMATION STATEMENT may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service.

(3) If any party to the appeal concludes that the APPEAL INFORMATION STATEMENT is in any way inaccurate or incomplete, that party may file with the Court of Appeals a written statement setting out additions or corrections within 7 days of the service of the APPEAL INFORMATION STATEMENT and shall serve a copy of the written statement upon all other parties to the appeal pursuant to Rule 26. The written statement may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service. (Adopted March 3, 1994, effective March 15, 1994.)

**CASE NOTES**

**Cited** in Troy v. Tucker, 126 N.C. App. 213, 484 S.E.2d 98 (1997).

## Rule 42. Title.

The title of these rules is "North Carolina Rules of Appellate Procedure." They may be so cited either in general references or in reference to particular rules. In reference to particular rules the abbreviated form of citation, "App. R.....," is also appropriate. (Renumbered effective March 15, 1994.)

**CASE NOTES**

**Cited** in Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755 (1986); Burlington Indus., Inc. v. Richmond County, DOT, 90 N.C. App. 577, 369 S.E.2d 119 (1988).

# APPENDIXES

**Editor's note.** — These Appendixes were adopted Dec. 7, 1982, and amended Jan. 1, 1983. Appendixes A and F were further amended Oct. 7, 1985. Appendix A was further revised to reflect June 30, 1988, amendments to Rule 13(a). Appendixes A to F were further amended effective July 1, 1989. Appendixes A to F were further amended effective October 18, 2001.

## Appendix A. Timetables for appeals.

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THE RULES OF APPELLATE PROCEDURE

| *Action* | *Time (Days)* | *From date of* | *Rule Ref.* |
|---|---|---|---|
| Taking Appeal (civil) | 30 | entry of judgment (unless tolled) | 3(c) |
| Taking Appeal (agency) | 30 | receipt of final agency order (unless statutes provide otherwise) | 18(b)(2) |
| Taking Appeal (crim.) | 14 | entry of judgment (unless tolled) | 4(a) |
| Ordering Transcript (civil, agency) | 14 | filing notice of appeal | 7(a)(1)<br>18(b)(3) |
| Ordering Transcript (criminal indigent) | 14 | order filed by clerk of superior court | 7(a)(2) |
| Preparing & delivering transcript | | service of order for transcript | 7(b)(1) |
| (civil, non-capital criminal) | 60 | | |
| (capital criminal) | 120 | | |
| Serving proposed record on appeal (civil, non-captial criminal) | 35<br>35 | notice of appeal (no transcript) or reporter's certificate of delivery of transcript | 11(b)<br>18(d) |
| Serving proposed record on appeal (capital) | 70 | reporter's certificate of delivery | 11(b) |
| Serving objections or proposed alternative record on appeal | | service of proposed record | 11(c) |
| (civil, non-capital criminal) | 21 | | |
| (capital criminal) | 35 | | |
| (agency) | 30 | service of proposed record | 18(d)(2) |

| *Action* | *Time (Days)* | *From date of* | *Rule Ref.* |
|---|---|---|---|
| Requesting judicial settlement of record | 10 | expiration of the last day within which an appellee served could serve objections, etc. | 11(c) 18(d)(3) |
| Judicial settlement of record | 20 | service on judge of request for settlement | 11(c) 18(d)(3) |
| Filing Record on Appeal in appellate court | 15 | settlement of record on appeal | 12(a) |
| Filing appellant's brief (or mailing brief under Rule 26(a)) | 30 | Clerk's mailing of printed record — or from docketing record in civil appeals in forma pauperis (60 days in Death Cases) | 13(a) |
| Filing appellee's brief (or mailing brief under Rule 26(a)) | 30 | service of appellant's brief (60 days in Death Cases) | 13(a) |
| Oral Argument | 30 | filing appellant's brief (usual minimum time) | 29 |
| Certification or Mandate | 20 | Issuance of opinion | 32 |
| Petition for Rehearing (civil action only) | 15 | Mandate | 31(a) |

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THE RULES OF APPELLATE PROCEDURE

| *Action* | *Time (Days)* | *From date of* | *Rule Ref.* |
|---|---|---|---|
| Petition for Discretionary Review prior to determination | 15 | docketing appeal in Court of Appeals | 15(b) |
| Notice of Appeal and/or Petition for Discretionary Review | 15 | Mandate of Court of Appeals (or from order of Court of Appeals denying petition for rehearing) | 14(a), 15(b) |

| *Action* | *Time (Days)* | *From date of* | *Rule Ref.* |
|---|---|---|---|
| Cross-Notice of Appeal | 10 | filing of first notice of appeal | 14(a) |
| Response to Petition for Discretionary Review | 10 | service of petition | 15(d) |
| Filing appellant's brief in the Supreme Court (or mailing brief under Rule 26(a)) | 30<br>30 | Filing notice of appeal<br>certification of review | 14(d)<br>15(g)(2) |
| Filing appellee's brief (or mailing brief under Rule 26(a)) | 30 | service of appellant's brief | 14(d)<br>15(g) |
| Oral Argument | 30 | filing appellant's brief (usual minimum time) | 29 |
| Certification or Mandate | 20 | Issuance of opinion | 32 |
| Petition for Rehearing (civil action only) | 15 | Mandate | 31(a) |

## NOTES

All of the critical time intervals here outlined except those for taking an appeal and petitioning for discretionary review or for rehearing may be extended by order of the Court wherein the appeal is docketed at the time. Note that Rule 27 grants the trial tribunal the authority to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in the rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." Rule 21(c)

**Appendix B. Format and style.**

All documents for filing in either Appellate Court are prepared on 8½ x 11 inch, plain, white unglazed paper of 16 to 20 pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using at least 12 point type and spacing, so as to produce a clear, black image. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½″, 1″, 1½″, 2″, 4¼″ (center), and 5″.

*Captions of Documents*

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the Clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and, again, on the first textual page of the document.

No. ____

(Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

**********

| | | |
|---|---|---|
| STATE OF NORTH CAROLINA | ) | |
| or | ) | |
| (Name of Plaintiff) | ) | From (Name) County |
| | ) | No. _____ |
| v | ) | |
| | ) | |
| (Name of Defendant) | ) | |

**********

(TITLE OF DOCUMENT)

**********

The caption should reflect the title of the action (all parties named) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative position of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the Trial Division should include directly below the name of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however,

should not be included in other documents except for a petition for writ of certiorari or other petitions and motions where no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the court of appeals' docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled NEW BRIEF.

Indexes

A brief or petition which is long or complex or which treats multiple issues, and all Appendixes to briefs (Rule 28) and Records on Appeal (Rule 9) must contain an index to the contents.

The index should be indented approximately ¾" from each margin, providing a 5-inch line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

**INDEX**

Organization of the Court ..... 1
Complaint of Tri-Cities Mfg. Co. ..... 1

***

* PLAINTIFF'S EVIDENCE:
John Smith ..... 17
Tom Jones ..... 23
Defendant's Motion for Nonsuit ..... 84
* DEFENDANT'S EVIDENCE:
John Q. Public ..... 86
Mary J. Public ..... 92
Request for Jury Instructions ..... 101
Charge to the Jury ..... 101
Jury Verdict ..... 102
Order or Judgment ..... 108
Appeal Entries ..... 109
Order Extending Time ..... 111
Assignments of Error ..... 113
Certificate of Service ..... 114
Stipulation of Counsel ..... 115
Names and Addresses of Counsel ..... 116

*Use of the Transcript of Evidence with Record on Appeal*

Those portions asterisked (*) in the sample index above would be omitted if the transcript option were selected under Appellate Rule 9(c). In their place in the record, counsel should place a statement in substantially the following form:

> "Per Appellate Rule 9(c) the transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of pages) pages, numbered (1) through (last page #), and bound in (# of volumes) volumes is filed contemporaneously with this record."

The transcript should be prepared with a clear, black image on 8½ x 11 paper of 16-20 pound substance. Enough copies should be reproduced to assure the parties of a reference copy, and file one copy in the Appellate Court. In criminal appeals, the District Attorney is responsible for conveying a copy to the Attorney General (App. Rule 9(c)).

The transcript should not be inserted into the record on appeal, but, rather, should be separately bound and submitted for filing in the proper appellate court with the record. Transcript pages inserted into the record on appeal will be treated in the manner of a narration and will be printed at the standard page charge. Counsel should note that the separate transcript will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

*Table of Cases and Authorities*

Immediately following the index and before the inside caption, all briefs, petitions, and motions greater than five pages in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to A Uniform System of Citation (14th ed.).

*Format of Body of Document*

The body of the document of records on appeal should be single-spaced with double-spaces between paragraphs. The body of the document of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, and long quotes single-spaced.

Adherence to the margins is important since the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾ inch from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made through a parenthetic entry in the text. (R pp. 38-40) References to the transcript, if used, should be made in similar manner. (T p. 558, line 21)

*Topical Headings*

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented ½ inch from the left margin.

*Numbering Pages*

The cover page containing the caption of the document (and the index in Records on Appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lower case roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g., -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

*Signature and Address*

All original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example below. The name, address, telephone number, and e-mail address of the person signing, together with the capacity in which he signs the paper will be included. Where counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained)

ATTORNEY, COUNSELOR, LAWYER & HOWE

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**CASE NOTES**

**Type Size.** — N.C.R.A.P., Rule 26 requires all type to be "at least 11 point," while Appendix B specifies "10-12 point type." To the extent that Appendix B conflicts with Rule 26, Rule 26 governs and no brief shall be submitted in less than eleven point type Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

A brief presented in eleven point type will contain no more than three lines of double spaced text in a single, vertical inch, or twenty-seven (27) lines of double-spaced text on a properly formatted 8.5 by 11 inch page. The numbering of the pages, as provided in Appendix B., is not included in the text of the page and shall be centered in the one-inch margin at the top of the page. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

**Characters per Inch.** — Characters per inch, referred to in some modern word processing systems as "cpi," is not equivalent to point size and defines only the width or "set" size of a character, which includes spaces, punctuation, and letters. N.C.R.A.P., Rule 26 does not speak in terms of characters per inch; however, in order to provide a uniform construction of this rule and prevent unfair advantage to any litigant, it is necessary to provide for a limit on the characters per inch. Ten characters per inch is the standard used in the slip opinions of the Court of Appeals and the Supreme Court and the standard we will apply to the briefs filed with the Court of Appeals. Using this standard, a properly formatted 8.5 by 11 inch page will contain no more than 65 characters per line. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

**Prospective Application of Construction of Rule.** — Where the point size in defendants' appellate brief did not comply with N.C.R.A.P., Rule 26, but neither the rule nor the Court of Appeals had previously construed Rule 26, the court would consider the arguments presented in defendants' brief. Rule 26, as construed in this case, will be applied by the Court to briefs, petitions, notices of appeal, responses and motions filed after the date of this opinion. Lewis v. Craven Regional Medical Ctr., 122 N.C. App. 143, 468 S.E.2d 269 (1996).

**Cited** in Staton v. Brame, 136 N.C. App. 170, 523 S.E.2d 424 (1999).

**Appendix C. Arrangement of record on appeal.**

Only those items listed in the following tables which are required by Rule 9(a) in the particular case should be included in the record. See Rule 9(b)(2) for sanctions against including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the record proper if the transcript option of Rule 9(c) is used, and there exists a transcript of the items.

TABLE 1

SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(1)a
3. Statement of organization of trial tribunal, per Rule 9(a)(1)b
4. Statement of record items showing jurisdiction, per Rule 9(a)(1)c
5. Complaint
6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pre-trial order

*10. Plaintiff's evidence, with any evidentiary rulings assigned as error
*11. Motion for directed verdict, with ruling thereon
*12. Defendant's evidence, with any evidentiary rulings assigned as error
*13. Plaintiff's rebuttal evidence, with any evidentiary rulings assigned as error

14. Issues tendered by parties
15. Issues submitted by court
16. Court's instructions to jury, per Rule 9(a)(1)f
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment
20. Items required by Rule 9(a)(1)i
21. Entries showing settlement of record on appeal, extension of time, etc.
22. Assignments of error, per Rule 10
23. Names, office addresses, telephone numbers, and e-mail address of counsel for all parties to appeal

TABLE 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(2)a
3. Statement of organization of superior court, per Rule 9(a)(2)b
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(a)(2)c
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all pertinent items from administrative proceeding filed for review in superior court, including evidence

*8. Evidence taken in superior court, in order received

9. Copies of findings of fact, conclusions of law, and judgment of superior court
10. Items required by Rule 9(a)(2)g
11. Entries showing settlement of record on appeal, extension of time, etc.
12. Assignments of error, per Rule 9(a)(2)h
13. Names, office addresses, telephone numbers, and e-mail address of counsel for all parties to appeal

TABLE 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(3)a
3. Statement of organization of trial tribunal, per Rule 9(a)(3)b
4. Warrant
5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. Voir dire of Jurors
*10. State's evidence, with any evidentiary rulings assigned as error
11. Motions at close of state's evidence, with rulings thereon (* if oral)
*12. Defendant's evidence, with any evidentiary rulings assigned as error
13. Motions at close of defendant's evidence, with rulings thereon (* if oral)
*14. State's rebuttal evidence, with any evidentiary rulings assigned as error
15. Motions at close of all evidence, with rulings thereon (* if oral)
16. Court's instructions to jury, per Rules 9(a)(3)f, 10(b)(2)
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries
21. Entries showing settlement of record on appeal, extension of time, etc.
22. Assignments of error, per Rule 9(a)(3)j
23. Names, office addresses, telephone numbers, and e-mail addresses of counsel for all parties to appeal.

TABLE 4

ASSIGNMENTS OF ERROR

A. Examples related to pre-trial rulings in civil action

Defendant assigns as error:

1. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(2) to dismiss for lack of jurisdiction over the person of the defendant on the grounds (that the uncontested affidavits in support of the motion show that no grounds for jurisdiction existed) (or other appropriately stated grounds).

   Record, p. 4.

2. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(6) to dismiss for failure of the complaint to state a claim upon which relief can be granted, on the ground that the complaint affirmatively shows that the plaintiff's own negligence contributed to any injuries sustained.

   Record, p. 7.

3. The court's denial of defendant's motion requiring the plaintiff to submit to physical examination under N.C.R.Civ.P. 35, on the ground that on the record before the court, good cause for the examination was shown.
   Transcript, vol. 1, p. 137, lines 17-20.
4. The court's denial of defendant's motion for summary judgment, on the ground that there was not [no] genuine issue of fact that the statute of limitations had run and defendant was therefore entitled to judgment as a matter of law.
   Record, p. 15.

B. Examples related to civil jury trial rulings

Defendant assigns as error the following:

1. The court's admission of the testimony of the witness E.F., on the ground that the testimony was hearsay.
   Transcript, vol. 1, p. 295, line 5, through p. 297, line 12.
   Transcript, vol. 1, p. 299, lines 1-8.
2. The court's denial of the defendant's motion for directed verdict at the conclusion of all the evidence, on the ground that plaintiff's evidence as a matter of law established his contributory negligence.
   Record, p. 45.
3. The court's instructions to the jury, Record, pp. 50-51, as bracketed, explaining the doctrine of last clear chance, on the ground that the doctrine was not correctly explained.
4. The court's instructions to the jury, Record, pp. 53-54, as bracketed, applying the doctrine of sudden emergency to the evidence, on the ground that the evidence referred to by the court did not support application of the doctrine.
5. The court's denial of defendant's motion for a new trial for newly discovered evidence, on the ground that on the uncontested affidavits in support of the motion the court abused its discretion in denying the motion.
   Record, p. 80; Transcript, Vol. 3, p. 764, lines 8-23.

C. Examples related to civil non-jury trial

Defendant assigns as error:

1. The court's refusal to enter judgment of dismissal on the merits against plaintiff upon defendant's motion for dismissal made at the conclusion of plaintiff's evidence, on the ground that plaintiff's evidence established as a matter of law that plaintiff's own negligence contributed to the injury.
   Record, p. 20.
2. The court's Finding of Fact No. 10, on the ground that there was insufficient evidence to support it.
   Record, p. 25.
3. The court's Conclusion of Law No. 3, on the ground that there are findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.
   Record, p. 27.

**Editor's note.** — A former Table 4, relating to exceptions set out in the record on appeal, was deleted by the amendment of Appendix C, effective July 1, 1989.

**Appendix D. Forms.**

Captions for all documents filed in the Appellate Division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

**1. Notices of Appeal**

a. *to Court of Appeals from Trial Division*
Appropriate in all appeals of right from district or superior court except appeals from criminal judgments imposing sentences of death.

(Caption)

**********

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:
(Plaintiff) (Defendant) (Name of Party) hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment) (from the order) entered on (date) in the (District) (Superior) Court of (name) County, (describing it).

Respectfully submitted this ____ day of _____ 2_____.

s/_____
Attorney for (Plaintiff) (Defendant)
(Address and Telephone)

b. *to Supreme Court from a Judgment of the Superior Court Including a Sentence of Death*

(Caption)

**********

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:
(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment, entered by (name of Judge), in the Superior Court of (name) County on (date), which judgment included a conviction of murder in the first degree and a sentence of (death).

Respectfully submitted this ____ day of _____ 2_____.

s/_____
Attorney for Defendant-Appellant
(Address and Telephone)

c. *to the Supreme Court from a Judgment of the Court of Appeals*
Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under G.S. 7A-30. The appealing party shall enclose a certified copy of the opinion of the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)

**********

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:
(Plaintiff) (Defendant) (name of party) hereby appeals to the Supreme Court

of North Carolina from the judgment of the Court of Appeals (describe it), which judgment ...

(*Constitutional question* — G.S. 7A-30(1)) ... directly involves substantial questions arising under the Constitution(s) (of the United States) (and) (or) (of the State of North Carolina) as follows:

(here describe the specific issues, citing Constitutional provisions under which they arise, and showing how such issues were timely raised below and are set out in the record on appeal, e.g.:

"Question 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's assignment of error to the denial of his Motion to Suppress Evidence Obtained by a Search Warrant, thereby depriving defendant of his Constitutional right to be secure in his person, house, papers, and effects, against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without probable cause and warrants not supported by evidence. This constitutional issue was timely raised in the trial tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp. 7 through 10). This constitutional issue was determined erroneously by the Court of Appeals.")

In the event the Court finds this constitutional question to be substantial, petitioner intends to present the following issues in his brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the constitutional question claim. An issue may not be briefed if it is not listed in the notice of appeal.)

(*dissent* — G.S. 7A-30(2)) ... was entered with a dissent by Judge (name), based on the following issue(s):

(Here state the issue or issues which are the basis of the dissenting opinion in the Court of Appeals. Do not state additional issues as with the constitutional question appeal, above. Any additional issues desired to be raised in the Supreme Court where the appeal of right is based solely on a dissenting opinion must be presented by a petition for discretionary review as to the additional issues.)

Respectfully submitted this ____ day of _____ 2_____.

s/_____
Attorney for (Plaintiff) (Defendant)-Appellant
(Address and Telephone)

**2. Appeal Entries**

The appeal entries are appropriate as a ready means of providing in composite form for the record on appeal:

1) the entry required by App. Rule 9(a) showing appeal duly taken by oral notice under App. Rule 3(b) or 4(a) and

2) the entry required by App. Rule 9(a) showing any judicial extension of time for serving proposed record on appeal under App. Rule 27(c).

These entries of record may also be made separately.

Where appeal is taken by filing and serving written notice after the term of court, a copy of the notice with filing date and proof of service is appropriate as the record entry required.

Such "appeal entries" are appropriately included in the record on appeal following the judgment from which appeal is taken.

The judge's signature, while not technically required, is traditional and serves as authentication of the substance of the entries.

(Defendant) gave due notice of appeal to the (Court of Appeals) (Supreme Court). (Defendant) shall have 10 days in which to order the transcript, or, in the alternative, 35 days in which to serve a proposed record on appeal on the appellee. (Plaintiff) is allowed 21 days thereafter within which to serve objections or a proposed alternative record on appeal.

This ____ day of _____ 2_____.

s/_____
Judge Presiding

**3. Petition for Discretionary Review Under G.S. 7A-31**

To seek review of the opinion and judgment of the Court of Appeals where appellant contends case involves issues of public interest or jurisprudential significance. May also be filed as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant considers that such appeal lies of right due to substantial constitutional questions under G.S. 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)

**********

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from G.S. 7A-31 which provide the basis for the petition). In support of this petition, (Plaintiff) (Defendant) shows the following:

*Facts*

(Here state first the procedural history of the case through the trial division and the Court of Appeals. Then set out factual background necessary for understanding the basis of the petition.)

*Reasons Why Certification Should Issue*

(Here set out factual and legal argument to justify certification of [the] case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should be to show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is one significant to the jurisprudence of the State or one which offers significant public interest. If the Court is persuaded [to] take the case, then the appellant may deal thoroughly with the substantive issues in the new brief.)

*Issues to Be Briefed*

In the event the Court allows this petition for discretionary review, petitioner intends to present the following issues in his brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the petition. An issue may not be briefed if it is not listed in the petition.)

Respectfully submitted this ____ day of _____ 2_____.

s/_____
Attorney for (Plaintiff) (Defendant)
(Address and Telephone)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in [the] case.

**4. Petition for Writ of Certiorari**

To seek review 1) of the judgments or orders of trial tribunals in the appropriate appellate court when the right to prosecute an appeal has been lost or where no right to appeal exists; 2) by the Supreme Court of the decisions and orders of the Court of Appeals where no right to appeal or to petition for discretionary review exists or where such right has been lost by failure to take timely action.

(Caption)

**********

TO THE HONORABLE (SUPREME COURT) (COURT OF APPEALS) OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the N.C. Rules of Appellate Procedure to review the (judgment) (order) (decree) of the [Honorable (name), Judge Presiding, (name) County Superior (District) Court] [North Carolina Court of Appeals], dated (date), (here describe the judgment, order, or decree appealed from), and in support of this petition shows the following:

*Facts*

(Here set out factual background necessary for understanding the basis petition: e.g., failure to perfect appeal by reason of circumstances constituting excusable neglect; nonappealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from reporter, statement should include estimate of date of availability, and supporting affidavit from the Court Reporter.)

*Reasons Why Writ Should Issue*

(Here set out factual and legal argument to justify issuance of writ: e.g., reasons why interlocutory order makes it impractical for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed assignments of error; etc.)

*Attachments*

Attached to this petition for consideration by the Court are certified copies of the (judgment) (order) (decree) sought to be reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition.)

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the [Superior Court of (name) County] [North Carolina Court of

Appeals] to permit review of the (judgment) (order) (decree) above specified, upon errors [(to be) assigned in the record on appeal constituted in accordance with the Rules of Appellate Procedure] [stated as follows: (here list the errors, as issues, in the manner provided for the petition for discretionary review)]; and that the petitioner have, such other relief as to the Court may seem proper.

Respectfully submitted, this the ____ day of _____, 2_____.

s/_____
Attorney for Petitioner
(Address and Telephone)

(Verification by petitioner or counsel)
(Certificate of service upon opposing parties)
(Attach a clear copy of the opinion, order, etc., which is the subject of the petition and other attachments as described in petition.)

**Petition for Writ of Supersedeas under Rule 23 and Motion for Temporary Stay**

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Appellate Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, e.g., fines, are stayed automatically pending an appeal of right).

A motion for temporary stay is appropriate to show good cause for immediate stay of execution on an ex parte basis pending the Court's decision on the Petition for Supersedeas or the substantive petition in the case.

(Caption)

**********

TO THE HONORABLE (COURT OF APPEALS) (SUPREME COURT) OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution) (enforcement) of the (judgment) (order) (decree) of the [Honorable _____, Judge Presiding, (Superior) (District) Court of _____ County] [North Carolina Court of Appeals] dated _____, pending review by this Court of said (judgment) (order) (decree) which (here describe the judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

*Facts*

(Here set out factual background necessary for understanding basis of petition and justifying its filing under Rule 23: e.g. trial judge has vacated the entry upon finding security deposited under G.S. Section _____ inadequate; or that trial judge has refused to stay execution upon motion therefor by petitioner; or that circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

*Reasons Why Writ Should Issue*

(Here set out factual and legal argument for justice of issuing writ: e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if he is required to obey

decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

*Attachments*

Attached to this petition for consideration by the court are certified copies of the (judgment) (order) (decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the [(Superior) (District) Court of _____ County)] [(North Carolina Court of Appeals)] staying (execution) (enforcement) of its (judgment) (order) (decree) above specified, pending issuance of the mandate to this Court following its review and determination of the (Appeal) (discretionary review) (review by extraordinary writ) (now pending) (the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, this the ____ day of _____, 2_____.

s/_____
Attorney for Petitioner
(Address and Telephone)

(Verification by petitioner or counsel.)
(Certificate of Service upon opposing party.)

Rule 23(e) provides that in conjunction with such a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included in the main petition as part of it or filed separately.

*Motion for Temporary Stay*

(Plaintiff) (Defendant) respectfully applies to the Court for an order temporarily staying (execution) (enforcement) of the (judgment) (order) (decree) which is the subject of (this) (the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this Application, movant shows that (here set out the legal and factual argument for the issuance of such a temporary stay order; e.g., irreparable harm practically threatened of [if] petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

*Motion for Stay of Execution*

In death cases, the Supreme Court uses an order for stay of execution [of] death sentence in lieu of the writ of supersedeas. Counsel should promptly apply for such a stay after the judgment of the Superior Court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)

**********

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the defendant, (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable _____, Judge Presiding,

Superior Court of _____ County, sentenced the defendant to death, execution being set for (date of execution).

2. That pursuant to G.S. 15A-2000(d)(1), there was an automatic appeal of this matter to the Supreme Court of North Carolina, and that defendant's notice of appeal was given (describe the circumstances and date of notice).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the scheduled date for execution.

WHEREFORE, the defendant prays the Court to enter an Order staying the execution pending judgment and further orders of this Court.

Respectfully submitted, this the ____ day of _____, 2_____.

s/_____
Attorney for Defendant
(Address and Telephone)

(Certificate of Service on Attorney General, District Attorney, and Warden of Central Prison)

**Appendix E. Content of briefs.**

**CAPTION**

Briefs should use the caption as shown in Appendix B. The Title of the Document should reflect the position of the filing party both at the trial level and on the appeal, e.g., DEFENDANT-APPELLANT'S BRIEF, PLAINTIFF-APPELLEE'S BRIEF or BRIEF FOR THE STATE. A brief filed in the Supreme Court in a case decided by the Court of Appeals is captioned a "New Brief" and the position of the filing party before the Supreme Court should be reflected, e.g., DEFENDANT-APPELLEE'S NEW BRIEF (where the State has appealed from the Court of Appeals in a criminal matter).

The cover page should contain only the caption of the case. Succeeding pages should present the following items, in order.

**INDEX OF THE BRIEF**

Each brief should contain a topical index beginning at the top margin of the first page following the cover, in substantially the following form:

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STATEMENT OF THE CASE ..... 2
STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW .... 2
STATEMENT OF THE FACTS ..... 2
ARGUMENT:
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*****

**TABLE OF CASES AND AUTHORITIES**

This table should begin at the top margin of the page following the Index.

Page reference should be made to the first citation of the authority in each question to which it pertains.

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*****

**QUESTIONS PRESENTED**

The inside caption is on "page 1" of the brief, followed by the questions presented. The phrasing of the questions presented need not be identical with that set forth in the assignments of error in the Record; however, the brief may not raise additional questions or change the substance of the questions already presented in those documents. The appellee's brief need not restate the questions unless the appellee desires to present additional questions to the Court.

*QUESTIONS PRESENTED*

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION?

***

**STATEMENT OF THE CASE**

If the Questions Presented carry beyond page 1, the Statement of the Case should follow them, separated by the heading. If the Questions Presented do not carry over, the Statement of the Case should begin at the top of page 2 of the brief.

Set forth a concise chronology of the course of the proceedings in the trial court and the route of appeal, including pertinent dates. For example:

*STATEMENT OF THE CASE*

The defendant, John Q. Public, was convicted of first degree rape at the October 5, 1988, Criminal Session of the Superior Court of Bath County, the Honorable I. M. Wright presiding, and received the mandatory life sentence for the Class B felony. The defendant gave written notice of appeal in open court to the Supreme Court of North Carolina at the time of the entry of judgment

on October 8, 1988, the transcript was ordered on October 15, 1988, and was delivered to parties on December 10, 1988.

A motion to extend the time for serving and filing the record on appeal was allowed by the Supreme Court on January 12, 1989. The record was filed and docketed in the Supreme Court on February 25, 1989.

**STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW**

Set forth the statutory basis for permitting appellate review. For example, in an appeal from a final judgment to the Court of Appeals, the appellant might state that the ground for appellate review is a final judgment of the superior court under N.C. Gen. Stat. § 7A-27(b). If the appeal is based on N.C.R. Civ. P. 54(b), the appellant must also state that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. If the appeal is from an interlocutory order or determination based on a substantial right, the appellant must present, in addition to the statutory authorization, facts and argument showing the substantial right that will be lost, prejudiced, or less than adequately protected absent immediate appellate review.

**STATEMENT OF THE FACTS**

The facts constitute the basis of the dispute or criminal charges and the procedural mechanics of the case if they are significant to the questions presented. The facts should be stated objectively and concisely and should be limited to those which are relevant to the issue or issues presented.

Do not include verbatim portions of the record or other matters of an evidentiary nature in the statement of the facts. Summaries and record or transcript citations should be used. No appendix should be compiled simply to support the statement of the facts.

The appellee's brief need contain no statement of the case or facts if there is no dispute. The appellee may state additional facts where deemed necessary, or, if there is a dispute of the facts, may restate the facts as they objectively appear from the appellee's viewpoint.

**ARGUMENT**

Each question will be set forth in upper case type as the party's contention, followed by the assignments of error pertinent to the question, identified by their numbers and by the pages in the printed record on appeal or in the transcript at which they appear, and separate arguments pertaining to and supporting that contention, e.g.,

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.

ASSIGNMENT OF ERROR NO. 2
(T p. 45, lines 20-23)

Parties should feel free to summarize, quote from, or cite to the record or transcript during the presentation of argument. If the transcript option is selected under Appellate Rule 9(c), the Appendix to the Brief becomes a consideration, as described in Appellate Rule 28 and below.

Where statutory or regulatory materials are cited, the relevant portions should be quoted in the body of the argument or placed in the appendix to the brief. Rule 28(d)(1)c.

**CONCLUSION**

State briefly and clearly the specific objective or relief sought in the appeal. It is not necessary to restate the party's contentions, since they are presented both in the index and as headings to the individual arguments.

**SIGNATURE AND CERTIFICATE OF SERVICE**

Following the conclusion, the brief must be dated and signed, with the attorney's mailing address and telephone number, all indented to the center of the page.

The Certificate of Service is then shown with centered, upper case heading. The certificate itself, describing the manner of service upon the opposing party with the complete mailing address of the party or attorney served is followed by the date and the signature of the person certifying the service.

**APPENDIX TO THE BRIEF UNDER THE TRANSCRIPT OPTION**

Appellate Rules 9(c) and 28 require additional steps to be taken in the brief to point the Court to appropriate excerpts of the transcript considered essential to the understanding of the arguments presented.

Counsel is encouraged to cite, narrate, and quote freely within the body of the brief. However, if because of length a verbatim quotation is not included in the body of the brief, that portion of the transcript and others like it shall be gathered into an appendix to the brief which is situated at the end of the brief, following all signatures and certificates. Counsel should *not* compile the entire transcript into an appendix to support issues involving directed verdict, sufficiency of evidence, or the like.

The appendix should be prepared so as to be clear and readable, distinctly showing the transcript page or pages from which each passage is drawn. Counsel may reproduce transcript pages themselves, clearly indicating those portions to which attention is directed.

The appendix should include a table of contents, showing the pertinent contents of the appendix, the transcript or appendix page reference and a reference back to the page of the brief citing the appendix.
For example:

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VOIR DIRE CROSS-EXAMINATION OF OFFICER
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(or T pp. 74-76)

*****

The appendix will be printed with the brief to which it is appended; however, it will not be retyped, but run as is. Therefore, clarity of image is extremely important.

**Appendix F. Fees and costs.**

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. There is no fee for filing a motion in a cause; other fees are as follows, and should be submitted with the document to which they pertain, made payable to the Clerk of the appropriate appellate court:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas — docketing fee of $10.00 for each document, i.e.: docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

Certification fee of $10.00 (payable to Clerk, Court of Appeals) where review of a judgment of Court of Appeals is sought in Supreme Court by notice of appeal or by petition.

An appeal bond of $250.00 is required in civil cases per Appellate Rule 6 and 17. The bond should be filed contemporaneously with the record in the Court of Appeals and with the notice of appeal in the Supreme Court. The Bond will not be required in cases brought by petition for discretionary review or certiorari unless and until the Court allows the petition.

Costs for printing documents are $1.75 per printed page. The Appendix to a brief under the Transcript option of Appellate Rules 9(c) and 28 (b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief.

The Clerk of the Court of Appeals requires that a deposit for estimated printing costs accompany the document at filing. The Clerk of the Supreme Court prefers to bill the party for the costs of printing after the fact.

Court costs on appeal total $9.00, plus the cost of copies of the opinion to each party filing a brief, and are imposed when a notice of appeal is withdrawn or dismissed and when the mandate is issued following the opinion in a case.

Photocopying charges are $.20 per page. The facsimile transmission fee for documents sent from the clerk's office, which is in addition to standard photocopying charges, is $5.00 for the first 25 pages and $.20 for each page thereafter.

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# RULES OF THE JUDICIAL STANDARDS COMMISSION

Adopted January 1, 1973,
with amendments received through September 10, 1997.


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## Rule 1. Authority.

These rules are promulgated pursuant to the authority contained in G.S. 7A-377, and are effective January 1, 1973.

## Rule 2. Organization; Officers; Meetings; Quorum.

The Commission shall have a Chairman, who is the Court of Appeals member, and a Vice-Chairman, who shall be elected by the members. The Vice-Chairman shall preside in the absence of the Chairman. The Commission shall also have a Secretary, who shall be elected by the members and perform such duties as the Commission may assign. The Vice-Chairman and Secretary shall serve for one-year terms, and may succeed themselves.

The Commission shall meet on the call of the Chairman or of any four members.

A quorum for the conduct of business shall consist of any four members, except as otherwise provided in these rules.

Each member of the Commission, including the Chairman, Vice-Chairman, Secretary, or other presiding member, shall be a voting member.

The Commission shall ordinarily meet in Raleigh, but may meet anywhere in the State. The Commission's address is P. O. Box 1122, Raleigh, N.C. 27602.

## Rule 3. Interested party.

A judge who is a member of the Commission is disqualified from acting in any case in which he is a respondent, except in his own defense.

### CASE NOTES

**Convicting Defendants of Traffic Violations With Which They Were Not Charged** — The actions of respondent/judge constituted willful misconduct, were prejudicial to the administration of justice such that they brought the judicial office into disrepute, violated Canons 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct, and warranted censure where the respondent knowingly convicted one defendant of careless and reckless driving when he had not been charged with that offense and where respondent took the disposition of a second case outside of the courtroom and convicted that defendant, charged with DWI, of

careless and reckless driving. In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651 (2000).

## Rule 4. Confidentiality of proceedings.

(a) Unless otherwise waived by the justice or judge involved, all papers filed with and proceedings before the Commission, including any preliminary investigation which the Commission may make, are confidential except as provided herein. If the Commission concludes that formal proceedings should be instituted after a preliminary investigation is completed, the notice and complaint filed by the Commission along with the answer and all other pleadings are not confidential. Formal hearings ordered by the Commission are not confidential, and recommendations of the Commission to the Supreme Court along with the record filed in support of such recommendations are not confidential.

(b) At the request of the judge involved or on its own motion in any case in which a complaint filed with the Commission or a Commission proceeding is made public by the complainant, the judge involved, independent sources, or the law, the Commission may issue such statements of clarification and correction as it deems appropriate in the interest of maintaining confidence in the justice system. Such statements may address the status and procedural aspects of the proceeding, the judge's right to a fair hearing in accordance with due process requirements, and any official action or disposition by the Commission, including release of its written notice to the complainant or the judge of such action or disposition.

(c) All written communications to a judge (counsel, guardian, guardian ad litem) which are considered confidential pursuant to these rules shall be enclosed in a securely sealed inner envelope marked "Confidential."

### CASE NOTES

**Minority Recommendations Not Confidential.** — A written minority recommendation filed with the Judicial Standards Commission by one or more of its members is not confidential and should be filed with the State Supreme Court together with the Commission's recommendation. In re Bissell, 333 N.C. 766, 429 S.E.2d 731 (1993).

## Rule 5. Defamatory matter.

Testimony and other evidence presented to the Commission is privileged in any action for defamation.

## Rule 6. Unfounded or frivolous complaints.

(a) Upon receipt of a written complaint that is obviously unfounded or frivolous, the Commission shall write a short letter of explanation to the complainant. The judge involved shall not be notified of these complaints unless otherwise determined.

(b) A determination that a complaint is unfounded or frivolous may be made by two Commission members one of whom must be a judge or attorney. Such determination may be reconsidered by the full Commission at its next meeting.

## Rule 7. Preliminary investigation.

(a) The Commission, upon receiving a written complaint, not obviously unfounded or frivolous, alleging facts indicating that a judge may be guilty of willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial

office into disrepute, or alleging that a judge is suffering from a mental or physical incapacity interfering with the performance of his duties, which incapacity is, or is likely to become, permanent, shall make a preliminary investigation to determine whether formal proceedings should be instituted. The Commission may also make a preliminary investigation on its own motion.

(b) The judge shall be notified of the investigation, the nature of the charge, and whether the investigation is on the Commission's own motion or upon written complaint, and afforded a reasonable opportunity to present such relevant matters as he may choose. Such notice shall be in writing, and may be transmitted by a member of the Commission, any person of suitable age and discretion designated by it, or by certified or registered mail.

(c) Once a preliminary investigation has been ordered, if the Commission feels that immediate suspension of the judge involved is necessary for the proper administration of justice, it may recommend to the Chief Justice that the judge be temporarily suspended from performing judicial duties pending final disposition of the inquiry. A copy of the recommendation shall be provided to the judge by certified mail.

If the preliminary investigation does not disclose sufficient cause to warrant further proceedings, the judge shall be so notified, and the case closed.

**CASE NOTES**

**Cited** in In re Cornelius, 335 N.C. 198, 436 S.E.2d 836 (1993).

## Rule 8. Private admonition.

The Commission may issue a private admonition in any inquiry which discloses conduct by a judge which requires attention but is not of such a nature as would warrant a recommendation of censure or removal; provided, no private admonition may be issued after a formal proceeding has been instituted in accordance with Rule 9. Issuance of a private admonition will not bar proceedings before the Commission in future inquiries concerning similar or other conduct by a judge who receives a private admonition. In the event the Commission intends to refer to or consider, in subsequent proceedings, an inquiry which has been closed with a private admonition, adequate notice of such intentions shall be included in the Rule 9, NOTICE OF FORMAL PROCEEDINGS to the judge.

## Rule 9. Notice of formal proceedings.

After the preliminary investigation has been completed, if the Commission concludes that formal proceedings should be instituted, it shall promptly so notify the judge. Such notice shall be entitled "BEFORE THE JUDICIAL STANDARDS COMMISSIONS, Inquiry Concerning a Judge, No....." The notice shall identify the complainant, and shall specify in ordinary and concise language the charge or charges against the judge. The judge shall be advised of the alleged facts upon which such charges are based, and a copy of the verified complaint shall be furnished to the judge, and the notice shall advise the judge of his right to file a written, verified answer to the charges against him within 20 days after service of the notice upon him. The notice shall be served upon the judge by personal service by a member of the Commission, or some person of suitable age and discretion designated by it. If, after reasonable efforts to do so, personal service cannot be effected, service by certified or registered mail is authorized. Notice by mail shall be addressed to the judge at his residence of record.

CASE NOTES

**Cited** in In re Hayes, 353 N.C. 511, 546 S.E.2d 376 (2001).

### Rule 10. Answer.

(a) Within 20 days after service of the complaint and notice of formal proceedings the judge may file with the Commission an original and 8 copies of an answer, which shall be verified.

(b) The notice, complaint and answer constitute the pleadings. No further pleadings may be filed, and no motions may be filed against any of the pleadings.

CASE NOTES

**Cited** in In re Martin, 333 N.C. 242, 424 S.E.2d 118 (1993).

### Rule 11. Formal hearings.

Upon the filing of an answer, or upon the expiration of the time allowed for its filing, the Commission shall order a formal hearing before it concerning the charges. The hearing shall be held no sooner than 10 days after filing of the answer, or after the deadline for filing of the answer, unless the judge consents to an earlier hearing. The notice shall be served in the same manner as the notice of charges under Rule 9.

At the date set for the formal hearing, the Commission shall proceed whether or not the judge has filed an answer, and whether or not he appears in person or through counsel, but failure of the judge to answer or to appear shall not be taken as evidence of the facts alleged in the charges.

Special counsel (who shall be an attorney) employed by the Commission, or counsel supplied by the Attorney General at the request of the Commission, shall present the evidence in support of the charges.

The hearing shall be recorded by a reporter employed by the Commission for this purpose. (Amended December 12, 1975.)

### Rule 12. Witnesses; Oaths; Subpoenas; Compensation.

Witnesses shall take an oath or affirmation to tell the truth. The oath to witnesses may be administered by any member of the Commission.

Subpoenas to witnesses shall be issued in the name of the State, and shall be signed by a member of the Commission. They shall be served, without fee, by any officer authorized to serve process of the General Court of Justice.

Witnesses are entitled to the same compensation and reimbursement for travel expenses as witnesses in a civil case in the General Court of Justice. Vouchers authorizing disbursements for Commission witnesses shall be signed by the Chairman or Secretary of the Commission.

### Rule 13. Medical examination.

When the mental or physical health of a judge is in issue, the Commission may request the judge to submit to an examination by a licensed physician or physicians of its choosing. If the judge fails to submit to the examination, the Commission may take his failure into account, unless it has good reason to believe that the judge's failure was due to circumstances beyond his control. The judge shall be furnished a copy of the report of any examination conducted under this rule.

The examining physician or physicians shall receive the fee of an expert witness, to be set by the Commission.

**Rule 14. Rights of respondent.**

In formal hearings involving his censure, removal, or retirement, a judge shall have the right and opportunity to defend against the charges by introduction of evidence, representation by counsel, and examination and cross-examination of witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or to produce books, papers, and other evidentiary matter.

A copy of the transcript of proceedings prepared for transmission to the Supreme Court shall be furnished to the judge and, if he has objections to it, he may within 10 days present his objections to the Commission, and the Chairman or Vice-Chairman or his designee shall consider his objections and settle the record prior to transmitting it to the Supreme Court.

The judge has the right to have all or any portion of the testimony in the hearings transcribed at his own expense.

Once the judge has informed the Commission that he has counsel, a copy of any notices, pleadings, or other written communications (other than the transcript) sent to the judge shall be furnished to counsel by any reliable means. (Amended December 12, 1975; January 27, 1978.)

**Rule 15. Evidence.**

At a formal hearing before the Commission, legal evidence only shall be received, and oral evidence shall be taken only on oath or affirmation.

Rulings on evidentiary matters shall be made by the Chairman, or the Vice-Chairman presiding in his absence. (Amended December 12, 1975.)

**Rule 16. Amendments to notice or answer.**

The Commission, at any time prior to its recommendation, may allow or require amendments to the notice of formal proceedings, and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearings. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

**Rule 17. Commission voting.**

The affirmative vote of at least five members of the Commission is necessary to recommend to the Supreme Court censure or removal of a judge. A vote of four (a quorum) is necessary for any other official action, except as specified in Rule 6 for disposing of unfounded or frivolous complaints.

**Rule 18. Contempt.**

The Commission has the same power as a trial court of the General Court of Justice to punish for contempt, or for refusal to obey lawful orders or process issued by the Commission.

**Rule 19. Record of proceedings.**

The Commission shall keep a record of all preliminary investigations and formal proceedings concerning a judge. In formal hearings testimony shall be

recorded verbatim, and if a recommendation to the Supreme Court for censure or removal is made, a transcript of the evidence and all proceedings therein shall be prepared, and the Commission shall make written findings of fact and conclusions of law in support of its recommendation. (Amended December 12, 1975.)

**Rule 20. Transmission of recommendations to Supreme Court.**

After reaching a recommendation to censure or remove a judge, when 10 days have expired after the transcript of the proceeding has been transmitted to the Judge and no objection has been filed, or when the record is settled after objection has been made, the Commission shall promptly file with the Clerk of the Supreme Court the transcript of proceedings, and its findings of fact, conclusions of law, and recommendation, certified by the Chairman or Secretary. The Commission shall concurrently transmit to the judge a copy of the transcript (if the judge objected to the original transcript, and settlement proceedings resulting in changes in the transcript were had), its findings, conclusions, and recommendation. (Amended January 27, 1978.)

**Rule 21. Proceedings in the Supreme Court.**

Proceedings in the Supreme Court shall be as prescribed by Supreme Court Rule. See G.S. 7A-33.

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# RULES FOR SUPREME COURT REVIEW OF RECOMMENDATIONS OF THE JUDICIAL STANDARDS COMMISSION

Adopted September 25, 1975,
with amendments received through September 10, 1997.


Rule
1. Definitions.
2. Petition for hearing.
3. Decision by the court.
4. Reproduction of record and briefs.
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Index follows Rules.


## Rule 1. Definitions.

In these rules, unless the context or subject matter otherwise requires:

(a) Commission means the Judicial Standards Commission.

(b) Judge or respondent means a justice or judge of the General Court of Justice who has been recommended for censure or removal under N. C. Gen. Stat. ch. 7A, art. 30 (1974 Supp.).

(c) Court means the Supreme Court of North Carolina. Clerk means the Clerk of the Supreme Court.

(d) Commission's attorney means the attorney who represented the Commission at the hearing which resulted in the recommendation under consideration by the Court.

(e) The masculine gender includes the feminine gender.

(f) Service of a document required to be served means either mailing the document by U.S. certified mail, return receipt requested, to the person to be served or service in the manner provided in Rule 4 of the N.C. Rules of Civil Procedure.

### CASE NOTES

**Cited** in In re Greene, 340 N.C. 251, 456 S.E.2d 516 (1995); In re Martin, 340 N.C. 248, 456 S.E.2d 517 (1995).

## Rule 2. Petition for hearing.

(a) *Notice to judge.* When the Commission, pursuant to its Rule 19, files with the Clerk a recommendation that a judge be censured or removed, the Clerk shall immediately transmit a copy of the recommendation by U.S. certified mail, return receipt requested, to the respondent named therein.

(b) *Petition for hearing.* The respondent may petition the Court for a hearing upon the Commission's recommendation. The petition shall be signed by the judge or his counsel of record and specify the grounds upon which it is based. It must be filed with the Clerk within 10 days from the date shown on the return receipt as the time the respondent received the copy of the recommendation from the Clerk. At the time the petition is filed it shall be accompanied by a certificate showing service of a copy of the petition upon the Commission's attorney and its chairman or secretary. Upon the filing of his petition, the respondent becomes entitled under G.S. 7A-377 to file a brief and, upon filing a brief, to argue his case to the Court, in person and through counsel.

(c) *Failure to file petition.* If a respondent fails to file a petition for hearing within the time prescribed, the Court will proceed to consider and act upon the

recommendation on the record filed by the Commission. Failure to file a petition waives the right to file a brief and to be heard on oral argument.

(d) *Briefs.* Within 15 days after filing his petition, the respondent may file his brief with the Clerk. At the time the brief is filed the respondent shall also file a certificate showing service of a copy of the brief upon the Commission's attorney and its chairman or secretary. Within 15 days after the service of such brief upon him, the Commission's attorney may file a reply brief, together with a certificate of service upon the respondent and his attorney of record. The form and content of briefs shall be similar to briefs in appeals to the Court.

(e) *Oral argument.* After the briefs are filed, and as soon as may be, the Court will set the case for argument on a day certain and notify the parties. Oral arguments shall conform as nearly as possible to the rules applicable to arguments on appeals to the Court. A judge who has filed a brief may, if he desires, waive the oral argument. A judge who has filed a petition but who has not filed a brief will not be heard upon oral argument.

CASE NOTES

**Cited** in In re Hair, 335 N.C. 150, 436 S.E.2d 128 (1993); In re Cornelius, 335 N.C. 198, 436 S.E.2d 836 (1993).

## Rule 3. Decision by the court.

After considering the record, and the briefs and oral arguments if any, the Court will act upon the Commission's recommendation as required by G.S. 7A-377. The decision on a recommendation for removal shall be by a written opinion filed and published as any other opinion of the Court. Decision on a recommendation for censure shall be by a written order filed with the Clerk and published in the Advance Sheets and bound volumes of the Supreme Court Reports. (Amended April 14, 1976.)

CASE NOTES

**Censure Held Appropriate.** — Where judge was publicly intoxicated out of State which resulted in his arrest and in a negotiated plea of nolo contendere to the criminal offense of trespass after warning, was publicly intoxicated which resulted in his conviction of the criminal offense of indecent exposure, and the respondent refused, even after admitting psychological dependency, to abstain from the consumption of alcohol, he was properly censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Leonard, 339 N.C. 596, 453 S.E.2d 521 (1995).

Respondent/judge was censured under this section where he found defendant who was pleading guilty not guilty of a DWI charge, without hearing sworn testimony or according the State its full right to participate and be heard in the proceedings. In re Tucker, 350 N.C. 649, 516 S.E.2d 593 (1999).

**Conduct Prejudicial to Administration of Justice.** — Judge was censured for conduct prejudicial to the administration of justice where he failed to continue a bad check action and improperly issued an arrest order. In re Ammons, 344 N.C. 195, 473 S.E.2d 326 (1996).

**Cited** in In re Bullock, 36 N.C. 586, 444 S.E.2d 174 (1994).

## Rule 4. Reproduction of record and briefs.

As soon as the Commission files with the Clerk a recommendation of censure or removal and the transcript of the proceedings on which it is based, the Clerk will reproduce and distribute copies of the record as directed by the Court. When briefs are filed, one copy will suffice. The Clerk will also reproduce and distribute copies of the briefs as directed by the Court.

**Rule 5. Costs.**

If the Court dismisses the Commission's recommendation the costs of the proceeding will be paid by the State; otherwise, by the judge. Reproduction and other costs in this Court will be taxed as in appeals to the Court, except there will be no filing fee.

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# CODE OF JUDICIAL CONDUCT

Adopted September 26, 1973,
with amendments received through April 17, 1998.

Preamble

Canon
1. A judge should uphold the integrity and independence of the judiciary.
2. A judge should avoid impropriety and the appearance of impropriety in all his activities.
3. A judge should perform the duties of his office impartially and diligently.
4. A judge may engage in activities to improve the law, the legal system, and the administration of justice.
5. A judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties.
6. A judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities.
7. A judge should refrain from political activity inappropriate to his judicial office.

Effective Date of Compliance.

Index follows Rules.

## PREAMBLE

A violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina. No other code or proposed code of judicial conduct shall be relied upon in the interpretation and application of this Code of Judicial Conduct.

### Canon 1. A judge should uphold the integrity and independence of the judiciary.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

**Editor's note.** — For North Carolina court system website, see www.aoc.state.nc.us.

**Legal Periodicals.** — For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

#### CASE NOTES

**Code is Guide to Meaning of § 7A-376.** — The General Assembly intended the North Carolina Code of Judicial Conduct to be a guide to the meaning of § 7A-376. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

**A judge willfully abuses the power and prestige of his office by** consenting to receive and receiving sums of money not in payment of a legal salary, fee, or perquisite of his office as a district court judge with the corrupt intent and understanding that said sums are to influence his action in the performance of or the omission to perform his duties as an officer of the court and a public official in violation of the laws of the State and his oath of office. In re Hunt, 308 N.C. 328, 302 S.E.2d 235 (1983).

**Judge's efforts to prevent the convening of a grand jury for his own benefit** would support a charge of common-law obstruction of justice. It also violates Canons 1, 2(A), and 3(A)(4). In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

**Drug Conviction.** — Judge's conduct resulting in his entering a plea of guilty to all charges concerning possession of cocaine, marijuana and drug paraphernalia constituted willful misconduct in office and conduct prejudicial to the administration of justice that

brings the judicial office into disrepute, for which he should be removed and be disqualified from holding further judicial office and ineligible for retirement benefits. In re Sherrill, 328 N.C. 719, 403 S.E.2d 255 (1991).

**Interference with Divorce Proceedings.** — Where, during the course of his divorce proceedings, respondent judge had ex parte contact with another judge in which he questioned the fairness of the judge's decision and attempted to exert pressure on him, resulting in the other judge's withdrawal from respondent's case; where respondent threatened members of the staff of the district attorney's office, his ex-wife's attorneys, and other attorneys with professional reprisal for their involvement in his case; and where respondent presided over cases in which his attorney or members of his attorney's law firm represented parties while respondent's divorce case was pending, the finding by the Judicial Standards Commission that the respondent be censured for conduct prejudicial to the administration of justice that brought the judicial office into disrepute was affirmed. In re Hair, 335 N.C. 150, 436 S.E.2d 128 (1993).

**Contact with Solicitor on Behalf of Another Who Faced Rape Charges Held Willful Misconduct.** — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

**Applied** in In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

**Cited** in In re Greene, 340 N.C. 251, 456 S.E.2d 516 (1995); In re Hayes, 353 N.C. 511, 546 S.E.2d 376 (2001).

## Canon 2. A judge should avoid impropriety and the appearance of impropriety in all his activities.

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interest of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. He should not testify voluntarily as a character witness.

C. A judge should not hold membership in any organization that practices unlawful discrimination on the basis of race, gender, religion or national origin. (Amended May 25, 1997, effective September 1, 1997.)

### CASE NOTES

**Conduct in Conferring Alone with Defendant Concerning Pending Cases Held Violation of This Canon.** — See In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

**A judge willfully abuses the power and prestige of his office by** consenting to receive and receiving sums of money not in payment of a legal salary, fee, or perquisite of his office as a district court judge with the corrupt intent and understanding that said sums are to influence his action in the performance of or the omission to perform his duties as an officer of the court and a public official in violation of the laws of the State and his oath of office. In re Hunt, 308 N.C. 328, 302 S.E.2d 235 (1983).

**Judge's efforts to prevent the convening of a grand jury for his own benefit** would support a charge of common-law obstruction of justice. It also violates Canons 1, 2(A), and 3(A)(4). In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

**Knowing Erroneous Conviction.** — Convicting defendants of reckless driving when they were charged with driving while impaired was an act which respondent judge knew to be improper and ultra vires, or beyond the powers of his office; therefore, respondent's actions constituted conduct in violation of Canons 2A and 3A(1) of the Code of Judicial Conduct. In re Martin, 333 N.C. 242, 424 S.E.2d 118 (1993).

**Convicting Defendants of Traffic Violations With Which They Were Not Charged.** — The actions of respondent/judge constituted willful misconduct, were prejudicial to the administration of justice such that they brought the judicial office into disrepute, violated Canons 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct, and warranted censure where the respondent knowingly convicted one defendant of careless and reckless driving when he had not been charged with that offense and where respondent took the disposition of a second case outside of the courtroom and convicted that defendant, charged with DWI, of careless and reckless driving. In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651 (2000).

**Derogatory Remarks.** — Judge's conduct in making of derogatory remarks in court concerning a group supporting woman in assault on female case and in making statements in traffic case to the effect that he had driven just over the proscribed speed limit himself to impress defendant that speeding in excess of leeway allowed by police was a serious offense, violated Canons 2A and 3A, and was conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of § 7A-376. In re Greene, 328 N.C. 639, 403 S.E.2d 257 (1991).

**Directives to Attorney.** — Where after judge in criminal case denied attorney's motion to withdraw and after inquiring as to the basis for such withdrawal and attorney's answer that he could not reply because to do so would require him to reveal confidential information in violation of attorney client privilege, judge directed attorney to remain in the courtroom while defendant was sent to another room to be interviewed for first offenders' program and during a recess, judge discussed the matter with an experienced attorney who called the judge's attention to the adverse impact judge's directives would have on the attorney's ability to practice law, and thereafter, despite expressions of concern about the judge's directives, judge again addressed himself to the attorney in open court in front of all those present and stated that the matter had gotten out of hand but that everything he had said earlier regarding his refusal in the future to grant to such attorney recommendations, continuances, indigent appointments, and pleas still applied, actions of the judge constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute and violated Canon 2A. In re Bullock, 328 N.C. 712, 403 S.E.2d 264 (1991).

**Misled by Counsel.** — A judge's actions did not amount to conduct prejudicial to the administration of justice that brought the judicial office into disrepute, where in dismissing two DUI cases based on defense counsel's ex parte representations without determining if the state consented or wanted to be heard, the judge was acting pursuant to a shorthand disposition practice that had been acquiesced in by the state, and the judge had no reason to suspect that defense counsel had not been authorized to proceed in that manner. In re Inquiry Concerning Judge Tucker, 348 N.C. 677, 501 S.E.2d 67 (1998).

**Action Against Attorneys.** — Evidence supported the Judicial Standards Commission's conclusions that respondent judge's actions in declaring counsel, who initiated preliminary investigation of her before Judicial Standards Commission, persona non grata constituted conduct in violation of Canons 2A and 3A(3) of the Code of Judicial Conduct and N.C.G.S. § 7A-376. In re Bissell, 333 N.C. 766, 429 S.E.2d 731 (1993).

**Drug Conviction.** — Judge's conduct resulting in his entering a plea of guilty to all charges concerning possession of cocaine, marijuana and drug paraphernalia constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute, for which he should be removed and be disqualified from holding further judicial office and ineligible for retirement benefits. In re Sherrill, 328 N.C. 719, 403 S.E.2d 255 (1991).

**Conduct Held Prejudicial to Administration of Justice.** — Former judge's conduct amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of § 7A-376 where he (1) attempted an assignation with a woman convicted of prostitution and on probation and gave the impression that he could assist her with her legal problems, (2) changed verdicts in motor vehicle violation cases upon ex parte communications from defendants without providing the state an opportunity to be heard, (3) made an inappropriate advance toward a woman detective, (4) made improper and potentially embarrassing and humiliating remarks to the victim in a criminal proceeding before the court and the victim's girl friend, and (5) made what could be construed as implied threats to attorneys who were representing clients in cases heard by the respondent or pending before his court. In re Hair, 324 N.C. 324, 377 S.E.2d 749 (1989).

Where respondent took it upon himself to give legal advice and counsel to a former probationary employee with regard to her discharge from employment by the Department of Social Services and undertook in his official capacity to intervene on her behalf, the evidence was sufficient to establish violations of Canons 2A and 2B of the Code of Judicial Conduct and amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Cornelius, 335 N.C. 198, 436 S.E.2d 836 (1993).

**Willful Misconduct Shown.** — Judges may not be disciplined for error of judgment or error of law; however, when judges knowingly act beyond the bounds of their judicial power, their actions amount to willful misconduct which brings the judicial office into disrepute and prejudices the administration of justice. In re Martin, 333 N.C. 242, 424 S.E.2d 118 (1993).

**Correction of Errors.** — Judge who solicited and accepted a plea of guilty to a charge which was not a lesser included offense of the charged offense, but who then corrected his mistake when the error was called to his attention, was not censured. In re Fuller, 345 N.C. 157, 478 S.E.2d 641 (1996).

**Cited** in In re Martin, 295 N.C. 291, 245

S.E.2d 766 (1978); In re Griffin, 320 N.C. 163, 357 S.E.2d 682 (1987); In re Hair, 335 N.C. 150, 436 S.E.2d 128 (1993); In re Greene, 340 N.C. 251, 456 S.E.2d 516 (1995); In re Martin, 340 N.C. 248, 456 S.E.2d 517 (1995); In re Tucker, 350 N.C. 649, 516 S.E.2d 593 (1999); In re Hayes, 353 N.C. 511, 546 S.E.2d 376 (2001).

**Canon 3. A judge should perform the duties of his office impartially and diligently.**

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. *Adjudicative responsibilities.*

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about a pending or impending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law and should encourage similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the proceedings of the Court.

(7) A judge should exercise discretion with regard to permitting broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during civil or criminal sessions of court or recesses between sessions, pursuant to the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts.

B. *Administrative responsibilities.*

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

C. *Disqualification.*

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) He served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that hold securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. *Remittal of disqualification.*

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding. (Amended June 13, 1990; further amended May 25, 1997, effective September 1, 1997.)

**Editor's note.** — An order adopted Sept. 21, 1982, and effective Oct. 18, 1982, as amended, provided that former versions of this rule and Rule 15 of the General Rules of Practice for the Superior and District Courts, published in 276 N.C. at p. 740, were thereby suspended to and including June 30, 1990, and that electronic media and still photograph coverage of public judicial proceedings in the appellate and trial courts of this State would be allowed on an experimental basis, in accordance with the terms of the order. The amended versions of

this rule, set out above, and Rule 15 of the General Rules of Practice for the Superior and District Courts now contain provisions regarding electronic media and still photography coverage of public judicial proceedings.

**Legal Periodicals.** — For a survey of 1977 law on professional responsibility and the administration of justice, see 56 N.C.L. Rev. 871 (1978).

For article, "The Perils of Caesar's Wife: Special Litigation Committees v. The Judiciary; Is Anyone Above Reproach?", see 22 Wake Forest L. Rev. 57 (1987).

For note on determining the proper standard for recusal of judges in North Carolina, see 65 N.C.L. Rev. 1138 (1987).

## CASE NOTES

**Conduct need not be criminal in order to constitute willful misconduct in office.** — In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

**Conduct in Conferring Alone with Defendant Concerning Pending Cases Held Violation of This Canon.** — See In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

**Judge's efforts to prevent the convening of a grand jury for his own benefit** would support a charge of common-law obstruction of justice. It also violates Canons 1, 2(A), and 3(A)(4). In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

**A judge willfully abuses the power and prestige of his office by** consenting to receive and receiving sums of money not in payment of a legal salary, fee, or perquisite of his office as a district court judge with the corrupt intent and understanding that said sums are to influence his action in the performance of or the omission to perform his duties as an officer of the court and a public official in violation of the laws of the State and his oath of office. In re Hunt, 308 N.C. 328, 302 S.E.2d 235 (1983).

**The failure of a judge to make due inquiry into the facts and law** upon which his judgments were based and his execution of them upon a mere ex parte application of counsel for defendants violates this Canon. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

**Conduct Violative of Subdivision A(4).** — A judge violated subdivision A(4) of this canon where, in disposing of a traffic case, (a) the plea of guilty was not taken in open court in the presence of the defendant, the assistant district attorney and the prosecuting officer; (b) the plea of guilty was taken without prior notice to the assistant district attorney; (c) the judgments signed by the judge were signed out of the presence of the defendant, assistant district attorney and prosecuting officer; (d) the judgments were signed by the judge when court was not in session and in places where court is not held; and (e) the judgments were signed without prior notice to the assistant district attorney. In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976).

A criminal prosecution is an adversary proceeding in which the prosecuting attorney and defendant or his counsel are entitled to be present and to be heard. Failure to accord the prosecutor such opportunity violates this Canon. In re Stuhl, 292 N.C. 379, 233 S.E.2d 562 (1977); In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

**Conduct Not Violative of Subdivision A(4).** — The trial court did not violate this section by receiving a written communication from the jury, summarizing its content and responding to it in open court. State v. Davis, 353 N.C. 1, 539 S.E.2d 243 (2000).

**When Recusal Warranted.** — A trial judge should recuse himself or refer the recusal motion to another judge if there is sufficient force in the allegations contained in defendant's motion to proceed to find facts. Savani v. Savani, 102 N.C. App. 496, 403 S.E.2d 900 (1991).

Respondent/judge was censured for violating this section when he found defendant who was pleading guilty not guilty of a DWI charge, without hearing sworn testimony or according the State its full right to participate and be heard in the proceedings. In re Tucker, 350 N.C. 649, 516 S.E.2d 593 (1999).

**The test to apply in deciding what is reasonable under subdivision (1)** is whether a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner. Savani v. Savani, 102 N.C. App. 496, 403 S.E.2d 900 (1991).

**Failure to Disqualify Himself on Motion to Recuse.** — The trial judge committed error by not disqualifying himself from considering a motion to recuse himself from hearing the plaintiffs' motion to set aside a judgment on grounds of excusable neglect, since a reasonable man knowing all the circumstances would have had doubts about the judge's ability to rule on the motion to recuse in an impartial manner. McClendon v. Clinard, 38 N.C. App. 353, 247 S.E.2d 783 (1978).

**Recusal Not Required.** — Judge did not err in denying the motion for recusal in a parental rights termination case where, some eight months earlier, he had conducted a re-

view hearing pursuant to N.C.G.S. § 7A-657 and had concluded that the three children should remain with Department of Social Services. In re LaRue, 113 N.C. App. 807, 440 S.E.2d 301 (1994).

Judge who issued search warrant did not have to recuse himself from presiding over a suppression hearing which sought to have the warrant declared invalid. State v. Monserrate, 125 N.C. App. 22, 479 S.E.2d 494 (1997).

**Knowing Erroneous Conviction.** — Convicting defendants of reckless driving when they were charged with driving while impaired was an act which respondent judge knew to be improper and ultra vires, or beyond the powers of his office; therefore, respondent's actions constituted conduct in violation of Canons 2A and 3A(1) of the Code of Judicial Conduct. In re Martin, 333 N.C. 242, 424 S.E.2d 118 (1993).

**Convicting Defendants of Traffic Violations With Which They Were Not Charged** — The actions of respondent/judge constituted willful misconduct, were prejudicial to the administration of justice such that they brought the judicial office into disrepute, violated Canons 2A, 3A(1), and 3A(4) of the North Carolina Code of Judicial Conduct, and warranted censure where the respondent knowingly convicted one defendant of careless and reckless driving when he had not been charged with that offense and where respondent took the disposition of a second case outside of the courtroom and convicted that defendant, charged with DWI, of careless and reckless driving. In re a Judge, No. 238 Brown, 351 N.C. 601, 527 S.E.2d 651 (2000).

**Involvement in Divorce Proceedings.** — Where, during the course of his divorce proceedings, respondent judge had ex parte contact with another judge in which he questioned the fairness of the judge's decision and attempted to exert pressure on him, resulting in the other judge's withdrawal from respondent's case; where respondent threatened members of the staff of the district attorney's office, his ex-wife's attorneys, and other attorneys with professional reprisal for their involvement in his case; and where respondent presided over cases in which his attorney or members of his attorney's law firm represented parties while respondent's divorce case was pending, the finding by the Judicial Standards Commission that the respondent be censured for conduct prejudicial to the administration of justice that brought the judicial office into disrepute was affirmed. In re Hair, 335 N.C. 150, 436 S.E.2d 128 (1993).

**Actions Toward Counsel.** — Evidence supported the Judicial Standards Commission's conclusions that respondent judge's actions in declaring counsel, who initiated preliminary investigation of her before Judicial Standards Commission, persona non grata constituted conduct in violation of Canons 2A and 3A(3) of the Code of Judicial Conduct and G.S.N.C. § 7A-376. In re Bissell, 333 N.C. 766, 429 S.E.2d 731 (1993).

**Prior Sharing of Office Space.** — Defendant was not prejudiced by trial judge's prior sharing of office space with counsel for former wife in a child support case, as the primary issue before the judge was the amount of support to be provided. Savani v. Savani, 102 N.C. App. 496, 403 S.E.2d 900 (1991).

**Derogatory Remarks.** — Judge's conduct in making of derogatory remarks in court concerning a group supporting woman in assault on female case and in making statements in traffic case to the effect that he had driven just over the proscribed speed limit himself to impress defendant that speeding in excess of leeway allowed by police was a serious offense violated Canons 2A and 3A, and was conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of § 7A-376. In re Greene, 328 N.C. 639, 403 S.E.2d 257 (1991).

**Use of a judge's office to grant leniency or favors to a defendant because of sexual activities** between a judge and a defendant is willful misconduct in office. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

**Contact with Solicitor on Behalf of Another Who Faced Rape Charges Held Willful Misconduct.** — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

**Contact with Assistant District Attorney on Behalf of Another Who Faced Driving under the Influence Charge Held Willful Misconduct.** — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

**Changing of Parole Conditions Without Notice to Solicitor Held Willful Misconduct.** — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Trial judge's alleged opinions regarding the crime of driving while impaired did not constitute proper grounds to require the judge to recuse himself. State v. Kennedy, 110 N.C. App. 302, 429 S.E.2d 449 (1993).

**A court has not only the inherent power but also the duty to discipline attorneys for unprofessional conduct.** — Unprofessional conduct subject to this power and duty includes misconduct, malpractice, or deficiency in character, and any dereliction of duty except mere negligence or mismanagement. In re Hunoval, 294 N.C. 740, 247 S.E.2d 230 (1977).

**Conduct Held Prejudicial to the Administration of Justice.** — Former judge's conduct amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of § 7A-376 where he (1) attempted an assignation with a woman convicted of prostitution and on probation and gave the impression that he

could assist her with her legal problems, (2) changed verdicts in motor vehicle violation cases upon ex parte communications from defendants without providing the state an opportunity to be heard, (3) made an inappropriate advance toward a woman detective, (4) made improper and potentially embarrassing and humiliating remarks to the victim in a criminal proceeding before the court and the victim's girl friend, and (5) made what could be construed as implied threats to attorneys who were representing clients in cases heard by the respondent or pending before his court. In re Hair, 324 N.C. 324, 377 S.E.2d 749 (1989).

**Willful Misconduct Shown.** — Judges may not be disciplined for error of judgment or error of law; however, when judges knowingly act beyond the bounds of their judicial power, their actions amount to willful misconduct which brings the judicial office into disrepute and prejudices the administration of justice. In re Martin, 333 N.C. 242, 424 S.E.2d 118 (1993).

**Bias of Judge in Magistrate Removal Hearing.** — Every Resident Regular Superior Court Judge who appoints a magistrate does not have as a matter of law a personal bias or prejudice which would disqualify him under Code of Judicial Conduct, Canon 3 from conducting a magistrate's removal hearing pursuant to § 7A-173(c). In re Ezzell, 113 N.C. App. 388, 438 S.E.2d 482 (1994).

**Correction of Errors.** — Judge who solicited and accepted a plea of guilty to a charge which was not a lesser included offense of the charged offense, but who then corrected his mistake when the error was called to his attention, was not censured. In re Fuller, 345 N.C. 157, 478 S.E.2d 641 (1996).

**Applied** in In re Greene, 306 N.C. 376, 297 S.E.2d 379 (1982); State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980).

**Cited** in In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); In re Griffin, 320 N.C. 163, 357 S.E.2d 682 (1987); State v. Fie, 320 N.C. 626, 359 S.E.2d 774 (1987); Brown v. Dixon, 891 F.2d 490 (4th Cir. 1989), cert. denied, 525 U.S. 1025, 119 S. Ct. 559, 142 L. Ed. 2d 465 (1998); In re Bullock, 328 N.C. 712, 403 S.E.2d 264 (1991); In re Greene, 340 N.C. 251, 456 S.E.2d 516 (1995); In re Martin, 340 N.C. 248, 456 S.E.2d 517 (1995); State v. Scott, 343 N.C. 313, 471 S.E.2d 605 (1996); State v. Gary, 348 N.C. 510, 501 S.E.2d 57 (1998); In re Hayes, 353 N.C. 511, 546 S.E.2d 376 (2001).

## Canon 4. A judge may engage in activities to improve the law, the legal system, and the administration of justice.

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

## Canon 5. A judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties.

A. *Avocational activities.* A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

B. *Civic and charitable activities.* A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious,

charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization.

(3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. *Financial activities.*

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, manager, advisor, or employee of any business.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) A judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) A judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) A judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C.

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. *Fiduciary activities.* A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family"

includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

E. *Arbitration.* A judge should not act as an arbitrator or mediator. However, an emergency justice or judge of the Appellate Division designated as such pursuant to Article 6 of Chapter 7A of the General Statutes of North Carolina, and an Emergency Judge of the District Court or Superior Court commissioned as such pursuant to Article 8 of Chapter 7A of the General Statutes of North Carolina may serve as an arbitrator or mediator when such service does not conflict with or interfere with the justice's or judge's judicial service in emergency status.

F. *Practice of law.* A judge should not practice law.

G. *Extra-judicial appointments.* A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

**Canon 6. A judge should regularly file reports of compensation received for quasi-judicial and extra-judicial activities.**

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. *Compensation.* Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. *Expense reimbursement.* Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. *Public reports.* A judge shall report the name and nature of any source or activity from which he received more than $1,000 in income during the calendar year for which the report is filed. Any required report shall be made annually and filed as a public document as follows: The members of the Supreme Court shall file such reports with the Clerk of the Supreme Court; the members of the Court of Appeals shall file such reports with the Clerk of the Court of Appeals; and each Superior Court Judge, regular, special, and emergency, and each District Court Judge, shall file such report with the Clerk of the Superior Court of the county in which he resides. For each calendar year, such report shall be filed not later than May 15th of the following year. (Amended December 30, 1974; November 3, 1983.)

**Canon 7. A judge should refrain from political activity inappropriate to his judicial office.**

A. *Political conduct in general.*

(1) A judge or candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political party or any subdivision thereof. For example, he may not attend a political convention on any level as a delegate, nor may he preside or serve as an officer. He may attend any political party meeting, provided he does not violate any other Canon, particularly 7A(1)(b) or (c).

(b) make speeches in support of a political party or candidate for public office or publicly endorse a candidate for public office.

(c) solicit funds for a political organization or candidate other than as permitted under Canon 7B(2).

(d) make financial contributions to any candidate for public office, including a candidate for a judgeship, unless the candidate is a member of the judge's or judicial candidate's family.

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may attend political gatherings, speak to such gatherings, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if he is otherwise permitted by law to do so.

(4) The foregoing provisions of Canon 7A do not prohibit a judge's spouse or any other adult member of his family from engaging in political activity provided the spouse or other family member acts in accordance with his or her individual convictions, on his or her own initiative, and not as alter ego of the judge.

(5) The foregoing provisions of Canon 7A do not prohibit candidates for judicial office from conducting a joint campaign, soliciting support for, endorsing or financially contributing to other judicial candidates.

B. *Campaign conduct.*

(1) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; nor misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not solicit campaign funds but may establish committees of responsible persons to secure and manage the expenditure of such funds. Such committees are not prohibited from soliciting campaign contributions from anyone not otherwise prohibited by law from making such contributions or from soliciting public support from anyone. A candidate is not prohibited from soliciting public support from anyone. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

(3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

(Amended December 30, 1974; further amended March 16, 1976; further amended May 25, 1997, effective September 1, 1997; further amended February 17, 1998.)

**CASE NOTES**

**Political Organizations.** — The political organizations envisioned by section A(2) of Canon 7 are entities such as the Republican Party, the Wake County Democratic Men's Club, the Democratic Party, the Conservative Party, etc. In re Wright, 313 N.C. 495, 329 S.E.2d 668 (1985).

**A campaign committee set up by a candidate** to handle the contributions to his campaign is not a "political organization" as referred to by section A(2) of Canon 7, but is, in effect, the alter ego of the candidate. In re Wright, 313 N.C. 495, 329 S.E.2d 668 (1985).

Under section (A)(1) of Canon 7, checks made to a candidate's campaign committee must be treated as contributions to the candidate. In re Wright, 313 N.C. 495, 329 S.E.2d 668 (1985).

**Contributions to Political Campaigns.** — The clear purpose of section A(1) of Canon 7 is to prevent judges from making contributions to the campaigns of candidates for political office other than judicial candidates or members of the judge's family. In re Wright, 313 N.C. 495, 329 S.E.2d 668 (1985).

Contributions of a district court judge to the United States Senate campaign of former Governor and to the gubernatorial campaign of former Attorney General, by checks payable to the campaign committees of the candidates, violated Canon 7 and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute, meriting censure. In re Wright, 313 N.C. 495, 329 S.E.2d 668 (1985).

## EFFECTIVE DATE OF COMPLIANCE

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Code becomes effective may:

(a) Continue to act as an officer, director, or non-legal advisor of a family business;

(b) Continue to act as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family.

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# RULES OF CONTINUING JUDICIAL EDUCATION

Adopted October 24, 1988,
with amendments received through September 10, 1997.


Rule
I. Coverage.
II. Requirements.
III. Accredited sponsors.
IV. Reporting.
V. Exemptions.
VI. Expenses.

Index follows Rules.


## Rule I. Coverage.

These rules are applicable only to North Carolina District Court, Superior Court, and Court of Appeals Judges and to the Chief Justice and Associate Justices of the Supreme Court of North Carolina, including retired judges and justices qualified as emergency or recalled judges or justices.

Upon leaving judicial service, a judge or justice shall be bound by the rules of the Supreme Court of North Carolina for continuing legal education of members of the Bar.

Continuing legal education hours earned prior to entering judicial service and judicial education hours earned prior to leaving judicial service shall be recognized and accepted on a pro rata basis by the appropriate accrediting and reporting agency.

## Rule II. Requirements.

A. Every judge in the trial division shall, within the first year after appointment or election, attend a course of instruction or orientation for new judges provided by the Administrative Office of the Courts. Attendance will be counted as a part of the hours of instruction required for the biennium in which the instruction is received.

B. Each judge and justice of the trial and appellate division shall attend at least thirty (30) hours of instruction in one or more approved continuing legal or judicial education programs in each biennium, effective with the biennium beginning 1 July 1989 and ending 30 June 1991.

C. At least twenty (20) of the thirty (30) hours required shall be continuing judicial education courses designed especially for judges and attended exclusively or primarily by judges. All Superior Court Judges are expected to attend the scheduled Superior Court Judges Conferences and the programs there presented. All District Court Judges are expected to attend the scheduled District Court Judges Conferences and the programs there presented.

D. Judges participating as teachers, lecturers, discussion leaders, or panelists in an approved continuing judicial or legal education program shall receive five hours credit for each hour of actual presentation time. Presentation of the same material on subsequent occasions shall accrue credit for the actual time of presentation only.

E. Continuing judicial education hours shall be computed by the following formula:

$$\frac{\text{Sum of the Total Minutes of Actual Instruction}}{60} = \text{Total Hours.}$$

The instruction may be in no less than fifteen (15) minute segments. Only actual instruction shall be included in computing the total hours of instruction. The following shall not be included: introductory remarks, breaks, business meetings, keynote speeches, and speeches in connection with meals.

Except as otherwise provided in this subsection E and the preceding subsection D, computation for credit of continuing legal education courses shall be computed in accordance with Regulation 5 of the Board of Continuing Legal Education of the North Carolina State Bar.

**Rule III. Accredited sponsors.**

A. Continuing legal education programs offered by the Conference of Superior Court Judges or the Conference of District Court Judges or others offered to judges by the Administrative Office of the Courts or the Institute of Government of the University of North Carolina at Chapel Hill are approved for credit as continuing judicial education under these rules.

B. All continuing legal education programs approved by the Board of Continuing Legal Education of the North Carolina State Bar are approved for credit as continuing legal education under these rules.

C. Programs offered for judges by any law school accredited by the American Bar Association and the following national providers of judicial education are approved for credit as continuing judicial education under these rules:

1. National Judicial College
2. American Academy of Judicial Education
3. National Council of Juvenile and Family Court Judges
4. American Bar Association
5. Institute for Court Management of the National Center for State Courts
6. Institute of Judicial Administration
7. National Institute of Justice
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E. Any program not approved under A, B, C, or D above may be approved by the Chief Justice upon application by a judge who has attended or desires to attend the program. To be approved, a program must meet the following standards:

1. It must be an organized program of learning which contributes directly to the professional competency of a judge.

2. It must deal primarily with matter directly related to law or related fields or to the professional responsibility, administrative duties, or ethical obligations of a judge.

3. Instructors in the program must be qualified by practical or academic experience to teach in the topic or area of discipline covered by the course.

4. Thorough, high quality, written topic materials and/or outlines must be distributed to judges attending the program.

**Rule IV. Reporting.**

A. The Administrative Office of the Courts is designated as the office in which all records, reports, and documents pertaining to continuing judicial education shall be filed and compiled.

B. Each judge must report in writing to the Administrative Office of the Courts, no later than July 31 following the end of each year of an educational biennium, the continuing education programs he has attended. Reports may be made sooner after attendance, and the Administrative Office of the Courts will maintain a cumulative record of such reports for the submitting judges. One year after the beginning of each educational biennium, the Administrative Office of the Courts shall notify all judges and justices subject to these rules that reports are required and that they are due by the following July 31. If a program is other than a continuing judicial education program offered by the Conference of Superior Court Judges, the Conference of District Court Judges,

or the Administrative Office of the Courts or the Institute of Government, the judge must attach a copy of the program brochure or other material which outlines the program presentation and identifies the instructors, unless the program is certified as having previously received approval of the Chief Justice, pursuant to Section III.E. Forms for the report will be provided by the Administrative Office of the Courts.

C. As soon as practical after August 1 of the second year of each educational biennium, the Administrative Office of the Courts shall notify any judge or justice in writing of his or her delinquency. Any such delinquent judge or justice shall have sixty (60) days within which to comply with the requirements of these rules and notify the Administrative Office of the Courts of his or her compliance.

D. The Director of the Administrative Office of the Courts shall report to the Chief Justice the name of any judge or justice who does not meet the continuing judicial education requirements specified in these rules or who has not filed a timely report of his or her continuing judicial education activities, and the Chief Justice shall make such inquiry or investigation and take such action as he deems appropriate.

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The Chief Justice of the Supreme Court shall have the authority to relieve any judge or justice of the requirement of meeting the minimum hours required by these rules for undue hardship by reason of disability or other cause.

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The Administrative Office of the Courts shall fund the regular judicial conferences of the Judges of the Superior and District Court divisions and shall ensure that a sufficient number of hours of instructional material are provided to permit the judges of the trial division regularly attending the conferences to satisfy the requirements of this Order and shall provide reimbursement for expenses incurred in attending the conferences in accordance with its regular policies and practices.

For Judges and Justices of the Appellate Division, the Administrative Office of the Courts shall ensure the availability of a sufficient number of hours of instruction to satisfy the requirements of the Order either by providing and funding Appellate Court conferences or providing funding for alternative methods of satisfying such requirements in accordance with its regular policies and practices.

Judges and Justices attending continuing judicial education programs other than those presented at judicial conferences shall be reimbursed for their expenses in accordance with policies and practices established by the Administrative Office of the Courts, subject to the availability of funds.

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# RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

With amendments through September 20, 2001.


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**Editor's note.** — See state website at www.nc.bar.com.

# SUBCHAPTER 1A. ORGANIZATION OF THE NORTH CAROLINA STATE BAR

## SECTION .0100. FUNCTIONS

### A.0101. Purpose.

The North Carolina State Bar shall foster the following purposes, namely:
(1) to cultivate and advance the science of jurisprudence;
(2) to promote reform in the law and in judicial procedure;
(3) to facilitate the administration of justice;
(4) to uphold and elevate the standards of honor, integrity and courtesy in the legal profession;
(5) to encourage higher and better education for membership in the profession;
(6) to promote a spirit of cordiality and unity among the members of the Bar;
(7) to perform all duties imposed by law.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**Editor's note.** — For North Carolina court system website, see www.aoc.state.nc.us. For the North Carolina State Bar website, see www.ncbar.com.

### A.0102. Division of work.

(a) To facilitate the work for the accomplishment of the above enumerated purposes, the council may, from time to time, classify such work under appropriate sections and committees, either standing or special, of the North Carolina State Bar.
(b) The council shall determine the number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act, and other matters relating to each committee.
(c) Any committee may, at the discretion of the appointing or electing authority, be composed of council members or members of the North Carolina State Bar who are not members of the council or of lay persons or of any combination.

**History Note:** Statutory Authority G.S. 84-22; G.S. 84-23, Readopted Effective December 8, 1994.

### A.0103. Cooperation with local bar association committees.

The sections and committees so appointed may secure the cooperation of like sections and committees of the North Carolina Bar Association and all local bar associations of the state.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### A.0104. Organization of local bar associations.

The council shall encourage and foster the organization of local bar associations.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### A.0105. Annual program.

The council shall provide a suitable program for each annual meeting of the North Carolina State Bar.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### A.0106. Reports made to annual meeting.

The annual reports of the several committees and boards shall be delivered to the secretary of the North Carolina State Bar before the annual meeting.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; amendment effective February 3, 2000.

## SECTION .0200. MEMBERSHIP — ANNUAL MEMBERSHIP FEES

### A.0201. Classes of membership.

(a) *Two classes of membership.*

Members of the North Carolina State Bar shall be divided into two classes: active members and inactive members.

(b) *Active members.*

The active members shall be all persons who have obtained a license entitling them to practice law in North Carolina, including persons serving as a justice or judge of any state or federal court in this state, unless classified as an inactive member by the council. All active members must pay the annual membership fee.

(c) *Inactive members.*

The inactive members shall include all persons who have been admitted to the practice of law in North Carolina but who the council has found are not engaged in the practice of law or holding themselves out as practicing attorneys and who do not occupy any public or private position in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document or law. Inactive members of the North Carolina State Bar may not practice law and are exempt from payment of membership dues during the period in which they are inactive members. For purposes of the State Bar's membership records, the category of inactive members shall be further divided into the following subcategories:

(1) *Retired/nonpracticing.*

This subcategory includes those members who are not engaged in the practice of law or holding themselves out as practicing attorneys and who are retired, hold positions unrelated to the practice of law, or practice law in other jurisdictions.

(2) *Disability inactive status.*

This subcategory includes members who suffer from a mental or physical condition which significantly impairs the professional judgment, performance or competence of an attorney, as determined by the courts, the council or the Disciplinary Hearing Commission.

(3) *Disciplinary suspensions/disbarments.*

This subcategory includes those members who have been suspended from the practice of law or who have been disbarred by the courts, the council or the

Disciplinary Hearing Commission for one or more violations of the Rules of Professional Conduct.

(4) *Administrative suspensions.*

This subcategory includes those members who have been suspended from the practice of law for failure to comply with the regulations regarding mandatory continuing legal education, payment of membership fees, or payment of late fees pursuant to these rules.

**History Note:** Statutory Authority G.S. 84-16; G.S. 84-23, Readopted Effective December 8, 1994.

## A.0202. Register of members.

(a) *Initial registration with State Bar.*

Every member shall register by completing and returning to the North Carolina State Bar a signed registration card containing the following information:

(1) name and address;

(2) date;

(3) date passed examination to practice in North Carolina;

(4) date and place sworn in as an attorney in North Carolina;

(5) date and place of birth;

(6) list of all other jurisdictions where the member has been admitted to the practice of law and date of admission;

(7) whether suspended or disbarred from the practice of law in any jurisdiction or court, and if so, when and where, and when readmitted.

(b) *Membership records of State Bar.*

The secretary shall keep a permanent register for the enrollment of members of the North Carolina State Bar. In appropriate places therein entries shall be made showing the address of each member, date of registration and class of membership, date of transfer from one class to another, if any, date and period of suspension, if any, and such other useful data which the council may from time to time require.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-34, Readopted Effective December 8, 1994.

## A.0203. Annual membership fees; When due.

(a) *Amount and due date.*

The annual membership fee shall be in the amount as provided by law and shall be due and payable to the secretary of the North Carolina State Bar on January 1 of each year and the same shall become delinquent if not paid before July 1 of each year.

(b) *Late fee.*

Any attorney who fails to pay the entire annual membership fee in the amount provided by law and the annual Client Security Fund assessment approved by the N.C. Supreme Court before July 1 of each year shall also pay a late fee of $30.00.

(c) *Waiver of all or part of dues.*

No part of the annual membership fee or Client Security Fund assessment shall be prorated or apportioned to fractional parts of the year, and no part of the membership fee or Client Security Fund assessment shall be waived or rebated for any reason with the following exceptions:

(1) A person licensed to practice law in North Carolina for the first time by examination shall not be liable for dues or the Client Security Fund assessment during the year in which the person is admitted;

(2) A person licensed to practice law in North Carolina serving in the armed forces, whether in a legal or nonlegal capacity, will be exempt from payment of dues and Client Security Fund assessment for any year in which the member is on active duty in the military service;

(3) A person licensed to practice law in North Carolina who files a petition for inactive status on or before December 31 of a given year shall not be liable for the membership fee or the Client Security Fund assessment for the following year if the petition is granted. A petition shall be deemed timely if it is postmarked on or before December 31.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-34, Readopted Effective December 8, 1994, Amended July 21, 1995, Amended effective December 7, 1995.

## SECTION .0300. ELECTION AND SUCCESSION OF OFFICERS

### A.0301. Officers.

(a) The officers of the North Carolina State Bar and the council shall consist of a president, a president-elect, a vice-president, and an immediate past president. These officers shall be deemed members of the council in all respects.

(b) There shall be a secretary who shall also have the title of executive director. The secretary shall not be a member of the council.

**History Note:** Statutory Authority G.S. 84-22; G.S. 84-23, Readopted Effective December 8, 1994.

### A.0302. Eligibility for office.

The president, president-elect, and vice-president need not be members of the council at the time of their election.

**History Note:** Statutory Authority G.S. 84-22; G.S. 84-23, Readopted Effective December 8, 1994.

### A.0303. Term of office.

(a) The term of each office shall be one year beginning at the conclusion of the annual meeting. Each officer will hold office until a successor is elected and qualified.

(b) The president shall assume the office of immediate past president at the conclusion of the term as president. The president-elect shall assume the office of president at the conclusion of the annual meeting following the term as president-elect.

**History Note:** Statutory Authority G.S. 84-21; G.S. 84-22; G.S. 84-23, Readopted Effective December 8, 1994.

### A.0304. Elections.

(a) A president-elect, vice-president and secretary shall be elected annually by the council at an election to take place at the council meeting held during the annual meeting of the North Carolina State Bar. All elections will be conducted by secret ballot.

(b) If there are more than two candidates for an office, then any candidate receiving a majority of the votes shall be elected. If no candidate receives a majority, then a run-off shall be held between the two candidates receiving the highest number of votes.

**History Note:** Statutory Authority G.S. 84-22; G.S. 84-23, Readopted Effective December 8, 1994.

### A.0305. Nominating committee.

(a) There shall be a Nominating Committee appointed to nominate one or more candidates for each of the offices. The Nominating Committee shall be composed of the immediate past president and the five most recent living past presidents who are in good standing with the North Carolina State Bar. The Nominating Committee shall meet prior to the council meeting at which the election of officers will be held. The Nominating Committee shall submit its nominations in writing to the secretary at least 45 days prior to the election, and the secretary shall transmit the report by mail to the members of the council at least 30 days prior to the election.

(b) At the council meeting at which elections are held, the floor shall be open for additional nominations for each office at the time of the election.

**History Note:** Statutory Authority G.S. 84-22; G.S. 84-23, Readopted Effective December 8, 1994.

### A.0306. Vacancies and succession.

(a) If the office of president becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, the president-elect shall become president for the unexpired term and the next term. If the office of the president-elect becomes vacant because the president-elect must assume the presidency under the foregoing provision of this section, then the vice-president shall become the president-elect for the unexpired term and at the end of the unexpired term to which the vice-president ascended the office will become vacant and an election held in accordance with Rule .0304 of this subchapter; if the office of president-elect becomes vacant for any other reason, the vice-president shall become the president-elect for the unexpired term following which said officer shall assume the presidency as if elected president-elect. If the office of vice-president or secretary becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, or if the office of president or president-elect becomes vacant without an available successor under these provisions then the office will be filled by election by the council at a special meeting of the council with such notice as required by Rule .0602 of this subchapter or at the next regularly scheduled meeting of the council.

(b) If the president is absent or unable to preside at any meeting of the North Carolina State Bar or the council, the president-elect shall preside, or if the president-elect is unavailable, then the vice-president shall preside. If none are available, then the council shall elect a member to preside during the meeting.

(c) If the president is absent from the state or for any reason is temporarily unable to perform the duties of office, the president-elect shall assume those duties until the president returns or becomes able to resume the duties. If the president-elect is unable to perform the duties, then the council may select one of its members to assume the duties for the period of inability.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### A.0307. Removal from office.

The council may, upon giving due notice and an opportunity to be heard, remove from office any officer found by the council to have a disablility or to have engaged in misconduct including misconduct not related to the office.

**History Note:** Statutory Authority G.S. 84-21; 84-23, Readopted effective December 8, 1994; amendment effective February 3, 2000.

## SECTION .0400. DUTIES OF OFFICERS

### A.0401. Compensation of officers.

The secretary shall receive a salary fixed by the council. All other officers shall serve without compensation except the per diem allowances fixed by statute for members of the council.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### A.0402. President.

The president shall preside over meetings of the North Carolina State Bar and the council. The president shall sign all resolutions and orders of the council in the capacity of president. The president shall execute, along with the secretary, all contracts ordered by the council. The president will perform all other duties prescribed for the office by the council.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### A.0403. President-elect, vice-president, and immediate past president.

The president-elect, vice-president, and immediate past president will perform all duties prescribed for the office by the council.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### A.0404. Secretary.

The secretary shall attend all meetings of the council and of the North Carolina State Bar, and shall record the proceedings of all such meetings. The secretary shall, with the president, president-elect or vice-president, execute all contracts ordered by the council. He or she shall have custody of the seal of the North Carolina State Bar, and shall affix it to all documents executed on

behalf of the council or certified as emanating from the council. The secretary shall take charge of all funds paid into the North Carolina State Bar and deposit them in some bank selected by the council; he or she shall cause books of accounts to be kept, which shall be the property of the North Carolina State Bar and which shall be open to the inspection of any officer, committee or member of the North Carolina State Bar during usual business hours. At each January meeting of the council, the secretary shall make a full report of receipts and disbursements since the previous annual report, together with a list of all outstanding obligations of the North Carolina State Bar. The books of accounts shall be audited as of December 31 of each year and the secretary shall publish same in the annual reports as referred to above. He or she shall perform such other duties as may be imposed upon him or her, and shall give bond for the faithful performance of his or her duties in an amount to be fixed by the council with surety to be approved by the council.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SECTION .0500. MEETINGS OF THE NORTH CAROLINA STATE BAR

### A.0501. Annual meetings.

The annual meeting of the North Carolina State Bar shall be held at such time and place within the state of North Carolina, after such notice (but not less than 30 days) as the council may determine.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### A.0502. Special meetings.

(a) Special meetings of the North Carolina State Bar may be called upon 30 days' notice, as follows:

(1) by the secretary, upon direction of the council.

(2) by the secretary, upon the call addressed to the council, of not less than 25% of the active members of the North Carolina State Bar.

(b) At special meetings no subjects shall be dealt with other than those specified in the notice.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-33, Readopted Effective December 8, 1994.

### A.0503. Notice of meetings.

Notice of all meetings shall be given by publication in such newspapers of general circulation as the council may select, or, in the discretion of the council, by mailing notice to the secretary of the several district bars or to the individual active members of the North Carolina State Bar.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-33, Readopted Effective December 8, 1994.

### A.0504. Quorum.

At all annual and special meetings of the North Carolina State Bar those active members of the North Carolina State Bar present shall constitute a quorum, and there shall be no voting by proxy.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-33, Readopted Effective December 8, 1994.

### A.0505. Parliamentary rules.

Proceedings at any meeting of the North Carolina State Bar shall be governed by *Roberts' Rules of Order*.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SECTION .0600. MEETINGS OF THE COUNCIL

### A.0601. Regular meetings.

Regular meetings of the council shall be held in each of the months of January, April, and July, at such time and place after such notice (but not less than 30 days) as the council may determine; and on the day before the annual meeting of the North Carolina State Bar, at the location of said annual meeting. Any regular meeting may be adjourned from time to time as a majority of members present may determine.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994, Amended Effective June 1, 1995.

### A.0602. Special meetings.

The president in his or her discretion may call special meetings of the council. Upon written request of eight councilors, filed with the secretary requesting the president to call a special meeting of the council, the secretary shall, within five days thereafter, call such special meeting. The date fixed for such meeting shall not be less than five days nor more than 10 days from the date of such call.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### A.0603. Notice of called special meetings.

Notice of called special meetings shall be signed by the secretary. The notice shall set forth the day and hour of the meeting and the place for holding the same. Any business may be presented for consideration at such special meeting. Such notice must be given to each councilor unless waived by him or her. A written waiver signed by any councilor shall be equivalent to notice as herein provided. Notice to councilors not waiving as aforesaid shall be in writing and may be communicated by telegraph, or by letter through the United States mail in the usual course, addressed to each of said councilors at his or her law office address. Notice by telegraph shall be filed with the telegraph carrier for transmission at least three days, and notice by mail shall

be deposited in the United States post office at least five days, before the day fixed for the special meeting.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### A.0604. Quorum at meeting of council.

At meetings of the council the presence of 10 councilors shall constitute a quorum.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SECTION .0700. STANDING COMMITTEES OF THE COUNCIL

### A.0701. Standing committees and boards.

(a) *Standing Committees.* Promptly after his or her election, the president shall appoint members to the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election. Members of the committees need not be councilors, except to the extent expressly required by these rules, and may include non-lawyers. Unless otherwise directed by resolution of the council, all members of a standing committee, whether councilors or non-councilors, shall be entitled to vote as members of the standing committee or any subcommittee or panel thereof.

(1) *Executive Committee.* It shall be the duty of the Executive Committee to examine the books and financial records of the State Bar at each regular meeting of the council; to make recommendations to the council on the budget, finances, and annual audit of the State Bar; to receive reports and recommendations from standing committees, boards, and special committees; to nominate individuals for appointments made by the council; to make long range plans for the State Bar; and to perform such other duties and consider such other matters as the council or the president may designate.

(2) *Ethics Committee.* It shall be the duty of the Ethics Committee to study the rules of professional responsibility currently in effect; to make recommendations to the council for such amendment to the rules as the committee deems necessary or appropriate; to study and respond to questions that arise concerning the meaning and application of the rules of professional conduct; to issue opinions in response to questions of legal ethics in accordance with the provisions of Section .0100 of Subchapter 1D of these rules; to consider issues concerning the regulation of lawyers' trust accounts; and to perform such other duties and consider such other matters as the council or the president may designate.

(3) *Grievance Committee.* It shall be the duty of the Grievance Committee to exercise the disciplinary and disability functions and responsibilites set forth in Section .0100 of Subchapter 1B of these rules and to make recommendations to the council for such amendments to that section as the committee deems necessary or appropriate. The Grievance Committee shall sit in panels as assigned by the president. Each panel shall have at least ten members. Two members of each panel shall be non-lawyers and the remaining members of each panel shall be councilors of the North Carolina State Bar. A quaorum of a panel shall be five members serving at a particular time. Each panel shall exercise the powers and discharge the duties of the Grievance Committee with respect to the grievances and other matters referred to it by the chairperson of the Grievance Committee. Each panel member shall be furnished a brief

description of all matters referred to other panels (and such other available information as he or she may request) and be given a reasonable opportunity to provide comments to such other panels. Each panel's decision respecting the grievances and other matters assigned to it will be deemed final action of the Grievance Committee, unless the full committee at its next meeting, by a majority vote of those present, elects to review a panel decision and upon further consideration decides to reverse or modify that decision. There will be no other right of appeal to the committee as a whole or to another panel. The president shall designate a vice-chairperson to preside over, and oversee the functions of, each panel. The vice-chairpersons shall have such other powers as may be delegated to them by the chairperson of the Grievance Committee. The Grievance Committee shall perform such other duties and consider such other matters as the council or the president may designate.

(4) *Authorized Practice Committee.* It shall be the duty of the Authorized Practice Committee to respond to or investigate inquiries and complaints about conduct that may constitute the unauthorized practice of law in accordance with the provisions of Section .0200 of Subchapter 1D of these rules; to study and advise the council on the appropriate and lawful use and regulation of legal assistants, paralegals and other lay person in connection with the provision of law-related services; to the study and advise the council on the regulation of professional organizations; and to perform such other duties and consider such other matters as the council or the president may designate.

(5) *Administrative Committee.* It shall be the duty of the Administrative Committee to study and make recommendations on policies concerning the administration of the State Bar, including the administration of the State Bar's facilities, automation, personnel, retirement plan, publications, and district bars; to oversee the membership functions of the State Bar, including the collection of dues, the suspension of members for failure to pay dues and other fees, and the transfer of members to active or inactive status in accordance with the provisions of Sections .0900 and .1000 of Subchapter 1D of these rules; and to perform such other duties and consider such other matters as the the council or the president may designate. The committee may establish a Publications Board to oversee the regular publications of the State Bar.

(6) *Justice System Committee.* It shall be the duty of the Justice System Committee to assist the council in identifying and advancing the appropriate role of the State Bar in connection with initiatives, programs, legislation and other actions intended to improve access to justice, simplify the law and judicial procedures, and enhance the justice system and the public's confidence in that system; to assist the judicial district bars of the State Bar in establishing plans for the representation of indigents in criminal cases in accordance with provisions of Sections .0400 and .0500 of Subchapter 1D of these rules; to provide assistance and advice concerning the operation of such plans; to consider means and methods of enhancing the degree of professionalism exhibited in the practice and conduct of the lawyers of this State; and to perform such other duties and consider such other matters as the council or the president may designate.

(7) *Client Assistance Committee.* It shall be the duty of the Client Assistance Committee to develop and oversee policies and programs to help clients and lawyers resolve difficulties or disputes, including fee disputes, using means other than the formal grievance or civil litigation processes; to establish and implement a disaster response plan, in accordance with the provisions of Section .0300 of Subchapter 1D of these rules, to assist victims of disasters in obtaining legal representation and to prevent the improper solicitation of victims by lawyers; and to perform such other duties and consider such other matters as the council or the president may designate.

(8) *Legal Assistance for Military Personnel (LAMP) Committee.* It shall be the duty of the LAMP Committee to serve as liaison for lawyers in the military service in this State; to improve legal services to military personnel and dependents stationed in this State; and to perform such other duties and consider such other matters as the council or the president may designate.

(b) *Boards.* The council of the State Bar shall make appointments to the following boards upon the recommendation of the Executive Committee. The boards are constituents of the North Carolina State Bar and, as standing committees of the State Bar, are subject to the authority of the council.

(1) *Interest on Lawyers' Trust Accounts (IOLTA) Board of Trustees.* The IOLTA Board shall be constituted in accordance with and shall carry out the provisions of the Plan for Disposition of Funds Received by the North Carolina State Bar from Interest on Trust Accounts set forth in Section .1300 of Subchapter 1D of these rules.

(2) *Board of Legal Specialization.* The Board of Legal Specialization shall be constituted in accordance with and shall carry out the provisions of the Plan of Legal Specialization set forth in Section .1700 of Subchapter 1D of these rules.

(3) *Client Security Fund Board of Trustees.* The Client Security Fund Board of Trustees shall be constituted in accordance with and shall carry out the provisions of the Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar set forth in Section .1400 of Subchapter 1D of these rules.

(4) *Board of Continuing Legal Education (CLE).* The Board of Continuing Legal Education shall be constituted in accordance with and shall carry out the provisions of the Continuing Legal Education Rules and Regulations of the North Carolina State Bar set forth in Sections .1500 and .1600 of Subchapter 1D of these rules.

(5) *Lawyer Assistance Program Board.* The Lawyer Assistance Program Board shall be constituted in accordance with and shall carry out the provisions of the Rules Governing the Lawyer Assistance Program of the North Carolina State Bar set forth in Section .0600 of Subchapter 1D of these rules.

**History Note:** Statutory Authority G.S. 84-22; G.S. 84-23, Readopted effective December 8, 1994; Amended effective June 12, 1996; Amended effective February 3, 2000.

**Cross References.** — As to preservation of identity of clients' funds and property, record keeping and accounting therefor, and interest on lawyers' trust accounts, see Rules 10.1 to 10.3 of the Rules of Professional Conduct.

## CASE NOTES

**Constitutionality.** — The order of the North Carolina Supreme Court establishing the Client Security Fund and requiring annual payments by attorneys to the Fund is an essential corollary to the Court's function, was required for the proper administration of justice, and did not violate the North Carolina Constitution. Beard v. North Carolina State Bar, 320 N.C. 126, 357 S.E.2d 694 (1987).

**The availability of prompt postsuspension review,** along with a relatively brief suspension period, reduces the weight of the private interest in a suspended attorney's continued use of his or her law license pending the outcome of the postsuspension hearing. In re Lamm, 116 N.C. App. 382, 448 S.E.2d 125 (1994), aff'd, 341 N.C. 196, 458 S.E.2d 921 (1995).

**The procedure contained in this rule** provides for independent judicial review by a superior court judge, who must determine if the affidavits and petition establish a sufficient showing to justify a suspension and this procedure satisfies the requirements for sufficient process under the Law of the Land Clause of the North Carolina Constitution. In re Lamm, 116 N.C. App. 382, 448 S.E.2d 125 (1994), aff'd 341 N.C. 196, 458 S.E.2d 921 (1995).

## SECTION .0800. ELECTION AND APPOINTMENT OF STATE BAR COUNCILORS

### A.0801. Purpose.

The purpose of these rules is to promulgate fair, open, and uniform procedures to elect and appoint North Carolina State Bar councilors in all judicial district bars. These rules should encourage a broader and more diverse participation and representation of all attorneys in the election and appointment of councilors.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### A.0802. Election — When held; Notice; Nominations.

(a) Every judicial district bar, in any calendar year at the end of which the term of one or more of its councilors will expire, shall fill said vacancy or vacancies at an election to be held at a meeting during that year.

(b) The officers of the district bar shall fix the time and place of such election and shall give to each active member (as defined in G.S. 84-16) of the district bar a written notice thereof directed to him or her at his or her address on file with the North Carolina State Bar, which notice shall be placed in the United States mail, postage prepaid, at least 30 days prior to the date of the election.

(c) The district bar shall submit its written notice of the election to the North Carolina State Bar, at least six weeks before the date of the election.

(d) The North Carolina State Bar will, at its expense, mail these notices.

(e) The notice shall state the date, time and place of the election, give the number of vacancies to be filled, identify how and to whom nominations may be made before the election, and advise that all elections must be by a majority of the votes cast. If the election will be held at a meeting of the bar, the notice will also advise that additional nominations may be made from the floor at the meeting itself. In judicial districts that permit elections by mail, the notice to members shall advise that nominations may be made in writing directed to the president of the district bar and received prior to a date set out in the notce. Sufficient notice shall be provided to permit nominations received from district bar members to be included on the printed ballots.

**History Note:** Statutory Authority G.S. 84-18; G.S. 84-23, Readopted Effective December 8, 1994; Amended November 5, 1999.

### A.0803. Same — Voting procedures.

(a) All nominations made either before or at the meeting shall be voted on by secret ballot.

(b) Cumulative voting shall not be permitted.

(c) Nominees receiving a majority of the votes cast shall be declared elected.

**History Note:** Statutory Authority G.S. 84-18; G.S. 84-23, Readopted Effective December 8, 1994; Amended November 5, 1999.

### A.0804. Procedures Governing Elections by Mail.

(a) Judicial district bars may adopt bylaws permitting elections by mail, in accordance with procedures approved by the N.C. State Bar Council and as set out in this section.

(b) Only active members of the judicial district bar may participate in elections conducted by mail.

(c) In districts which permit elections by mail, the notice sent to members referred to in Rule .0802(e) of this subchapter shall advise that the election will be held by mail.

(d) The judicial district bar shall mail a ballot to each active member of the judicial district bar at the member's address of record on file with the North Carolina State Bar. The ballot shall be accompanied by written instructions and shall state when and where the ballot should be returned.

(e) Each ballot shall be sequentially numbered with a red identifying numeral in the upper right hand corner of the ballot. The judicial district bar shall maintain appropriate records respecting how many ballots were mailed to prospective voters in each election, as well as how many ballots are returned.

(f) Only original ballots will be accepted. No photocopied or faxed ballots will be accepted. Voting by computer or electronic mail will not be permitted.

**History Note:** Adopted November 5, 1999.

### A.0805. Vacancies.

The unexpired term of any councilor whose office has become vacant because of resignation, death, or any cause other than the expiration of a term, shall be filled within 90 days of the occurrence of the vacancy by an election conducted in the same manner as above provided.

**History Note:** Statutory Authority G.S. 84-18; 84-23, Readopted Effective December 8, 1994; Amended November 5, 1999.

### A.0806. By-laws providing for geographical rotation or division of representation.

Nothing contained herein shall prohibit the district bar of any judicial district from adopting by-laws providing for the geographical rotation or division of its councilor representation.

**History Note:** Statutory Authority G.S. 84-18; 84-23, Readopted Effective December 8, 1994; Amended November 5, 1999.

## SECTION .0900. ORGANIZATION OF THE JUDICIAL DISTRICT BARS

### A.0901. Bylaws.

(a) Each judicial district bar shall adopt bylaws for its governance subject to the approval of the council.

(b) Each judicial district bar shall submit its current bylaws to the secretary of the North Carolina State Bar for review by the council on or before June 1, 1996.

(c) Pending review by the council, any bylaws submitted to the secretary on behalf of a judicial district bar or which already exist in the files of the secretary shall be deemed official and authoritative.

(d) All amendments to the bylaws of any judicial district bar must be filed with the secretary within 30 days of adoption and shall have no force and effect until approved by the council.

(e) The secretary shall maintain an official record for each judicial district bar containing bylaws which have bee approved by the council or for which approval is pending.

**History Note:** Adopted March 7, 1996.

### Rule A.0902. Annual Membership Fee.

(a) *Notice to State Bar.* The judicial district bar shall notify the North Carolina State Bar of its election to assess an annual membership fee each year at least thirty days prior to mailing to its members the first invoice therefore, specifying the amount of the annual membership fee, the date after which payment will be delinquent, and the amount of any late fee for delinquent payment.

(b) *Accounting to State Bar.* No later than thirty days after the end of the judicial district bar's fiscal year, the judicial district bar shall provide the North Carolina State Bar with an accounting of the annual membership fees it collected during such judicial district bar's fiscal year.

(c) *Delinquency Date.* The date upon which the annual membership fee shall be delinquent if not paid shall be not later than ninety days after, and not sooner than thirty days after, the date of the first invoice for the annual membership fee. The delinquency date shall be stated on the invoice and the invoice shall advise each member that failure to pay the annual membership fee must be reported to the North Carolina State Bar and may result in suspension of the member's license to practice law.

(d) *Late Fee.* Each judicial district bar may impose, but shall not be required, to impose a late fee of any amount not to exceed thirty dollars ($30.00) for non-payment of the annual membership fee on or before the stated delinquency date.

(e) *Members Subject to Assessment.* Only those lawyers who are active members of a judicial district bar may be assessed an annual membership fee. A lawyer who joins a judicial district bar after the beginning of its fiscal year shall be exempt from the obligation to pay the annual membership fee for that fiscal year only if the lawyer can demonstrate that he or she previously paid an annual membership fee to another judicial district bar with a fiscal year that runs coterminously, for a period of three (3) month or more, with the fiscal year of the lawyer's new judicial district bar.

(f) *Hardship Waivers.* A judicial district bar may not grant any waiver from the obligation to pay the judicial district bar's annual membership fee or any late fee unless the lawyer requesting the waiver is granted a waiver of the lawyer's annual membership fee to the North Carolina State Bar for the comparable period.

(g) *Reporting Delinquent Members to State Bar.* Twelve months after the date of the first invoice for the annual membership fee, the judicial district bar shall report to the North Carolina State Bar all of its members who have not paid the annual membership fee or any late fee.

**History Note:** Adopted December 20, 2000.

### A.0903. Fiscal Period.

To avoid conflict with the assessment of the membership fees for the North

Carolina State Bar, each judicial district bar that assesses a membership fee shall adopt a fiscal year that is not a calendar year.

**History Note:** Adopted December 20, 2000.

## SECTION .1000. MODEL BYLAWS FOR USE BY JUDICIAL DISTRICT BARS

### A.1001. Name.

The name of this District Bar shall be THE DISTRICT BAR OF THE _____ JUDICIAL DISTRICT, and shall be hereinafter referred to as the "District Bar."

**History Note:** Adopted March 7, 1996.

### A.1002. Authority and purpose.

The District Bar is formed pursuant to the provisions of Chapter 84 of the North Carolina General Statutes to promote the purposes therein set forth and to comply with the duties and obligations therein or thereunder imposed upon the Bar of this judicial district.

**History Note:** Adopted March 7, 1996.

### A.1003. Membership.

The members of the District Bar shall consist of two classes: active and inactive.

(a) *Active members.* The active members shall be all persons who, at the time of the adoption of these bylaws or any time thereafter

(1) are active members in good standing with the North Carolina State Bar and

(2) reside in the judicial district or

(3) practice in the judicial district and elect to belong to the District Bar as provided in G.S. 84-16.

(b) *Inactive members.* The inactive members shall be all persons, who, at the time of the adoption of these bylaws or at any time thereafter

(1) have been granted voluntary inactive status by the North Carolina State Bar and

(2) reside in the judicial district and

(3) elect to participate, but not vote or hold office, in the District Bar by giving written notice to the Secretary of the District Bar.

**History Note:** Adopted March 7, 1996.

### A.1004. Officers.

The officers of the District Bar shall be a President, a Vice President, and Secretary and/or Treasurer who shall be selected and shall serve for the terms set out herein.

(a) *President.* The President serving at the time these bylaws are effective shall continue to serve for a term ending at the next annual meeting following the adoption or effective date of these bylaws. The President for the following term shall be the then current Vice President. Thereafter, the duly elected Vice President shall automatically succeed to the office of the President for a term of one, two, or three years.

(b) *Vice president.* The Vice President serving at the time these bylaws are effective shall continue to serve for a term ending at the next annual meeting following the adoption or effective date of these bylaws, at which time said Vice President shall succeed to the office of the President. Thereafter, the Vice President shall be elected at the annual meeting as hereinafter provided for a term of one, two, or three years.

(c) *Secretary and/or treasurer.* The Secretary and/or the Treasurer serving at the time these bylaws are effective shall each continue to serve in their respective offices until the expiration of the term of that office or until successors are appointed by the President (or be elected by the active members of the District Bar), whichever occurs later. In all other years, the Secretary and/or Treasurer shall be appointed by the President (or be elected by the active members of the District Bar) to serve for a term of one, two, or three years.

(d) *Election.* Before (or at) the annual meeting at which officers are to be elected, the Nominating Committee shall submit the names of its nominees for the office of Vice President to the Secretary. Nominations from the floor shall be permitted. If no candidate receives a majority of the votes cast, the candidate with the lowest number of votes shall be eliminated and a run-off election shall immediately be held among the remaining candidates. This procedure shall be repeated until a candidate receives a majority of the votes.[1]

(e) *Duties.* The duties of the officers shall be those usual and customary for such officers, including such duties as may be from time to time designated by resolution of the District Bar, the North Carolina State Bar Council or the laws of the State of North Carolina.

(f) *Vacancies.* If a vacancy in the office of the Vice President, Secretary-Treasurer occurs, the vacancy will be filled by the Board of Directors, if any, and if there is no Board of Directors, then by the vote of the active members at a special meeting of such members. The successor shall serve until the next annual meeting of the District Bar. If the office of the President becomes vacant, the Vice President shall succeed to the office of the President and the Board of Directors, if any, and if there is no Board of Directors, then by the vote of the active members at a special meeting of such members, will select a new Vice resident, who shall serve until the next annual meeting.

(g) *Notification.* Within 10 days following the annual meeting, or the filling of a vacancy in any office, the President shall notify the Executive Director of the North Carolina State Bar of the names, addresses and telephone numbers of all officers of the District Bar.

(h) *Record of bylaws.* The President shall ensure that a current copy of these bylaws is filed with the office of the Senior Resident Superior Court Judge with the _____ Judicial District and with the Executive Director of the North Carolina State Bar.

(i) *Removal from office.* The District Bar, by a two-thirds vote of its active members present at a duly called meeting, may, after due notice and an

[1] The procedure for voting for, and election of, councilors is set by statute and rules of the N.C. State Bar. District Bar voting procedure with regard to matters relating to District Bar dues is now statutorily prescribed in North Carolina General Statutes Section 84-18.1. The procedure, but not the manner or method of conducting the vote, to submit nominations to the Governor to fill vacancies on the District Court beach is set forth in North Carolina General Statutes Section 7A-142. It is suggested that, for voting upon, and elections for, other District Bar matters and issues, the District Bars be permitted to adopt bylaws providing for procedures as may seem appropriate for each District Bar. Such rules might address notice provisions, including how much notice is given and permissible methods of giving notice, what shall constitute a quorum (see footnote 2), and how any such election shall be conducted (including whether or not members must be present to vote, whether proxies will be permitted, whether or not absentee or some other form of mail ballot will be allowed and whether or not cumulative voting should be permitted when elections for multiple candidates or positions are being conducted).

opportunity to be heard, remove from office any officer who has engaged in conduct which renders the officer unfit to serve, or who has become disabled, or for other good cause. The office of any officer who, during his or her term of office ceases to be an active member of the North Carolina State Bar shall immediately be deemed vacant and shall be filled as provided in Rule .1004(f) above.

**History Note:** Adopted March 7, 1996.

### A.1005. Councilor.

The District Bar shall be represented in the State Bar Council by one or more duly elected councilors, the number of councilors being determined pursuant to G.S. 84-17. Any councilor serving at the time of the adoption of these bylaws shall complete the term of office to which he or she was previously elected. Thereafter, elections shall be held as necessary. Nominations shall be made and the election held as provided in G.S. 84-18 and in Section .0800 et seq. of Subchapter 1A of the Rules of the North Carolina State Bar (27 N.C.A.C. 1A .0800 et seq.). If more than one council seat is to be filled, separate elections shall be held for each vacant seat. A vacancy in the office of councilor shall be filled as provided by Rule .0804 of Subchapter 1A of the Rules of the North Carolina State Bar (27 N.C.A.C. 1A .0804).

**History Note:** Adopted March 7, 1996;
Amended November 5, 1999.

### A.1006. Annual membership fee.

(a) Each active member of the District Bar shall:

(1) Pay such annual membership fee, if any, as is prescribed by a majority vote of the active members of the District Bar present and voting at a duly called meeting of the District Bar, provided, however, that such fee may never exceed the amount annual membership fee currently imposed by the North Carolina State Bar. Each member shall pay the annual District Bar membership fee at the time and place set forth in the notice thereof mailed to the member by the Secretary-Treasurer; and

(2) Keep the Secretary-Treasurer notified of the member's current mailing address and telephone number.

(b) The annual membership fee shall be used to promote and maintain the administration, activities and programs of the District Bar.

**History Note:** Adopted March 7, 1996.

### A.1007. Meetings.

(a) *Annual meetings.* The District Bar shall meet each _____ at a time and place designated by the President. The President, Secretary or other Officer shall mail or deliver written notice of the annual meeting to each active member of the District Bar at the member's last known mailing address on file with the District Bar at least ten days before the date of the annual meeting and shall so certify in the official minutes of the meeting. Notice of the meeting mailed by the Executive Director of the North Carolina State Bar shall also satisfy the notice requirement. Failure to mail or deliver the notice as herein provided shall invalidate any action at the annual meeting.

(b) *Special meetings.* Special meetings, if any, may be called at any time by the President or the Vice President. The President, Secretary or other Officer shall mail or deliver written notice of the special meeting to each active

member of the District Bar at the member's last known mailing address on file with the District Bar at least ten days before the date of any special meeting. Such notice shall set forth the time and place for the special meeting and the purpose(s) thereof. Failure to mail or deliver the notice shall invalidate any action taken at a special meeting.

(c) *Quorum.* Twenty percent of the active members of the District Bar shall constitute a quorum, and a quorum shall be required to take official action on behalf of the District Bar.[2]

**History Note:** Adopted March 7, 1996.

### A.1008. District bar finances.

(a) *Fiscal year.* The District Bar's fiscal year shall begin on _____ and shall end on _____.

(b) *Duties of treasurer.* The Treasurer shall maintain the funds of the District Bar on deposit, initiate any necessary disbursements and keep appropriate financial records.

(c) *Annual financial report.* Each _____ before the annual meeting, the Treasurer shall prepare the District Bar's annual financial report for review by the Board of Directors, if any, and submission to the District Bar's annual meeting and the North Carolina State Bar.

(d) *District bar checks.* All checks written on District Bar accounts (arising from the collection of mandatory dues) that exceed $500 must be signed by two (2) of the following: (1) the Treasurer, (2) any other officer, (3) another member of the Board of Directors, or (4) the Executive Secretary/Director, if any.

(e) *Fidelity bond.* If it is anticipated that receipts from membership fees will exceed $20,000 for any fiscal year, the District Bar shall purchase a fidelity bond at least equal in amount to the anticipated annual receipts to indemnify the District Bar for losses attributable to the malfeasance of the Treasurer or any other member having access to District Bar funds.

(f) *Taxpayer identification number.* The Treasurer shall be responsible for obtaining a federal taxpayer identification number for the District Bar.

**History Note:** Adopted March 7, 1996;
Amended effective April 23, 1999.

### A.1009. Prohibited activities.

(a) *Prohibited expenditures.* Mandatory District Bar dues, if any, shall not be used for the purchase of alcoholic beverages, gifts to public officials, including judges, charitable contributions, recreational activities or expenses of spouses of District Bar members or officers. However, such expenditures may be made from funds derived entirely from the voluntary contributions of District Bar members.

(b) *Political expenditures.* The District Bar shall not make any expenditures to fund political and ideological activities.

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[2] Consistent with the comment contained in Footnote 1, each District Bar should be permitted to adopt bylaws providing for what shall constitute a quorum based upon each District Bar's particular situation and circumstances. The above provision regarding quorum should be considered only as a suggestion and individual District Bars may wish to provide that a different percentage of the membership shall constitute a quorum. Other methods of defining a quorum should also be permitted. For example, in certain of the larger District Bars, any quorum based on a percentage of the membership, except for a very nominal percentage, may be difficult to attain. One alternate quorum provision might read as follows: A quorum shall be those present at any membership meeting for which proper notice was given.

(c) *Political activities.* The District Bar shall not engage in any political or ideological conduct or activity, including the endorsement of candidates and the taking or advocation of positions on political issues, referendums, bond elections, and the like, however, the District Bar, and persons speaking on its behalf, may take positions on, or comment upon, issues relating to the regulation of the legal profession and issues or matters relating to the improvement of the quality and availability of legal services to the general public.

**History Note:** Adopted March 7, 1996.

### A.1010. Committees.

(a) *Standing committee(s).* The standing committees shall be the Nominating Committee, Pro Bono Committee, Fee Dispute Arbitration Committee and Grievance Committee, provided that, with respect to the Fee Dispute Arbitration Committee and the Grievance Committee, the District meets the State Bar guidelines relating thereto.

(b) *Fee arbitration committee.*

(1) The Fee Arbitration Committee shall consist of at least six but not more than eighteen persons appointed by the President to staggered three-year terms as provided in the District Bar's Fee Arbitration Plan.

(2) The Fee Arbitration Committee shall be responsible for implementing a Fee Arbitration Plan approved by the Council of the North Carolina State Bar to resolve fee disputes efficiently, economically, and expeditiously without litigation.

(c) *Grievance committee.*

(1) The Grievance Committee shall consist of at lease five but not more than thirteen persons appointed by the President to staggered three-year terms as provided by the Rules and Regulations of the North Carolina State Bar governing Judicial District Grievance Committees.

(2) The Grievance Committee shall assist the Grievance Committee of the North Carolina State Bar by receiving grievances, investigating grievances, evaluating grievances, informally mediating disputes, facilitating communication between lawyers and clients and referring members of the public to other appropriate committees or agencies for assistance.

(3) The Grievance Committee shall operate in strict accordance with the rules and policies of the North Carolina State Bar with respect to District Bar Grievance Committees.

(d) *Special committees.* Special committees may be created and appointed by the President.

(e) *Nominating committee.*

(1) The Nominating Committee shall be appointed by the officers (or the Board of Directors) of the District Bar and shall consist of at least three active members of the District Bar who are not officers or directors of the District Bar.[3]

(2) The Nominating Committee shall meet as necessary for the purpose of nominating active members of the District Bar as candidates for officers and councilor(s) and the Board of Directors, if any.

[3] The composition of the Nominating Committee set forth above is a suggestion only. The District Bars may choose to constitute their nominating committees in a different manner, as for example, letting the committee consist of the three most immediate past presidents of the District Bar who are still active members of the District Bar as defined herein. Smaller District Bars may choose to have no Nominating Committee and nominate and elect officers from the floor at the annual meeting of the District Bar.

(3) The Nominating Committee members shall serve one-year terms beginning on _____ and ending on _____.

(4) Any active member whose name is submitted for consideration for nomination to any office or as a councilor must have indicated his or her willingness to serve if selected.

(f) *Pro bono committee.*

(1) The Pro Bono Committee shall consist of at least five active members of the District Bar appointed by the President.

(2) The Pro Bono Committee shall meet at least once each quarter and shall have the duty of encouraging members of the District Bar to provide pro bono legal services. The Committee shall also develop programs whereby attorneys not involved in other volunteer legal service programs may provide pro bono legal service in their areas of concentration and practice.

(3) The members of the Pro Bono Committee shall serve one-year terms commencing on _____.

**History Note:** Adopted March 7, 1996.

### A.1011. Board of directors or executive committee.

(a) *Membership of board.* A Board of Directors consisting of at least _____ active members of the District Bar shall be elected. At all times, the Board of Directors shall include at least one director from each county in the Judicial District. The Board of Directors serving when these bylaws become effective shall continue to serve until the following annual meeting. Beginning on _____ immediately after the effective date of these bylaws, the President shall appoint an initial Board of Directors who shall serve three-year terms commencing on _____, except that the terms of the initial members of the Board shall be staggered at one-year intervals to ensure continuity and experience. To effect the staggered initial terms, the President will determine which of the initial members shall serve terms of less than three years.

The State Bar Councilor (or Councilors) from the judicial district shall be an ex officio member (or members) of the District Bar Board of Directors or Executive Committee.

(b) *Terms of directors.* After the initial staggered terms of the Board of Directors expire, successors shall be elected by the active members at the annual District Bar meeting, as set out in Rule .1004(d) above, and Rule .1011(c) and (d) below. Following the completion of the initial staggered terms, the directors shall serve three-year terms beginning on _____ following their election.

(c) *Designated and at-large seats in multi-county districts.* In multi-county districts, one seat on the Board of Directors shall be set aside and designated for each county in the district. Only active members of the District Bar who reside or work in the designated county may be elected to a designated county seat. All other seats on the Board of Directors shall be at-large seats which may be filled by any active member of the District Bar.

(d) *Elections.* When one or more seats on the Board of Directors become vacant, an election shall be held at the annual meeting of the District Bar. Except as otherwise provided herein, the election shall be conducted as provided for in Rule .1004(d) above. The candidates receiving the highest number of votes cast will be elected, regardless of whether any of the candidates received a majority of the votes cast, provided that designated seats will be filled by the candidates receiving the highest number of votes who live or work in the designated county, regardless of whether any of the candidates received a majority of the votes cast.

(e) *Vacancies.* If a vacancy occurs on the Board of Directors, the President (or the Board of Directors) shall appoint a successor who shall serve until the next annual meeting of the District Bar. If the vacancy occurs in a designated seat for a particular county within the district, the successor will be selected from among the active members of the District Bar who live or work in the designated county.

(f) *Duties of board of directors.* The Board of Directors shall have the responsibilities described [in] Rules .1004(f) and .1007(c) above. The Board of Directors shall also consult with the officers regarding any matters of District Bar business or policy arising between meetings and may act for the District Bar on an emergency basis if necessary, provided that any such action shall be provisional pending its consideration by the District Bar at its next duly called meeting. The Board of Directors may not impose on its own authority any sort of fee upon the membership.

**History Note:** Adopted March 7, 1996.

### A.1012. Amendment of the bylaws.

The membership of the District Bar, by a _____ (majority, two-thirds, etc.) vote of the active members present at any duly called meeting at which there is a quorum present and voting throughout, may amend these bylaws in ways not inconsistent with the constitution of the United States, the policies and rules of the North Carolina State Bar and the laws of the United States and North Carolina.

**History Note:** Adopted March 7, 1996.

## SECTION .1100. OFFICE OF THE NORTH CAROLINA STATE BAR

### A.1101. Office.

Until otherwise ordered by the council, the office of the North Carolina State Bar shall be maintained in the city of Raleigh at such place as may be designated by the council.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SECTION .1200. FILING PAPERS WITH AND SERVING THE NORTH CAROLINA STATE BAR

### A.1201. When papers are filed under these rules and regulations.

Whenever in these rules and regulations there is a requirement that petitions, notices or other documents be filed with or served on the North Carolina State Bar, or the council, the same shall be filed with or served on the secretary of the North Carolina State Bar.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

SECTION .1300. SEAL

### A.1301. Form and custody of seal.

The North Carolina State Bar shall have a seal round in shape and having the words and figures, "The North Carolina State Bar July 1, 1933," with the word "Seal" in the center. The seal shall remain in the custody of the secretary at the office of the North Carolina State Bar, unless otherwise ordered by the council.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SUBCHAPTER 1B. DISCIPLINE AND DISABILITY RULES

SECTION .0100. DISCIPLINE AND DISABILITY OF ATTORNEYS

### B.0101. General provisions.

Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts, and the legal profession. The fact that certain misconduct has remained unchallenged when done by others, or when done at other times, or that it has not been made the subject of earlier disciplinary proceedings, will not be a defense to any charge of misconduct by a member.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**CASE NOTES**

**Cited** in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); North Carolina State Bar v. Talman, 62 N.C. App. 355, 303 S.E.2d 175 (1983).

### B.0102. Procedure for discipline.

(a) The procedure to discipline members of the bar of this state will be in accordance with the provisions hereinafter set forth.

(b) District bars will not conduct separate proceedings to discipline members of the bar but will assist and cooperate with the North Carolina State Bar in reporting and investigating matters of alleged misconduct on the part of its members.

(c) Concurrent Jurisdiction of State Bar and Courts

(1) The Council of the North Carolina State Bar is vested, as an agency of the state, with the control of the discipline, disbarment, and restoration of attorneys practicing law in this state.

(2) The courts of this state have inherent authority to take disciplinary action against attorneys practicing therein, even in relation to matters not pending in the court exercising disciplinary authority.

(3) The authority of the North Carolina State Bar and the courts to discipline attorneys is separate and distinct, the North Carolina State Bar having derived its jurisdiction by legislative act and the courts from the inherent power of the courts themselves.

(4) Neither the North Carolina State Bar nor the courts are authorized or empowered to act for or in the name of the other, and the disciplinary action taken by either entity should be clearly delineated as to the source or basis for the action being taken.

(5) It is the position of the North Carolina State Bar that no trial court has the authority to preempt a North Carolina State Bar disciplinary proceeding with a pending civil or criminal court proceeding involving attorney conduct, or to dismiss a disciplinary proceeding pending before the North Carolina State Bar.

(6) Whenever the North Carolina State Bar learns that a court has initiated an inquiry or proceeding regarding alleged improper or unethical conduct of an attorney, the North Carolina State Bar may defer to the court and stay its own proceeding pending completion of the court's inquiry or proceeding. Upon request, the North Carolina State Bar will assist in the court's inquiry or proceeding.

(7) If the North Carolina State Bar finds probable cause and institutes disciplinary proceedings against an attorney for conduct which subsequently becomes an issue in a criminal or civil proceeding, the court may, in its discretion, defer its inquiry pending the completion of the North Carolina State Bar's proceedings.

(8) Upon the filing of a complaint by the North Carolina State Bar, the North Carolina State Bar will send a copy of the complaint to the chief resident superior court judge and to all superior court judges regularly assigned to the district in which the attorney maintains his or her law office. The North Carolina State Bar will send a copy of the complaint to the district attorney in the district in which the attorney maintains a law office if the complaint alleges criminal activity by the attorney.

(9) The North Carolina State Bar will encourage judges to contact the North Carolina State Bar to determine the status of any relevant complaints filed against an attorney before the court takes disciplinary action against the attorney.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-36, Readopted Effective December 8, 1994.

### B.0103. Definitions.

Subject to additional definitions contained in other provisions of this subchapter, the following words and phrases, when used in this subchapter, will have, unless the context clearly indicates otherwise, the meanings given to them in this rule.

(1) *Admonition.* A written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct.

(2) *Appellate division.* The appellate division of the general court of justice.

(3) *Board.* The Board of Continuing Legal Education.

(4) *Board of Continuing Legal Education.* A standing committee of the council responsible for the administration of a program of mandatory continuing legal education and law practice assistance.

(5) *Censure.* A written form of discipline more serious than a reprimand issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the attorney's license.

(6) *Certificate of conviction.* A certified copy of any judgment wherein a member of the North Carolina State Bar is convicted of a criminal offense.

(7) *Chairperson of the Grievance Committee.* Councilor appointed to serve as chairperson of the Grievance Committee of the North Carolina State Bar.

(8) *Commission.* The Disciplinary Hearing Commission of the North Carolina State Bar.

(9) *Commission chairperson.* The chairperson of the Disciplinary Hearing Commission of the North Carolina State Bar.

(10) *Complainant or complaining witness.* Any person who has complained of the conduct of any member of the North Carolina State Bar to the North Carolina State Bar.

(11) *Complaint.* A formal pleading filed in the name of the North Carolina State Bar with the commission against a member of the North Carolina State Bar after a finding of probable cause.

(12) *Consolidation of cases.* A hearing by a hearing committee of multiple charges, whether related or unrelated in substance, brought against one defendant.

(13) *Council.* The Council of the North Carolina State Bar.

(14) *Councilor.* A member of the Council of the North Carolina State Bar.

(15) *Counsel.* The counsel of the North Carolina State Bar appointed by the council.

(16) *Court or courts of this state.* A court authorized and established by the constitution or laws of the state of North Carolina.

(17) *Criminal offense showing professional unfitness.* The commission of, attempt to commit, conspiracy to commit, solicitation or subornation of any felony or any crime that involves false swearing, misrepresentation, deceit, extortion, theft, bribery, embezzlement, false pretenses, fraud, interference with the judicial or political process, larceny, misappropriation of funds or property, overthrow of the government, perjury, willful failure to file a tax return, or any other offense involving moral turpitude or showing professional unfitness.

(18) *Defendant.* A member of the North Carolina State Bar against whom a finding of probable cause has been made.

(19) *Disabled or disability.* A mental or physical condition which significantly impairs the professional judgment, performance, or competence of an attorney.

(20) *Grievance.* Alleged misconduct.

(21) *Grievance Committee.* The Grievance Committee of the North Carolina State Bar or any of its panels acting as the Grievance Committee respecting the grievances and other matter referred to it by the chairperson of the Grievance Committee.

(22) *Hearing committee.* A hearing committee designated under Rule .0108(a)(2), .0114(d), .0114(x), .0118(b)(2), .0125(a)(6), .0125(b)(7) or .0125(c)(2) of this subchapter.

(23) *Illicit drug.* Any controlled substance as defined in the North Carolina Controlled Substances Act, section 5, chapter 90, of the North Carolina General Statutes, or its successor, which is used or possessed without a prescription or in violation of the laws of this state or the United States.

(24) *Incapacity or incapacitated.* Condition determined in a judicial proceeding under the laws of this or any other jurisdiction that an attorney is mentally defective, an inebriate, mentally disordered, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicants, drugs, or other cause.

(25) *Investigation.* The gathering of information with respect to alleged misconduct, alleged disability, or a petition for reinstatement.

(26) *Investigator.* Any person designated to assist in the investigation of alleged misconduct or facts pertinent to a petition for reinstatement.

(27) *Lawyer Assistance Program Board.* The Lawyer Assistance Program Board of the North Carolina State Bar.

(28) *Letter of notice.* A communication to a respondent setting forth the substance of a grievance.

(29) *Letter of warning.* Written communication from the Grievance Committee or the commission to an attorney stating that past conduct of the attorney, while not the basis for discipline, is an unintentional, minor, or technical violation of the Rules of Professional Conduct and may be the basis for discipline if continued or repeated.

(30) *Member.* A member of the North Carolina State Bar.

(31) *Office of the Counsel.* The office and staff maintained by the counsel of the North Carolina State Bar.

(32) *Office of the Secretary.* The office and staff maintained by the secretary-treasurer of the North Carolina State Bar.

(33) *Party.* After a complaint has been filed, the North Carolina State Bar as plaintiff or the member as defendant.

(34) *Plaintiff.* After a complaint has been filed, the North Carolina State Bar.

(35) *Preliminary hearing.* Hearing by the Grievance Committee to determine whether probable cause exists.

(36) *Probable cause.* A finding by the Grievance Committee that there is reasonable cause to believe that a member of the North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(37) *Reprimand.* A written form of discipline more serious than an admonition issued in cases in which a defendant has violated one or more provisions of the Rules of Professional Conduct and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require a censure.

(38) *Respondent.* A member of the North Carolina State Bar who has been accused of misconduct or whose conduct is under investigation, but as to which conduct there has not yet been a determination of whether probable cause exists.

(39) *Revised Rules of Professional Conduct.* The Rules of Professional Conduct adopted by the Council of the North Carolina State Bar and approved by the North Carolina Supreme Court effective July 24, 1997.

(40) *Rules of Professional Conduct.* The Rules of Professional Conduct adopted by the Council of the North Carolina State Bar and approved by the North Carolina Supreme Court and which were in effect from Oct. 7, 1985 through July 23, 1997.

(41) *Secretary.* The secretary-treasurer of the North Carolina State Bar.

(42) *Supreme Court.* The Supreme Court of North Carolina.

(43) *Will.* When used in these rules, means a direction or order which is mandatory or obligatory.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective December 30, 1998; Amended effective February 3, 2000.

### B.0104. State bar council: Powers and duties in discipline and disability matters.

The Council of the North Carolina State Bar will have the power and duty

(1) to supervise and conduct disciplinary proceedings in accordance with the provisions hereinafter set forth;

(2) to appoint members of the commission as provided by statute;

(3) to appoint a counsel. The counsel will serve at the pleasure of the council. The counsel will be a member of the North Carolina State Bar but will not be permitted to engage in the private practice of law;

(4) to order the transfer of a member to disability inactive status when such member has been judicially declared incompetent or has been involuntarily committed to institutional care because of incompetence or disability;

(5) to accept or reject the surrender of the license to practice law of any member of the North Carolina State Bar;

(6) to order the disbarment of any member whose resignation is accepted;

(7) to review the report of any hearing committee upon a petition for reinstatement of a disbarred attorney and to make final determination as to whether the license will be restored.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994, Amended July 21, 1995.

**CASE NOTES**

**Cited** in North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983).

## B.0105. Chairperson of the Grievance Committee: Powers and duties.

(a) The chairperson of the Grievance Committee will have the power and duty

(1) to supervise the activities of the counsel;

(2) to recommend to the Grievance Committee that an investigation be initiated;

(3) to recommend to the Grievance Committee that a grievance be dismissed;

(4) to direct a letter of notice to a respondent or direct the counsel to issue letters of notice in such cases or under such circumstances as the chairperson deems appropriate;

(5) to issue, at the direction and in the name of the Grievance Committee, a letter of caution, letter of warning, an admonition, a reprimand, or a censure to a member;

(6) to notify a respondent that a grievance has been dismissed, and to notify the complainant in accordance with Rule .0121 of this subchapter;

(7) to call meetings of the Grievance Committee;

(8) to issue subpoenas in the name of the North Carolina State Bar or direct the secretary to issue such subpoenas;

(9) to administer or direct the administration of oaths or affirmations to witnesses;

(10) to sign complaints and petitions in the name of the North Carolina State Bar;

(11) to determine whether proceedings should be instituted to activate a suspension which has been stayed;

(12) to enter orders of reciprocal discipline in the name of the Grievance Committee;

(13) to direct the counsel to institute proceedings in the appropriate forum to determine if an attorney is in violation of an order of the Grievance Committee, the commission, or the council;

(14) to rule on requests for reconsideration of decisions of the Grievance Committee regarding grievances;

(15) to tax costs of the disciplinary procedures against any defendant against whom the Grievance Committee imposes discipline, including a minimum administrative cost of $50;

(16) in his or her discretion, to refer grievances primarily attributable to unsound law office management to a program of law office management training approved by the State Bar and to so notify the complainant;

(17) to dismiss a grievance upon request of the complainant, where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct and where counsel consents to the dismissal;

(18) to dismiss a grievance where it appears that the grievance has not been filed within the time period set out in Rule .0111(e);

(19) to dismiss a grievance where it appears that the complaint, even if true, fails to state a violation of the Rules of Professional Conduct and where counsel consents to the dismissal;

(20) to dismiss a grievance where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct and where counsel and a member of the Grievance Committee designated by the Committee consent to the dismissal.

(21) to appoint a subcommittee to make recommendations to the council for such amendments to the Discipline and Disability Rules as the subcommittee deems necessary or appropriate.

(b) The president, vice-chairperson, or a member of the Grievance Committee designated by the president or the chairperson or vice-chairperson of the committee may perform the functions, exercise the power, and discharge the duties of the chairperson or any vice-chairperson when the chairperson or a vice-chairperson is absent or disqualified.

(c) The chairperson may delegate his or her authority to the president, the vice chairperson of the committee, or a member of the Grievance Committee.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 20, 1995; Amended effective March 6, 1997; Amended effective December 30, 1998; Amended effective October 2, 1997; Amended effective March 3, 1999; Amended effective February 3, 2000.

## B.0106. Grievance committee — Powers and duties.

The Grievance Committee will have the power and duty

(1) to direct the counsel to investigate any alleged misconduct or disability of a member of the North Carolina State Bar coming to its attention;

(2) to hold preliminary hearings, find probable cause and direct that complaints be filed;

(3) to dismiss grievances upon a finding of no probable cause;

(4) to issue a letter of caution to a respondent in cases wherein misconduct is not established but the activities of the respondent are unprofessional or not in accord with accepted professional practice. The letter of caution will recommend that the respondent be more professional in his or her practice in one or more ways which are to be specifically identified;

(5) to issue a letter of warning to a respondent in cases wherein no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct. The letter of warning will advise the attorney that he or she may be subject to discipline if such conduct is continued or repeated. The warning will specify in one or more ways the conduct or practice for which the respondent is being warned. A copy of the letter of warning will be maintained in the office of the counsel for three years subject to the confidentiality provisions of Rule .0129 of this subchapter;

(6) to issue an admonition in cases wherein the defendant has committed a minor violation of the Rules of Professional Conduct;

(7) to issue a reprimand wherein the defendant has violated one or more provisions of the Rules of Professional Conduct, and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require a censure;

(8) to issue a censure in cases wherein the defendant has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the defendant's license;

(9) to direct that a petition be filed seeking a determination whether a member of the North Carolina State Bar is disabled;

(10) to include in any order of admonition, reprimand, or censure a provision requiring the defendant to complete a reasonable amount of continuing legal education in addition to the minimum amount required by the North Carolina Supreme Court;

(11) in its discretion, to refer grievances primarily attributable to unsound law office management to a program of law office management training approved by the State Bar in accordance with Rule .0112(i) of this subchapter.

(12) in its discretion, to refer grievances primarily attributable to the respondent's substance abuse or mental health problem to the Lawyer Assistance Program in accordance with Rule .0112(j) of this subchapter.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective March 3, 1999; Amended effective December 20, 2000.

### B.0107. Counsel: Powers and duties.

The counsel will have the power and duty

(1) to initiate an investigation concerning alleged misconduct of a member;

(2) to direct a letter of notice to a respondent when authorized by the chairperson of the Grievance Committee;

(3) to investigate all matters involving alleged misconduct whether initiated by the filing of a grievance or otherwise;

(2) to recommend to the chairperson of the Grievance Committee that a matter be dismissed, that a letter of caution, or a letter of warning be issued, or that the Grievance Committee hold a preliminary hearing;

(3) to prosecute all disciplinary proceedings before the Grievance Committee, hearing committees, and the courts;

(4) to represent the North Carolina State Bar in any trial, hearing, or other proceeding concerning the alleged disability of a member;

(5) to appear on behalf of the North Carolina State Bar at hearings conducted by the Grievance Committee, hearing committees, or any other agency or court concerning any motion or other matter arising out of a disciplinary or disability proceeding;

(6) to appear at hearings conducted with respect to petitions for reinstatement of license by suspended or disbarred attorneys or by attorneys transferred to disability inactive status, to cross-examine witnesses testifying in support of such petitions, and to present evidence, if any, in opposition to such petitions;

(7) to employ such deputy counsel, investigators, and other administrative personnel in such numbers as the council may authorize;

(8) to maintain permanent records of all matters processed and of the disposition of such matters;

(9) to perform such other duties as the council may direct;

(10) after a finding of probable cause by the Grievance Committee, to designate the particular violations of the Rules of Professional Conduct to be alleged in a formal complaint filed with the commission;

(11) to file amendments to complaints and petitions arising out of the same transactions or occurrences as the allegations in the original complaints or petitions, in the name of the North Carolina State Bar, with the prior approval of the chairperson of the Grievance Committee;

(12) after a complaint is filed with the commission, to dismiss any or all claims in the complaint or to negotiate and recommend consent orders of discipline to the hearing committee.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-31, Readopted Effective December 8, 1994; Amended effective March 3, 1999.

**CASE NOTES**

**Cited** in North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983).

## B.0108. Chairperson of the hearing commission: Powers and duties.

(a) The chairperson of the Disciplinary Hearing Commission of the North Carolina State Bar will have the power and duty

(1) to receive complaints alleging misconduct and petitions alleging the disability of a member filed by the counsel; petitions requesting reinstatement of license by members who have been involuntarily transferred to disability inactive status, suspended, or disbarred; motions seeking the activation of suspensions which have been stayed; and proposed consent orders of disbarment;

(2) to assign three members of the commission, consisting of two members of the North Carolina State Bar and one nonlawyer to hear complaints, petitions, motions, and posthearing motions pursuant to Rule .0114(z)(2) of this subchapter. The chairperson will designate one of the attorney members as chairperson of the hearing committee. No committee member who hears a disciplinary matter may serve on the committee which hears the attorney's reinstatement petition. The chairperson of the commission may designate himself or herself to serve as one of the attorney members of any hearing committee and will be chairperson of any hearing committee on which he or she serves. Posthearing motions filed pursuant to Rule .0114(z)(2) of this subchapter will be considered by the same hearing committee assigned to the original trial proceeding. Hearing committee members who are ineligible or unable to serve for any reason will be replaced with members selected by the commission chairperson;

(3) to set the time and place for the hearing on each complaint or petition;

(4) to subpoena witnesses and compel their attendance and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. The chairperson may designate the secretary to issue such subpoenas;

(5) to consolidate, in his or her discretion for hearing, two or more cases in which a subsequent complaint or complaints have been served upon a defendant within ninety days of the date of service of the first or a preceding complaint;

(6) to enter orders disbarring members by consent.

(7) to enter an order suspending a member pending disposition of a disciplinary proceeding when the member has been convicted of a serious crime or has pled no contest to a serious crime and the court has accepted the plea.

(b) The vice-chairperson of the disciplinary hearing commission may perform the function of the chairperson in any matter when the chairperson is absent or disqualified.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994, Amended July 21, 1995.

**CASE NOTES**

**Cited** in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

## B.0109. Hearing committee: Powers and duties.

Hearing committees of the Disciplinary Hearing Commission of the North Carolina State Bar will have the following powers and duties:

(1) to hold hearings on complaints alleging misconduct, or petitions seeking a determination of disability or reinstatement, or motions seeking the activation of suspensions which have been stayed, and to conduct proceedings to determine if persons or corporations should be held in contempt pursuant to G.S. 84-28.1(b1);

(2) to enter orders regarding discovery and other procedures in connection with such hearings, including, in disability matters, the examination of a member by such qualified medical experts as the committee will designate;

(3) to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. Subpoenas will be issued by the chairperson of the hearing committee in the name of the commission. The chairperson may direct the secretary to issue such subpoenas;

(4) to administer or direct the administration of oaths or affirmations to witnesses at hearings;

(5) to make findings of fact and conclusions of law;

(6) to enter orders dismissing complaints in matters before the committee;

(7) to enter orders of discipline against or letters of warning to defendants in matters before the committee;

(8) to tax costs of the disciplinary proceedings against any defendant against whom discipline is imposed, provided, however, that such costs will not include the compensation of any member of the council, committees, or agencies of the North Carolina State Bar;

(9) to enter orders transferring a member to disability inactive status;

(10) to report to the council its findings of fact and recommendations after hearings on petitions for reinstatement of disbarred attorneys;

(11) to grant or deny petitions of attorneys seeking transfer from disability inactive status to active status;

(12) to enter orders reinstating suspended attorneys or denying reinstatement. An order denying reinstatement may include additional sanctions in the event violations of the petitioner's order of suspension are found;

(13) to enter orders activating suspensions which have been stayed or continuing the stays of such suspensions.

(14) to enter orders holding persons and corporations in contempt pursuant to G.S. 84-28.1(b1) and imposing such sanctions allowed by law.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-28; G.S. 84-28.1, Readopted Effective December 8, 1994; Amended effective March 3, 1999.

### B.0110. Secretary: Powers and duties in discipline and disability matters.

The secretary will have the following powers and duties in regard to discipline and disability procedures:

(1) to receive grievances for transmittal to the counsel, to receive complaints and petitions for transmittal to the commission chairperson, and to receive affidavits of surrender of license for transmittal to the council;

(2) to issue summonses and subpoenas when so directed by the president, the chairperson of the Grievance Committee, the chairperson of the commission, or the chairperson of any hearing committee;

(3) to maintain a record and file of all grievances not dismissed by the Grievance Committee;

(4) to perform all necessary ministerial acts normally performed by the clerk of the superior court in complaints filed before the commission;

(5) to enter orders of reinstatement where petitions for reinstatement of suspended attorneys are unopposed by the counsel;

(6) to dismiss reinstatement petitions based on the petitioner's failure to comply with the rules governing the provision and transmittal of the record of reinstatement proceedings;

(7) to determine the amount of costs assessed in disciplinary proceedings by the commission.

**History Note:** Statutory Authority G.S. 84-22; G.S. 84-23; G.S. 84-32(c), Readopted Effective December 8, 1994.

#### CASE NOTES

**Cited** in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

### B.0111. Grievances: Form and filing.

(a) A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance may be written or oral, verified or unverified, and may be made initially to the counsel. The counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose.

(b) Upon the direction of the council or the Grievance Committee, the counsel will investigate such conduct of any member as may be specified by the council or Grievance Committee.

(c) The counsel may investigate any matter coming to the attention of the counsel involving alleged misconduct of a member upon receiving authorization from the chairperson of the Grievance Committee. If the counsel receives information that a member has used or is using illicit drugs, the counsel will follow the provisions of Rule .0130 of this subchapter.

(d) The North Carolina State Bar may keep confidential the identity of an attorney or judge who reports alleged misconduct of another attorney pursuant to Rule 1.3 of the Rules of Professional Conduct and who requests to remain anonymous. Notwithstanding the foregoing, the North Carolina State Bar will reveal the identity of a reporting attorney or judge to the respondent attorney where such disclosure is required by law, or by considerations of due process or where identification of the reporting attorney or judge is essential to preparation of the attorney's defense to the grievance and/or a formal disciplinary complaint.

(e) Grievances must be instituted by the filing of a written or oral grievance with the North Carolina State Bar Grievance Committee or a District Bar Grievance Committee within six years from the accrual of the offense, provided that grievances alleging fraud by a lawyer or an offense the discovery of which has been prevented by concealment by the accused lawyer shall not be barred until six years from the accrual of the offense or one year after discovery of the offense by the aggrieved party or by the North Carolina State Bar counsel, whichever is later. Notwithstanding the foregoing, grievances which allege felonious criminal misconduct may be filed with the Grievance Committee at any time.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective February 20, 1995; Amended effective December 30, 1998.

### B.0112. Investigations: Initial determination.

(a) Subject to the policy supervision of the council and the control of the chairperson of the Grievance Committee, the counsel, or other personnel under the authority of the counsel, will investigate the grievance and submit to the chairperson of the Grievance Committee a report detailing the findings of the investigation.

(b) As soon as practicable after the receipt of the initial or any interim report of the counsel concerning any grievance, the chairperson of the Grievance Committee may

(1) treat the report as a final report;

(2) direct the counsel to conduct further investigation, including contacting the respondent in writing or otherwise; or

(3) send a letter of notice to the respondent.

(c) If a letter of notice is sent to the respondent, it will be by certified mail and will direct that a response be made within 15 days of receipt of the letter of notice. Such response will be a full and fair disclosure of all the facts and circumstances pertaining to the alleged misconduct. The counsel will provide the respondent with a copy of the grievance upon request, except where the complainant requests to remain anonymous pursuant to Rule .0111(d) of this subchapter.

(d) The counsel may provide a copy of the respondent's response(s) to the letter of notice to the complaining party unless the respondent objects thereto in writing.

(e) After a response to a letter of notice is received, the counsel may conduct further investigation or terminate the investigation, subject to the control of the chairperson of the Grievance Committee.

(f) For reasonable cause, the chairperson of the Grievance Committee may issue subpoenas to compel the attendance of witnesses, including the respondent, for examination concerning the grievance and may compel the production of books, papers, and other documents or writings deemed necessary or material to the inquiry. Each subpoena will be issued by the chairperson of the Grievance Committee, or by the secretary at the direction of the chairperson. The counsel, deputy counsel, investigator, or any members of the Grievance Committee designated by the chairperson may examine any such witness under oath or otherwise.

(g) As soon as practicable after the receipt of the final report of the counsel or the termination of an investigation, the chairperson will convene the Grievance Committee to consider the grievance, except as otherwise provided in these rules.

(h) The investigation into the conduct of an attorney will not be abated by the failure of the complainant to sign a grievance, settlement, or restitution.

The chair of the Grievance Committee may dismiss a grievance upon request of the complainant and with consent of counsel where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct.

(i) If at any time prior to a finding of probable cause, the chairperson of the Grievance Committee, upon the recommendation of the counsel or the Grievance Committee, determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the chairperson of the Grievance Committee may, with the respondent's consent, refer the case to a program of law office management training approved by the State Bar. The respondent will then be required to complete a course of training in law office management prescribed by the chairperson of the Grievance Committee which may include a comprehensive site audit of the respondent's records and procedures as well as continuing legal education seminars. Upon the respondent's successful completion of the prescribed training, the same will be reported to the chairperson of the Grievance Committee, who will order the dismissal of the grievance. If the respondent fails to cooperate with the training program's employees or fails to complete the prescribed training, that will be reported to the chairperson of the Grievance Committee and the investigation of the original grievance shall resume.

(j) If at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's substance abuse or mental health problem, the Committee may refer the matter to the Lawyer Assistance Program Board. The respondent must consent to the referral and must waive any right of confidentiality that the respondent might otherwise have had regarding communications with persons acting under the supervision of the Lawyer Assistance Program Board.

If the respondent successfully completes the rehabilitation program, the Grievance Committee can consider that as a mitigating factor and may, for good cause shown, dismiss the grievance. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer Assistance Program Board, the failure will be reported to the chairperson of the Grievance Committee and the investigation of the grievance will resume.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 20, 1995; Amended effective March 6, 1997; Amended effective December 30, 1998; Amended effective December 20, 2000.

CASE NOTES

**Cited** in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

## B.0113. Proceedings before the Grievance Committee.

(a) The Grievance Committee or any of its panels acting as the Grievance Committee with respect to grievances referred to it by the chairperson of the Grievance Committee will determine whether there is probable cause to believe that a respondent is guilty of misconduct justifying disciplinary action. In its discretion, the Grievance Committee or a panel thereof may find probable cause regardless of whether the respondent has been served with a written letter of notice. The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the chairperson of the Grievance Committee. A decision of a panel of the committee may not be appealed to the Grievance Committee as a whole or to another panel (except as provided in 27 N.C.A.C. 1A, .0701(a)(3)).

(b) The chairperson of the Grievance Committee will have the power to administer oaths and affirmations.

(c) The chairperson will keep a record of the Grievance Committee's determination concerning each grievance and file the record with the secretary.

(d) The chairperson will have the power to subpoena witnesses, to compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The chairperson may designate the secretary to issue such subpoenas.

(e) The counsel and deputy counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the committee is in session and deliberating, but no persons other than members may be present while the committee is voting.

(f) The results of any deliberation by the Grievance Committee will be disclosed to the counsel and the secretary for use in the performance of their duties. Otherwise, a member of the committee, the staff of the North Carolina State Bar, any interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the committee only when so directed by the committee or a court of record.

(g) At any preliminary hearing held by the Grievance Committee, a quorum of one-half of the members will be required to conduct any business. Affirmative vote of a majority of members present will be necessary to find that probable cause exists. The chairperson will not be counted for quorum purposes and will be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

(h) If probable cause is found and the committee determines that a hearing is necessary, the chairperson will direct the counsel to prepare and file a complaint against the defendant. If the committee finds probable cause but determines that no hearing is necessary, it will direct the counsel to prepare for the chairperson's signature an admonition, reprimand, or censure. If no probable cause is found, the grievance will be dismissed or dismissed with a letter of warning or a letter of caution.

(i) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is unprofessional or not in accord with accepted professional practice, the committee may issue a letter of caution to the respondent recommending that the respondent be more professional in his or her practice in one or more ways which are to be specifically identified.

(j) Letters of warning

(1) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct, the committee may issue a letter of warning to the respondent. The letter of warning will advise the respondent that he or she may be subject to discipline if such conduct is continued or repeated. The letter will specify in one or more ways the conduct or practice for which the respondent is being warned. The letter of warning will not constitute discipline of the respondent.

(2) A copy of the letter of warning will be maintained in the office of the counsel for three years. If relevant, a copy of the letter of warning may be offered into evidence in any proceeding filed against the respondent before the commission within three years after the letter of warning is issued to the respondent. In every case filed against the respondent before the commission within three years after the letter of warning is issued to the respondent, the letter of warning may be introduced into evidence as an aggravating factor concerning the issue of what disciplinary sanction should be imposed. A copy of

the letter of warning may be disclosed to the Grievance Committee if another grievance is filed against the respondent within three years after the letter of warning is issued to the respondent.

(3) A copy of the letter of warning will be served upon the respondent in person or by certified mail. A respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the letter of warning to the respondent's last known address on file with the N.C. State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service. Within 15 days after service the respondent may refuse the letter of warning and request a hearing before the commission to determine whether a violation of the Rules of Professional Conduct has occurred. Such refusal and request will be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. The refusal will state that the letter of warning is refused. If a refusal and request are not served within 15 days after service upon the respondent of the letter of warning, the letter of warning will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(4) In cases in which the respondent refuses the letter of warning, the counsel will prepare and file a complaint against the respondent for a hearing pursuant to Rule .0114 of this subchapter.

(k) Admonitions and Reprimands

(1) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the committee may issue an admonition or reprimand to the defendant, depending upon the seriousness of the violation of the Rules of Professional Conduct. A record of such admonition or reprimand will be maintained in the office of the secretary.

(2) A copy of the admonition or reprimand will be served upon the defendant in person or by certified mail. A defendant who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the admonition or reprimand to the defendant's last known address on file with the N.C. State Bar. Service shall be deemed complete upon deposit of the admonition or reprimand in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(3) Within 15 days after service the defendant may refuse the admonition or reprimand and request a hearing before the commission. Such refusal and request will be in writing, addressed to the Grievance Committee, and served upon the secretary by certified mail, return receipt requested. The refusal will state that the admonition or reprimand is refused.

(4) In cases in which the defendant refuses an admonition or reprimand, the counsel will prepare and file a complaint against the defendant pursuant to Rule .0114 of this subchapter. If a refusal and request are not served upon the secretary within 15 days after service upon the defendant of the admonition or reprimand, the admonition or reprimand will be deemed accepted by the defendant. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(*l*) Censures

(1) If probable cause is found and the Grievance Committee determines that the defendant has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or significant potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the defendant's license, the committee will issue a notice of proposed censure and a proposed censure to the defendant.

(2) A copy of the notice and the proposed censure will be served upon the defendant in person or by certified mail. A defendant who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the notice and proposed censure to the defendant's last known address on file with the N.C. State Bar. Service shall be deemed complete upon deposit of the Notice and proposed censure in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service. The defendant must be advised that he or she may accept the censure within 15 days after service upon him or her or a formal complaint will be filed before the commission.

(3) The defendant's acceptance must be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. Once the censure is accepted by the defendant, the discipline becomes public and must be filed as provided by Rule .0123(a)(3) of this subchapter.

(4) If the defendant does not accept the censure, the counsel will file a complaint against the defendant pursuant to Rule .0114 of this subchapter.

(m) Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the chairperson of the Grievance Committee. Amendments to complaints may be signed by the counsel alone, with the approval of the chairperson of the Grievance Committee.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-28, Readopted effective December 8, 1994; Amended effective March 3, 1999; Amended effective February 3, 2000.

## B.0114. Formal hearing.

(a) Complaints will be filed with the secretary. The secretary will cause a summons and a copy of the complaint to be served upon the defendant and thereafter a copy of the complaint will be delivered to the chairperson of the commission, informing the chairperson of the date service on the defendant was effected.

(b) Service of complaints and summonses and other documents or papers will be accomplished as set forth in the North Carolina Rules of Civil Procedure.

(c) Complaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint.

(d) Within 14 days of the receipt of return of service of a complaint by the secretary, the chairperson of the commission will designate a hearing committee from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing committee. Such notice will also contain the time and place determined by the chairperson for the hearing to commence. The commencement of the hearing will be initially scheduled not less than 60 nor more than 90 days from the date of service of the complaint upon the defendant, unless one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint. When one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint, the chairperson of the commission may consolidate the cases for hearing, and the hearing will be initially scheduled not less than 60 nor more than 90 days from the date of service of the last complaint upon the defendant.

(e) Within 20 days after the service of the complaint, unless further time is allowed by the chairperson of the hearing committee upon good cause shown,

the defendant will file an answer to the complaint with the secretary and will serve a copy on the counsel.

(f) Failure to file an answer admitting, denying or explaining the complaint or asserting the grounds for failing to do so, within the time limited or extended, will be grounds for entry of the defendant's default and in such case the allegations contained in the complaint will be deemed admitted. The secretary will enter the defendant's default when the fact of default is made to appear by motion of the counsel or otherwise. The counsel may thereupon apply to the hearing committee for a default order imposing discipline, and the hearing committee will thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate. The hearing committee may, in its discretion, hear such additional evidence as it deems necessary prior to entering the order of discipline. For good cause shown, the hearing committee may set aside the secretary's entry of default. After an order imposing discipline has been entered by the hearing committee upon the defendant's default, the hearing committee may set aside the order in accordance with Rule 60(b) of the North Carolina Rules of Civil Procedure.

(g) Discovery will be available to the parties in accordance with the North Carolina Rules of Civil Procedure. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended for good cause shown by the chairperson of the hearing committee. The chairperson of the hearing committee may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.

(h) The parties may meet by mutual consent prior to the hearing on the complaint to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing committee. If the committee rejects a proposed settlement, another hearing committee must be empaneled to try the case, unless all parties consent to proceed with the original committee. The parties may submit a proposed settlement to a second hearing committee, but the parties shall not have the right to request a third hearing committee if the settlement order is rejected by the second hearing committee. The second hearing committee shall either accept the settlement proposal or hear the disciplinary matter.

(i) At the discretion of the chairperson of the hearing committee, and upon five days' notice to the parties, a conference may be ordered before the date set for commencement of the hearing for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the committee designated by its chairperson who shall have the power to issue such orders as may be appropriate. At any conference which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in addition to any offers of settlement or proposals of adjustment the following:

(1) the simplification of the issues;

(2) the exchange of exhibits proposed to be offered in evidence;

(3) the stipulation of facts not remaining in dispute or the authenticity of documents;

(4) the limitation of the number of witnesses;

(5) the discovery or production of data;

(6) such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

The Chairperson may impose sanctions as set out in Rule 37(b) of the N.C. Rules of Civil Procedure against any party who willfully fails to comply with a prehearing order issued pursuant to this section.

(j) The chairperson of the hearing committee, without consulting the other committee members, may hear and dispose of all pretrial motions except motions the granting of which would result in dismissal of the charges or final judgment for either party. All motions which could result in dismissal of the charges or final judgment for either party will be decided by a majority of the members of the hearing committee. Any pretrial motion may be decided on the basis of the parties' written submissions. Oral argument may be allowed in the discretion of the chairperson of the hearing committee.

(k) The initial hearing date as set by the chairperson in accordance with Rule .0114(d) above may be reset by the chairperson, and said initial hearing or reset hearing may be continued by the chairperson of the hearing committee for good cause shown.

(*l*) After a hearing has commenced, no continuances other than an adjournment from day to day will be granted, except to await the filing of a controlling decision of an appellate court, by consent of all parties, or where extreme hardship would result in the absence of a continuance.

(m) The defendant will appear in person before the hearing committee at the time and place named by the chairperson. The hearing will be open to the public except that for good cause shown the chairperson of the hearing committee may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of the defendant. The defendant will, except as otherwise provided by law, be competent and compellable to give evidence for either of the parties. The defendant may be represented by counsel, who will enter an appearance.

(n) Pleadings and proceedings before a hearing committee will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts except as otherwise provided herein.

(o) Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing by the secretary within the time limits, if any, for such filing. The date of receipt by the secretary, and not the date of deposit in the mails, is determinative.

(p) All papers presented to the commission for filing will be on letter size paper (8 1/2 x 11 inches) with the exception of exhibits. The secretary will require a party to refile any paper that does not conform to this size.

(q) When a defendant appears in his or her own behalf in a proceeding, the defendant will file with the secretary, with proof of delivery of a copy to the counsel, an address at which any notice or other written communication required to be served upon the defendant may be sent, if such address differs from that last reported to the secretary by the defendant.

(r) When a defendant is represented by counsel in a proceeding, counsel will file with the secretary, with proof of delivery of a copy to the counsel, a written notice of such appearance which will state his or her name, address and telephone number, the name and address of the defendant on whose behalf he or she appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the counsel of record for such defendant at the stated address of the counsel in lieu of transmission to the defendant.

(s) The hearing committee will have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. Such process will be issued in the name of the committee by its chairperson, or the chairperson may designate the secretary of the North Carolina State Bar to issue such process. Both parties have the right to invoke the powers of the

committee with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.

(t) In any hearing admissibility of evidence will be governed by the rules of evidence applicable in the superior court of the state at the time of the hearing. The chairperson of the hearing committee will rule on the admissibility of evidence, subject to the right of any member of the hearing committee to question the ruling. If a member of the hearing committee challenges a ruling relating to admissibility of evidence, the question will be decided by majority vote of the hearing committee.

(u) If the hearing committee finds that the charges of misconduct are not established by clear, cogent, and convincing evidence, it will enter an order dismissing the complaint. If the hearing committee finds that the charges of misconduct are established by clear, cogent, and convincing evidence, the hearing committee will enter an order of discipline. In either instance, the committee will file an order which will include the committee's findings of fact and conclusions of law.

(v) The secretary will ensure that a complete record is made of the evidence received during the course of all hearings before the commission as provided by G.S. 7A-95 for trials in the superior court. The secretary will preserve the record and the pleadings, exhibits, and briefs of the parties.

(w) If the charges of misconduct are established, the hearing committee will then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this state or any other jurisdiction and any evidence in aggravation or mitigation of the offense.

(1) The hearing committee may consider aggravating factors in imposing discipline in any disciplinary case, including the following factors:

(A) prior disciplinary offenses;

(B) dishonest or selfish motive;

(C) a pattern of misconduct;

(D) multiple offenses;

(E) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;

(F) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(G) refusal to acknowledge wrongful nature of conduct;

(H) vulnerability of victim;

(I) substantial experience in the practice of law;

(J) indifference to making restitution;

(K) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint.

(2) The hearing committee may consider mitigating factors in imposing discipline in any disciplinary case, including the following factors:

(A) absence of a prior disciplinary record;

(B) absence of a dishonest or selfish motive;

(C) personal or emotional problems;

(D) timely good faith efforts to make restitution or to rectify consequences of misconduct;

(E) full and free disclosure to the hearing committee or cooperative attitude toward proceedings;

(F) inexperience in the practice of law;

(G) character or reputation;

(H) physical or mental disability or impairment;

(I) delay in disciplinary proceedings through no fault of the defendant attorney;

(J) interim rehabilitation;

(K) imposition of other penalties or sanctions;
(L) remorse;
(M) remoteness of prior offenses.

(x) In any case in which a period of suspension is stayed upon compliance by the defendant with conditions, the commission will retain jurisdiction of the matter until all conditions are satisfied. If, during the period the stay is in effect, the counsel receives information tending to show that a condition has been violated, the counsel may, with the consent of the chairperson of the Grievance Committee, file a motion in the cause with the secretary specifying the violation and seeking an order requiring the defendant to show cause why the stay should not be lifted and the suspension activated for violation of the condition. The counsel will also serve a copy of any such motion upon the defendant. The secretary will promptly transmit the motion to the chairperson of the commission who, if he or she enters an order to show cause, will appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter, appointing the members of the hearing committee that originally heard the matter wherever practicable. The chairperson of the commission will also schedule a time and a place for a hearing and notify the counsel and the defendant of the composition of the hearing committee and the time and place for the hearing. After such a hearing, the hearing committee may enter an order lifting the stay and activating the suspension, or any portion thereof, and taxing the defendant with the costs, if it finds that the North Carolina State Bar has proven, by the greater weight of the evidence, that the defendant has violated a condition. If the hearing committee finds that the North Carolina State Bar has not carried its burden, then it will enter an order continuing the stay. In any event, the hearing committee will include in its order findings of fact and conclusions of law in support of its decision.

(y) All reports and orders of the hearing committee will be signed by the members of the committee, or by the chairperson of the committee on behalf of the committee, and will be filed with the secretary. The copy to the defendant will be served by certified mail, return receipt requested or personal service. A defendant who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the order to the defendant's last known address on file with the N.C. State Bar. Service by mail shall be deemed complete upon deposit of the report or order enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(z) Posttrial Motions

(1) Consent Orders After Trial — At any time after a disciplinary hearing and prior to the execution of the committee's final order pursuant to Rule .0114(y) above, the committee may, with the consent of the parties, amend its decision regarding the findings of fact, conclusions of law, or the disciplinary sanction imposed.

(2) New Trials and Amendment of Judgments

(A) As provided in Rule .0114(z)(2)(B) below, following a disciplinary hearing before the commission, either party may request a new trial or amendment of the hearing committee's final order, based on any of the grounds set out in Rule 59 of the North Carolina Rules of Civil Procedure.

(B) A motion for a new trial or amendment of judgment will be served, in writing, on the chairperson of the hearing committee which heard the disciplinary case no later than 20 days after service of the final order upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

(C) The opposing party will have 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

(D) The hearing committee may rule on the motion based on the parties' written submissions or may, in its discretion, permit the parties to present oral argument.

(3) Relief from Judgment or Order

(A) Following a disciplinary proceeding before the commission, either party may file a motion for relief from the final judgment or order, based on any of the grounds set out in Rule 60 of the North Carolina Rules of Civil Procedure.

(B) Motions made under Rule .0114(z)(2)(B) above will be made no later than one year after the effective date of the order from which relief is sought. Motions pursuant to this section will be heard and decided in the same manner as motions submitted pursuant to Rule .0114(z)(2) above.

(4) Effect of Filing Motion — The filing of a motion under Rule .0114(z)(2) above or Rule .0114(z)(3) above will not automatically stay or otherwise affect the effective date of an order of the commission.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-28; G.S. 84-28.1; G.S. 84-29; G.S. 84-30; G.S. 84-32(a), Readopted Effective December 8, 1994; Amended effective October 2, 1997; Amended effective December 30, 1998.

CASE NOTES

**Whole Record Test.** — The standard for judicial review of attorney discipline cases is the "whole record" test. Under the whole record test there must be substantial evidence to support the findings, conclusions and result. The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion. North Carolina State Bar v. Whitted, 82 N.C. App. 531, 347 S.E.2d 60 (1986), aff'd, 319 N.C. 398, 354 S.E.2d 501 (1987).

**Clear, Cogent and Convincing Evidence.** — The standard of proof in attorney discipline and disbarment proceedings is one of "clear, cogent and convincing" evidence. Clear, cogent and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt. It has been defined as evidence which should fully convince. North Carolina State Bar v. Whitted, 82 N.C. App. 531, 347 S.E.2d 60 (1986), aff'd, 319 N.C. 398, 354 S.E.2d 501 (1987).

**Where parties stipulated that defendant failed to file answer** to the complaint served on him, and the record reflects that the defendant did not appear in person or through counsel at the hearing, the allegations of the complaint were deemed admitted. North Carolina State Bar v. Combs, 44 N.C. App. 447, 261 S.E.2d 207, cert. denied and appeal dismissed, 299 N.C. 740, 267 S.E.2d 663 (1980).

**Applied** in North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E.2d 396 (1981); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982); North Carolina State Bar v. Sheffield, 73 N.C. App. 349, 326 S.E.2d 320 (1985); North Carolina State Bar v. Shuping, 86 N.C. App. 496, 358 S.E.2d 534 (1987).

**Cited** in North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983); North Carolina State Bar v. Nelson, 107 N.C. App. 543, 421 S.E.2d 163 (1992).

## B.0115. Effect of a finding of guilt in any criminal case.

(a) Any member who has been found guilty of or has tendered and has had accepted a plea of guilty or no contest to a criminal offense showing professional unfitness in any state or federal court, may be suspended from the practice of law as set out in Rule .0115(d) below.

(b) A certificate of a the conviction of an attorney for any crime or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court will be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member.

(c) Upon the receipt of a certified copy of a jury verdict showing a verdict of guilty, a certificate of the conviction of a member a criminal offense showing professional unfitness, or a certificate of the judgment entered against an

attorney where a plea of nolo contendere or no contest has been accepted by a court, the Grievance Committee, at its next meeting following notification of the conviction, may authorize the filing of a complaint if one is not pending. In the hearing on such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the conviction or judgment, unless the attorney has obtained a stay of the disciplinary action as set out in G.S. § 84-28(d1). Such a stay shall not prevent the North Carolina State Bar from proceeding with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

(d) Upon the receipt of a certificate of conviction of a member of a criminal offense showing professional unfitness, or a certified copy of a plea of guilty or no contest to such an offense, or a certified copy of a jury verdict showing a verdict of guilty to such an offense, the commission chairperson may, in the chairperson's discretion, enter an order suspending the member pending the disposition of the disciplinary proceeding against the member before the commission. The provisions of Rule .0124(c) of this subchapter will apply to the suspension.

(e) Upon the receipt of a certificate of conviction of a member of a criminal offense which does not show professional unfitness, or a certificate of judgment against a member upon a plea of no contest to such an offense, or a certified copy of a jury verdict showing a verdict of guilty to such an offense, the Grievance Committee will take whatever action, including authorizing the filing of a complaint, it may deem appropriate. In a hearing on any such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the conviction or judgment, unless the attorney has obtained a stay of the disciplinary action as set out in G.S. § 84-28(d1). Such a stay shall not prevent the North Carolina State Bar from proceeding with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-28, Readopted effective December 8, 1994; Amended effective November 7, 1996; Amended effective March 6, 1997; Amended effective December 30, 1998; Amended effective February 3, 2000.

### B.0116. Reciprocal discipline & disability proceedings.

(a) All members who have been disciplined in any state or federal court for a violation of the Rules of Professional Conduct in effect in such state or federal court or who have been transferred to disability inactive status or its equivalent by any state or federal court will inform the secretary of such action in writing no later than 30 days after entry of the order of discipline or transfer to disability inactive status. Failure to make the report required in this section may subject the member to professional discipline as set out in Rule 8.3 of the Revised Rules of Professional Conduct.

(b) Except as provided in subsection (c) below which applies to disciplinary proceedings in certain federal courts, reciprocal discipline and disability proceedings will be administered as follows:

(1) Upon receipt of a certified copy of an order demonstrating that a member has been disciplined or transferred to disability inactive status or its equivalent in another jurisdiction, state or federal, the Grievance Committee will forthwith issue a notice directed to the member containing a copy of the order from the other jurisdiction and an order directing that the member inform the committee within 30 days from service of the notice of any claim by the

member that the imposition of the identical discipline or an order transferring the member to disability inactive status in this state would be unwarranted and the reasons therefor. This notice is to be served on the member in accordance with the provisions of Rule 4 of the North Carolina Rules of Civil Procedure.

(2) If the discipline or transfer order imposed in the other jurisdiction has been stayed, any reciprocal discipline or transfer to disability inactive status imposed in this state will be deferred until such stay expires.

(3) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of Rule .0116(b)(1) above, the chairperson of the Grievance Committee will impose the identical discipline or enter an order transferring the member to disability inactive status unless the Grievance Committee concludes

(A) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(B) there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Grievance Committee could not, consistent with its duty, accept as final the conclusion on that subject; or

(C) that the imposition of the same discipline would result in grave injustice; or

(D) that the misconduct established warrants substantially different discipline in this state; or

(E) that the reason for the original transfer to disability inactive status no longer exists.

(4) Where the Grievance Committee determines that any of the elements listed in Rule .0116(b)(3) above exist, the committee will dismiss the case or direct that a complaint be filed.

(5) If the elements listed in Rule .0116(b)(3) above are found not to exist, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct or should be transferred to disability inactive status will establish the misconduct or disability for purposes of reciprocal discipline or disability proceedings in this state.

(c) Reciprocal discipline with certain federal courts will be administered as follows:

(1) Upon receipt of a certified copy of an order demonstrating that a member has been disciplined in a United States District Court in North Carolina, in the United States Fourth Circuit Court of Appeals, or in the United States Supreme Court, the chairperson of the Grievance Committee will forthwith issue a notice directed to the member. The notice will contain a copy of the order from the court and an order directing the member to inform the committee within 10 days from service of the notice whether the member will accept reciprocal discipline which is substantially similar to that imposed by the federal court. This notice is to be served on the member in accordance with the provisions of Rule 4 of the North Carolina Rules of Civil Procedure. The member will have 30 days from service of the notice to file a written challenge with the committee on the grounds that the imposition of discipline by the North Carolina State Bar would be unwarranted because the facts found in the federal disciplinary proceeding do not involve conduct which violates the North Carolina Rules of Professional Conduct. If the member notifies the North Carolina State Bar within 10 days after service of the notice that he or she accepts reciprocal discipline which is substantially similar to that imposed by the federal court, substantially similar discipline will be ordered as provided in Rule .0116(c)(2) below and will run concurrently with the discipline ordered by the federal court.

(2) If the member notifies the North Carolina State Bar of his or her acceptance of reciprocal discipline as provided in Rule .0116(c)(1) above the

chairperson of the Grievance Committee will execute an order of discipline which is of a type permitted by these rules and which is substantially similar to that ordered by the federal court and will cause said order to be served upon the member.

(3) If the discipline imposed by the federal court has been stayed, any reciprocal discipline imposed by the North Carolina State Bar will be deferred until such stay expires.

(4) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of Rule .0116(c)(1) above, the chairperson of the Grievance Committee will enter an order of reciprocal discipline imposing substantially similar discipline of a type permitted by these rules to be effective throughout North Carolina unless the member requests a hearing before the Grievance Committee and at such hearing

(A) the member demonstrates that the facts found in the federal disciplinary proceeding did not involve conduct which violates the North Carolina Rules of Professional Conduct, in which event the case will be dismissed; or

(B) the Grievance Committee determines that the discipline imposed by the federal court is not of a type described in Rule .0123(a) of this subchapter and, therefore, cannot be imposed by the North Carolina State Bar, in which event the Grievance Committee may dismiss the case or direct that a complaint be filed in the commission.

(5) All findings of fact in the federal disciplinary proceeding will be binding upon the North Carolina State Bar and the member.

(6) Discipline imposed by any other federal court will be administered as provided in Rule .0116(b) above.

(d) If the member fails to accept reciprocal discipline as provided in Rule .0116(c) above or if a hearing is held before the Grievance Committee under either Rule .0116(b) above or Rule .0116(c) above and the committee orders the imposition of reciprocal discipline, such discipline will run from the date of service of the final order of the chairperson of the Grievance Committee unless the committee expressly provides otherwise.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-28, Readopted Effective December 8, 1994; Amended March 7, 1996; Amended effective December 30, 1998.

## B.0117. Surrender of license while under investigation.

(a) A member who is the subject of an investigation into allegations of misconduct, but against whom no formal complaint has been filed before the commission may tender his or her license to practice by delivering to the secretary for transmittal to the council an affidavit stating that the member desires to resign and that

(1) the resignation is freely and voluntarily rendered, is not the result of coercion or duress, and the member is fully aware of the implications of submitting the resignation;

(2) the member is aware that there is presently pending an investigation or other proceedings regarding allegations that the member has been guilty of misconduct, the nature of which will specifically be set forth;

(3) the member acknowledges that the material facts upon which the grievance is predicated are true;

(4) the resignation is being submitted because the member knows that if charges were predicated upon the misconduct under investigation, the member could not successfully defend against them.

(b) The council may accept a member's resignation only if the affidavit required under Rule .0117(a) above satisfies the requirements stated therein and the member has provided to the North Carolina State Bar all documents and financial records required to be kept pursuant to the Rules of Professional

Conduct and requested by the counsel. If the council accepts a member's resignation, it will enter an order disbarring the member. The order of disbarment is effective on the date the council accepts the member's resignation.

(c) The order disbarring the member and the affidavit required under Rule .0117(a) above are matters of public record.

(d) If a defendant against whom a formal complaint has been filed wishes to consent to disbarment, the defendant may do so by filing an affidavit with the chairperson of the commission. If the chairperson determines that the affidavit meets the requirements set out above, the chairperson will accept the surrender and issue an order of disbarment. The order of disbarment becomes effective 30 days after service of the order upon the defendant. If the affidavit does not meet the requirements set out above, the consent to disbarment will not be accepted and the disciplinary complaint will be heard pursuant to Rule .0114 of this subchapter.

(e) After a member tenders his or her license or consents to disbarment under this section the member may not undertake any new legal matters. The member may complete any legal matters which were pending on the date of the tender of the affidavit or consent to disbarment which can be completed within 30 days. The member has 30 days from the date on which the member tenders the affidavit of surrender or consent to disbarment in which to comply with all of the duties set out in Rule .0124 of this subchapter.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-28; G.S. 84-32(b), Readopted Effective December 8, 1994.

## B.0118. Disability hearings.

(a) *Disability proceedings where member involuntarily committed or judicially declared incompetent.*

Where a member of the North Carolina State Bar has been judicially declared incapacitated or mentally ill under the provisions of Chapter 122C of the General Statutes or similar laws of any jurisdiction, the secretary, upon proper proof of the fact, will enter an order transferring the member to disability inactive status effective immediately and for an indefinite period until further order of the commission. A copy of the order will be served upon the member, the member's guardian, or the director of the institution to which the member has been committed.

(b) *Disability proceedings initiated by the North Carolina State Bar.*

(1) When the North Carolina State Bar obtains evidence that a member has become disabled, the Grievance Committee will conduct a hearing in a manner that will conform as nearly as is possible to the procedures set forth in Rule .0113 of this subchapter. The Grievance Committee will determine whether there is probable cause to believe that the member is disabled within the meaning of Rule .0103(18) of this subchapter. If the committee finds probable cause, a petition alleging disability will be filed in the name of the North Carolina State Bar by the counsel and signed by the chairperson of the Grievance Committee.

(2) Whenever the counsel files a petition alleging the disability of a member, the chairperson of the commission will appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter to determine whether such member is disabled. The hearing committee will conduct a hearing on the petition in the same manner as a disciplinary proceeding under Rule .0114 of this subchapter. The hearing will be open to the public.

(3) The hearing committee may require the member to undergo psychiatric, physical, or other medical examination or testing by qualified medical experts selected by the hearing committee.

(4) In any proceeding seeking a transfer to disability inactive status under this rule, the North Carolina State Bar will have the burden of proving by clear, cogent, and convincing evidence that the member is disabled within the meaning of Rule .0103(18) of this subchapter.

(5) The hearing committee may appoint an attorney to represent the member in a disability proceeding, if the hearing committee concludes that justice so requires.

(6) If the hearing committee finds that the member is disabled, the committee will enter an order transferring the member to disability inactive status. The order of transfer will become effective immediately. A copy of the order will be served upon the member or the member's guardian or attorney.

(c) *Disability proceedings where defendant alleges disability in disciplinary proceeding.*

(1) If, during the course of a disciplinary proceeding, the defendant contends that he or she is disabled within the meaning of Rule .0103(18) of this subchapter, the disciplinary proceeding will be stayed pending a determination by the hearing committee whether such disability exists. The defendant will be immediately transferred to disability inactive status pending the conclusion of the disability hearing.

(2) The hearing committee scheduled to hear the disciplinary charges will hold the disability proceeding. The hearing will be conducted pursuant to the procedures outlined in Rule .0118(b)(3) and (5)-(6) above.

(3) The defendant will have the burden of proving by clear, cogent, and convincing evidence that he or she is disabled within the meaning of Rule .0103(18) of this subchapter. If the hearing committee concludes that the defendant is disabled, the disciplinary proceedings will be stayed as long as the defendant remains in disability inactive status.

(4) If the hearing committee determines that the defendant is not disabled, the chairperson of the hearing committee will set a date for resumption of the disciplinary proceeding.

(d) *Disability hearings initiated by a hearing committee.*

(1) If, during the pendency of a disciplinary proceeding a majority of the members of the hearing committee find reason to believe that the defendant is disabled, the committee will enter an order staying the disciplinary proceeding until the question of disability can be determined by the committee in accordance with the procedures set out in Rules .0118(b)(2)-(6) above. The State Bar will have the burden of proving by clear, cogent, and convincing evidence that the defendant is disabled within the meaning of Rule .0103(18) of this subchapter.

(2) If the hearing committee determines that the defendant is not disabled, the chairperson of the hearing committee will set a date for resumption of the disciplinary proceeding.

(3) If the hearing committee determines that the defendant is disabled, the disciplinary proceeding will be stayed as long as the defendant remains in disability inactive status. If the defendant is returned to active status by the commission, the disciplinary proceeding will be rescheduled by the chairperson of the commission.

(e) *Fees and costs.*

The hearing committee may direct the member to pay the costs of the disability proceeding, including the cost of any medical examination and the fees of any attorney appointed to represent the member.

(f) *Preservation of evidence.*

In any case in which disciplinary proceedings against a defendant have been stayed by reason of the defendant's disability, counsel may continue to

investigate allegations of misconduct and may seek orders from the chairperson of the commission to preserve evidence of any alleged professional misconduct by the disabled defendant, including orders which permit the taking of depositions. The chairperson may order appointment of counsel to represent the disabled defendant when necessary to protect the interests of the disabled defendant.

(g) A member of the North Carolina State Bar may be transferred to disability inactive status with the consent of the member, the counsel and the Chairperson of the Grievance committee.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-28(g); G.S. 84-28.1; G.S. 84-29; G.S. 84-30, Readopted Effective December 8, 1994; Amended March 5, 1998.

### B.0119. Enforcement of powers.

In addition to the other powers contained herein, in proceedings before any committee or subcommittee of the Grievance Committee or the commission, if any person refuses to respond to a subpoena, refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, refuses to obey any order in aid of discovery, or refuses to obey any lawful order of the committee contained in its decision rendered after hearing, the counsel or secretary may apply to the appropriate court for an order directing that person to comply by taking the requisite action.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-28(i), Readopted Effective December 8, 1994.

### B.0120. Notice to member of action and dismissal.

In every disciplinary case wherein the respondent has received a letter of notice and the grievance has been dismissed, the respondent will be notified of the dismissal by a letter by the chairperson of the Grievance Committee. The chairperson will have discretion to give similar notice to the respondent in cases wherein a letter of notice has not been issued but the chairperson deems such notice to be appropriate.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### B.0121. Notice to complainant.

(a) If the Grievance Committee finds probable cause and imposes discipline, the chairperson of the Grievance Committee will notify the complainant of the action of the committee.

(b) If the Grievance Committee finds probable cause and refers the matter to the commission, the chairperson of the Grievance Committee will advise the complainant that the grievance has been received and considered and has been referred to the commission for hearing.

(c) If the Grievance Committee finds that there is no probable cause to believe that misconduct occurred and votes to dismiss a grievance, the chairperson of the Grievance Committee will advise the complainant that the committee did not find probable cause to justify imposing discipline and dismissed the grievance.

(d) If final action on a grievance is taken by the Grievance Committee in the form of a letter of caution or a letter of warning, the chairperson of the Grievance Committee will so advise the complainant. The communication to

the complainant will explain that the letter of caution or letter of warning is not a form of discipline.

(e) If a grievance is referred to the Board of Continuing Legal Education, the chairperson of the Grievance Committee will advise the complainant of that fact and the reason for the referral. If the respondent successfully completes the prescribed training and the grievance is dismissed, the chairperson of the Grievance Committee will advise the complainant. If the respondent does not successfully complete the prescribed course of training, the chairperson of the Grievance Committee will advise the complainant that investigation of the original grievance has resumed.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended March 7, 1996.

### B.0122. Appointment of counsel to protect clients' interests when attorney disappears, dies, or is transferred to disability inactive status.

(a) Whenever a member of the North Carolina State Bar has been transferred to disability inactive status, disappears, or dies and no partner or other member of the North Carolina State Bar capable of protecting the interests of the attorney's clients is known to exist, the senior resident judge of the superior court in the district of the member's most recent address on file with the North Carolina State Bar, if it is in this state, will be requested by the secretary to appoint an attorney or attorneys to inventory the files of the member and to take action to protect the interests of the member and his or her clients.

(b) Any member so appointed will not be permitted to disclose any information contained in any files inventoried without the consent of the client to whom such files relate except as necessary to carry out the order of the court which appointed the attorney to make such inventory.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-28(j), Readopted Effective December 8, 1994.

### B.0123. Imposition of discipline; Findings of incapacity or disability; Notice to courts.

(a) Upon the final determination of a disciplinary proceeding wherein discipline is imposed, one of the following actions will be taken—

(1) *Admonition.* An admonition will be prepared by the chairperson of the Grievance Committee or the chairperson of the hearing committee depending upon the agency ordering the admonition. The admonition will be served upon the defendant. The admonition will not be recorded in the judgment docket of the North Carolina State Bar. Where the admonition is imposed by the Grievance Committee, the complainant will be notified that the defendant has been admonished, but will not be entitled to a copy of the admonition. An order of admonition imposed by the commission will be a public document.

(2) *Reprimand.* The chairperson of the Grievance Committee or chairperson of the hearing committee depending upon the body ordering the discipline, will file an order of reprimand with the secretary, who will record the order on the judgment docket of the North Carolina State Bar and will forward a copy to the complainant.

(3) *Censure, suspension, or disbarment.* The chairperson of the hearing committee will file the order of censure, order of suspension or disbarment with

the secretary, who will record the order on the judgment docket of the North Carolina State Bar and will forward a copy to the complainant. The secretary will also cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county of the defendant's last known address and of any county where the defendant maintains an office. A copy of the order of censure, order of suspension or disbarment will also be sent to the clerk of the superior court in any county where the defendant maintains an office, to the North Carolina Court of Appeals, to the North Carolina Supreme Court, to the United States District Courts in North Carolina, to the Fourth Circuit Court of Appeals, and to the United States Supreme Court. Orders of Censures imposed by the Grievance Committee will be filed by the committee chairperson with the secretary. Notice of the censure will be given to the complainant and to the courts in the same manner as orders of censures imposed by the commission.

(b) Upon the final determination of incapacity or disability, the chairperson of the hearing committee or the secretary, depending upon the agency entering the order, will file with the secretary a copy of the order transferring the member to disability inactive status. The secretary will cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county of the disabled member's last address on file with the North Carolina State Bar and of any county where the disabled member maintains an office and will forward a copy of the order to the courts referred to in Rule .0123(a)(3) above.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-32(a), Readopted effective December 8, 1994; Amended effective November 7, 1996.

### B.0124. Obligations of disbarred or suspended attorneys.

(a) A disbarred or suspended member of the North Carolina State Bar will promptly notify by certified mail, return receipt requested, all clients being represented in pending matters of the disbarment or suspension, the reasons for the disbarment or suspension, and consequent inability of the member to act as an attorney after the effective date of disbarment or suspension and will advise such clients to seek legal advice elsewhere. The written notice must be received by the client before a disbarred or suspended attorney enters into any agreement with or on behalf of any client to settle, compromise or resolve any claim, dispute or lawsuit of the client. The disbarred or suspended attorney will take reasonable steps to avoid foreseeable prejudice to the rights of his or her clients, including promptly delivering all file materials and property to which the clients are entitled to the clients or the clients' substituted attorney. No disbarred or suspended attorney will transfer active client files containing confidential information or property to another attorney, nor may another attorney receive such files or property, without prior written permission from the client.

(b) The disbarred or suspended member will withdraw from all pending administrative or litigation matters before the effective date of the suspension or disbarment and will follow all applicable laws and disciplinary rules regarding the manner of withdrawal.

(c) In cases not governed by Rule .0117 of this subchapter, orders imposing suspension or disbarment will be effective 30 days after being served upon the defendant. In such cases, after entry of the disbarment or suspension order, the disbarred or suspended attorney will not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, between the entry date of the order and its effective date, the member may complete, on behalf of any client, matters which were pending on the entry date and which can be completed before the effective date of the order.

(d) Within 10 days after the effective date of the disbarment or suspension order, the disbarred or suspended attorney will file with the secretary an affidavit showing that he or she has fully complied with the provisions of the order, with the provisions of this section, and with the provisions of all other state, federal, and administrative jurisdictions to which he or she is admitted to practice. The affidavit will also set forth the residence or other address of the disbarred or suspended member to which communications may thereafter be directed.

(e) The disbarred or suspended member will keep and maintain records of the various steps taken under this section so that, upon any subsequent proceeding, proof of compliance with this section and with the disbarment or suspension order will be available. Proof of compliance with this section will be a condition precedent to consideration of any petition for reinstatement.

(f) A suspended or disbarred attorney who fails to comply with Rules .0124(a)-(e) above may be subject to an action for contempt instituted by the appropriate authority. Failure to comply with the requirements of Rule .0124(a) above will be grounds for appointment of counsel pursuant to Rule .0122 of this subchapter.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective March 6, 1997.

## B.0125. Reinstatement.

(a) After disbarment

(1) No person who has been disbarred may have his or her license restored but upon order of the council after the filing of a verified petition for reinstatement and the holding of a hearing before a hearing committee as provided herein. No such hearing will commence until security for the costs of such hearing has been deposited with the secretary in an amount not to exceed $500.00.

(2) No disbarred attorney may petition for reinstatement until the expiration of at least five years from the effective date of the disbarment.

(3) The petitioner will have the burden of proving by clear, cogent, and convincing evidence that

(A) not more than six months or less than 60 days before filing the petition for reinstatement, a notice of intent to seek reinstatement has been published by the petitioner in an official publication of the North Carolina State Bar. The notice will inform members of the Bar about the application for reinstatement and will request that all interested individuals file notice of their opposition or concurrence with the secretary within 60 days after the date of publication;

(B) not more than six months or less than 60 days before filing the petition for reinstatement, the petitioner has notified the complainant(s) in the disciplinary proceeding which led to the lawyer's disbarment of the notice of intent to seek reinstatement. The notice will specify that each complainant has 60 days from the date of publication in which to raise objections or support the lawyer's petition;

(C) the petitioner has reformed and presently possesses the moral qualifications required for admission to practice law in this state taking into account the gravity of the misconduct which resulted in the order of disbarment;

(D) permitting the petitioner to resume the practice of law within the state will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest, taking into account the gravity of the misconduct which resulted in the order of disbarment;

(E) the petitioner's citizenship has been restored if the petitioner has been convicted of or sentenced for the commission of a felony;

(F) the petitioner has complied with Rule .0124 of this subchapter;

(G) the petitioner has complied with all applicable orders of the commission and the council;

(H) the petitioner has complied with the orders and judgments of any court relating to the matters resulting in the disbarment;

(I) the petitioner has not engaged in the unauthorized practice of law during the period of disbarment;

(J) the petitioner has not engaged in any conduct during the period of disbarment constituting grounds for discipline under G.S. 84-28(b);

(K) the petitioner understands the current Rules of Professional Conduct. Participation in continuing legal education programs in ethics and professional responsibility for each of the three years preceding the petition date may be considered on the issue of the petitioner's understanding of the Rules of Professional Conduct. Such evidence creates no presumption that the petitioner has met the burden of proof established by this section;

(L) the petitioner has reimbursed the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. This section shall not be deemed to permit the petitioner to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by attorneys who were disciplined after the effective date of this amendment;

(M) the petitioner has reimbursed all sums which the Disciplinary Hearing Commission found in the order of disbarment were misappropriated by the petitioner and which have not been reimbursed by the Client Security Fund.

(N) the petitioner paid all dues, Client Security Fund assessments, and late fees owed to the North Carolina State Bar as well as all attendee fees and late penalties due and owing to the Board of Continuing Legal Education at the time of disbarment.

(4) Petitions filed less than seven years after disbarment

(A) If less than seven years have elapsed between the effective date of the disbarment and the filing date of the petition for reinstatement, the petitioner will also have the burden of proving by clear, cogent, and convincing evidence that the petitioner has the competency and learning in the law required to practice law in this state.

(B) Factors which may be considered in deciding the issue of competency include

(i) experience in the practice of law;

(ii) areas of expertise;

(iii) certification of expertise;

(iv) participation in continuing legal education programs in each of the three years immediately preceding the petition date;

(v) certification by three attorneys who are familiar with the petitioner's present knowledge of the law that the petitioner is competent to engage in the practice of law.

(C) The factors listed in Rule .0125(a)(4)(B) above are provided by way of example only. The petitioner's satisfaction of one or all of these factors creates no presumption that the petitioner has met the burden of proof established by this section.

(D) The attainment of a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners and taken voluntarily by the petitioner shall be conclusive evidence on the issue of the petitioner's competence to practice law.

(5) If seven years or more have elapsed between the effective date of disbarment and the filing of the petition for reinstatement, reinstatement will

be conditioned upon the petitioner's attaining a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners.

(6) Verified petitions for reinstatement of disbarred attorneys will be filed with the secretary. Upon receipt of the petition, the secretary will transmit the petition to the chairperson of the commission and serve a copy on the counsel. The chairperson will within 14 days appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter and schedule a time and place for a hearing to take place within 60 to 90 days after the filing of the petition with the secretary. The chairperson will notify the counsel and the petitioner of the composition of the hearing committee and the time and place of the hearing, which will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the rules of evidence applicable in superior court.

(7) As soon as possible after the conclusion of the hearing, the hearing committee will file a report containing its findings, conclusions, and recommendations with the secretary.

(8) A petitioner in whose case the hearing committee recommends that reinstatement be denied may file notice of appeal to the council. Appeal from the report of the hearing committee must be taken within 30 days after service of the committee report upon the petitioner and shall be filed with the secretary. If no appeal is timely filed, the recommendation of the hearing committee to deny reinstatement will be deemed final. All cases in which the hearing committee recommends reinstatement of a disbarred attorney's license shall be heard by the council and no notice of appeal need be filed by the N.C. State Bar.

(9) *Transcript of Hearing Committee Proceedings.* The petitioner will have 60 days following the filing of the notice of appeal in which to produce a transcript of the trial proceedings before the hearing committee. The chairperson of the hearing committee, may, for good cause shown, extend the time to produce the record.

(10) *Record to the Council.*

(A) *Composition of the Record.* The petitioner will provide a record of the proceedings before the hearing committee, including a legible copy of the complete transcript, all exhibits introduced into evidence, and all pleadings, motions, and orders, unless the petitioner and counsel agree in writing to shorten the record. The petitioner will provide the proposed record to the counsel not later than 90 days after the hearing before the hearing committee, unless an extension of time is granted by the secretary for good cause shown. Any agreement or order regarding the record will be in writing and will be included in the record transmitted to the council.

(B) *Settlement of the Record.*

(i) By agreement — at any time following service of the proposed record upon the counsel, the parties may by agreement entered in the record settle the record to the council.

(ii) By counsel's failure to object to the proposed record — within 20 days after service of the proposed record, the counsel may serve a written objection or a proposed alternative record upon the petitioner. If the counsel fails to serve a notice of approval or an objection or a proposed alternative record, the petitioner's proposed record will constitute the record to the council.

(iii) By judicial settlement — If the counsel raises a timely objection to the proposed record or serves a proposed alternative record upon the petitioner, either party may request the chairperson of the hearing committee which heard the reinstatement petition to settle the record. Such request shall be filed in writing with the hearing committee chairperson no later than 15 days after the counsel files an objection or proposed alternative record. Each party

shall promptly provide to the chairperson a reference copy of the proposed record, amendments and objections filed by that party in the case. The chairperson of the hearing committee shall settle the record on appeal by order not more than 20 days after service of the request for judicial settlement upon the chairperson. The chairperson may allow oral argument by the parties or may settle the record based upon written submissions by the parties.

(C) The petitioner will transmit a copy of the settled record to each member of the council and to the counsel no later than 30 days before the council meeting at which the petition is to be considered.

(D) The petitioner will bear the costs of transcribing, copying, and transmitting the record to the council.

(E) If the petitioner fails to comply with any of the subsections of Rule .0125(a)(8) above, the counsel may petition the secretary to dismiss the petition.

(11) The council will review the report of the hearing committee and the record and determine whether, and upon what conditions, the petitioner will be reinstated.

(12) No person who has been disbarred and has unsuccessfully petitioned for reinstatement may reapply until the expiration of one year from the date of the last order denying reinstatement.

(b) After suspension

(1) No attorney who has been suspended may have his or her license restored but upon order of the commission or the secretary after the filing of a verified petition as provided herein.

(2) No attorney who has been suspended for a period of 120 days or less is eligible for reinstatement until the expiration of the period of suspension and, in no event, until 10 days have elapsed from the date of filing the petition for reinstatement. No attorney whose license has been suspended for a period of more than 120 days is eligible for reinstatement until the expiration of the period of suspension and, in no event, until 30 days have elapsed from the date of the filing of the petition for reinstatement.

(3) Any suspended attorney seeking reinstatement must file a verified petition with the secretary, a copy of which the secretary will transmit to the counsel. The petitioner will have the burden of proving the following by clear, cogent and convincing evidence:

(A) compliance with Rule .0124 of this subchapter;

(B) compliance with all applicable orders of the commission and the council;

(C) abstention from the unauthorized practice of law during the period of suspension;

(D) attainment of a passing grade on a regularly scheduled North Carolina bar examination, if the suspended attorney applies for reinstatement of his or her license more than seven years after the effective date of the suspension;

(E) abstention from conduct during the period of suspension constituting grounds for discipline under G.S. 84-28(b);

(F) reimbursement of the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. This section shall not be deemed to permit the petitioner to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by attorneys who were disciplined after the effective date of this amendment;

(G) reimbursement of all sums which the Disciplinary Hearing Commission found in the order of suspension were misappropriated by the petitioner and which have not been reimbursed by the Client Security Fund.

(H) satisfaction of the minimum continuing legal education requirements, as set forth in Rule .1517 of Subchapter 1D of these rules, for the two calendar

years immediately preceding the year in which the petitioner was suspended, provided that the petitioner may attend CLE programs after the effective date of the suspension to make up any unsatisfied requirement. These requirements shall be in addition to any continuing legal education requirements imposed by the Disciplinary Hearing Commission;

(I) *(Effective for petitioners suspended on or after January 1, 1997)* if two or more years have elapsed between the effective date of the suspension order and the date on which the reinstatement petition is filed with the secretary, the petitioner must, within one year prior to filing the petition, complete 15 hours of CLE approved by the Board of Continuing Legal Education pursuant to Subchapter 1D, Rule .1519 of these rules. Three hours of the 15 hours must be earned by attending a three-hour block course of instruction devoted exclusively to professional responsibility and/or professionalism. These requirements shall be in addition to any continuing legal education requirements imposed by the Disciplinary Hearing Commission;

(J) payment of all dues, Client Security Fund assessments and late fees due and owing to the North Carolina State Bar as well as all attendee fees and late penalties due and owing to the Board of Continuing Legal Education at the time of suspension.

(4) The counsel will conduct any necessary investigation regarding the compliance of the petitioner with the requirements set forth in Rule .0125(b)(3) above, and the counsel may file a response to the petition with the secretary prior to the date the petitioner is first eligible for reinstatement. The counsel will serve a copy of any response filed upon the petitioner.

(5) If the counsel does not file a response to the petition before the date the petitioner is first eligible for reinstatement, then the secretary will issue an order of reinstatement.

(6) If the counsel files a timely response to the petition, such response must set forth specific objections supported by factual allegations sufficient to put the petitioner on notice of the events at issue.

(7) The secretary will, upon the filing of a response to the petition, refer the matter to the chairperson of the commission. The chairperson will within 14 days appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter, schedule a time and place for a hearing, and notify the counsel and the petitioner of the composition of the hearing committee and the time and place of the hearing. The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the rules of evidence applicable in superior court.

(8) The hearing committee will determine whether the petitioner's license should be reinstated and enter an appropriate order which may include additional sanctions in the event violations of the petitioner's order of suspension are found. In any event, the hearing committee must include in its order findings of fact and conclusions of law in support of its decision and tax such costs as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition against the petitioner.

(c) After transfer to disability inactive status:

(1) No member of the North Carolina State Bar transferred to disability inactive status may resume active status until reinstated by order of the commission. Any member transferred to disability inactive status will be entitled to apply to the commission for reinstatement to active status once a year or at such shorter intervals as are stated in the order transferring the member to disability inactive status or any modification thereof.

(2) Petitions for reinstatement by members transferred to disability inactive status will be filed with the secretary. Upon receipt of the petition the secretary will refer the petition to the commission chairperson. The chairperson will appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter.

A hearing will be conducted pursuant to the procedures set out in Rule .0114 of this subchapter.

(3) The member will have the burden of proving by clear, cogent, and convincing evidence that he or she is no longer disabled within the meaning of Rule .0103(18) of this subchapter and that he or she is fit to resume the practice of law.

(4) Within 10 days of filing the petition for reinstatement, the member will provide the secretary with a list of the name and address of every psychiatrist, psychologist, physician, hospital, and other health care provider by whom or in which the member has been examined or treated or sought treatment while disabled. At the same time, the member will also furnish to the secretary a written consent to release all information and records relating to the disability.

(5) Where a member has been transferred to disability inactive status based solely upon a judicial finding of incapacity, and thereafter a court of competent jurisdiction enters an order adjudicating that the member's incapacity has ended, the chairperson of the commission will enter an order returning the member to active status upon receipt of a certified copy of the court's order. Entry of the order will not preclude the North Carolina State Bar from bringing an action pursuant to Rule .0118 of this subchapter to determine whether the member is disabled.

(6) The hearing committee may direct the member to pay the costs of the reinstatement hearing, including the cost of any medical examination ordered by the committee.

(d) The hearing committee may impose reasonable conditions on a lawyer's reinstatement from disbarment, suspension or disability inactive status in any case in which the hearing committee concludes that such conditions are necessary for the protection of the public.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-28.1; G.S. 84-29; G.S. 84-30, Readopted effective December 8, 1994; Amended effective February 20, 1995; Amended effective March 6, 1997; Amended effective October 2, 1997; Amended effective December 30, 1998; Amended effective January 15, 1999; Amended effective August 24, 2000.

**CASE NOTES**

**Cited** in Vann v. North Carolina State Bar, 79 N.C. App. 173, 339 S.E.2d 97 (1986).

## B.0126. Address of record.

Except where otherwise specified, any provision herein for notice to a respondent, member, petitioner, or a defendant will be deemed satisfied by appropriate correspondence addressed to that attorney by mail to the last address maintained by the North Carolina State Bar.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## B.0127. Disqualification due to interest.

No member of the council or hearing commission will participate in any disciplinary matter involving the member, any partner, or associate in the practice of law of the member, or in which the member has a personal interest.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**B.0128. Trust accounts; Audit.**

(a) For reasonable cause, the chairperson of the Grievance Committee is empowered to issue an investigative subpoena to a member compelling the production of any records required to be kept relative to the handling of client funds and property by the Rules of Professional Conduct for inspection, copying, or audit by the counsel or any auditor appointed by the counsel. For the purposes of this rule, any of the following will constitute reasonable cause:

(1) any sworn statement of grievance received by the North Carolina State Bar alleging facts which, if true, would constitute misconduct in the handling of a client's funds or property;

(2) any facts coming to the attention of the North Carolina State Bar, whether through random review as contemplated by Rule .0128(b) below or otherwise, which if true, would constitute a probable violation of any provision of the Rules of Professional Conduct concerning the handling of client funds or property; or

(3) any finding of probable cause, indictment, or conviction relative to a criminal charge involving moral turpitude. The grounds supporting the issuance of any such subpoena will be set forth upon the face of the subpoena.

(b) The chairperson of the Grievance Committee may randomly issue investigative subpoenas to members compelling the production of any records required to be kept relative to the handling of client funds or property by the Rules of Professional Conduct for inspection by the counsel or any auditor appointed by the counsel to determine compliance with the Rules of Professional Conduct. Any such subpoena will disclose upon its face its random character and contain a verification of the secretary that it was randomly issued. No member will be subject to random selection under this section more than once in three years. The auditor may report any violation of the Rules of Professional Conduct discovered during random audit to the Grievance Committee for investigation. The auditor may allow the attorney a reasonable amount of time to correct any procedural violation in lieu of reporting the matter to the Grievance Committee. The auditor shall have authority under the original subpoena for random audit to compel the production of any documents necessary to determine whether the attorney has corrected any violation identified during the audit.

(c) No subpoena issued pursuant to this rule may compel production within five days of service.

(d) The rules of evidence applicable in the superior courts of the state will govern the use of any material subpoenaed pursuant to this rule in any hearing before the commission.

(e) No assertion of attorney-client privilege or confidentiality will prevent an inspection or audit of a trust account as provided in this rule.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**B.0129. Confidentiality.**

(a) Except as otherwise provided in this rule and G.S. 84-24(f), all proceedings involving allegations of misconduct by or alleged disability of a member will remain confidential until

(1) a complaint against a member has been filed with the secretary after a finding by the Grievance Committee that there is probable cause to believe that the member is guilty of misconduct justifying disciplinary action or is disabled;

(2) the member requests that the matter be made public prior to the filing of a complaint;

(3) the investigation is predicated upon conviction of the member of or sentencing for a crime;

(4) a petition or action is filed in the general courts of justice; or

(5) the member files an affidavit of surrender of license.

(b) The previous issuance of a letter of warning, formerly known as a letter of admonition, or an admonition to a member may be revealed in any subsequent disciplinary proceeding.

(c) This provision will not be construed to prohibit the North Carolina State Bar from providing a copy of an attorney's response to a grievance to the complaining party where such attorney has not objected thereto in writing or to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, to other jurisdictions investigating qualifications for admission to practice, or to law enforcement agencies investigating qualifications for government employment or allegations of criminal conduct by attorneys. Further, this provision will not be construed to prohibit the North Carolina State Bar, with the consent of the chairperson of the Grievance Committee, from providing relevant information concerning a letter of caution, letter of warning or admonition to authorized agencies investigating complaints against North Carolina attorneys, so long as the inquiring jurisdiction maintains the same level of confidentiality respecting the information as the North Carolina State Bar. In addition, the secretary will transmit notice of all public discipline imposed and transfers to disability inactive status to the National Discipline Data Bank maintained by the American Bar Association. The secretary may also transmit any relevant information to the Client Security Fund Board of Trustees to assist the Client Security Fund Board in determining losses caused by dishonest conduct of members of the North Carolina State Bar.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 20, 1995; Amended effective November 7, 1996.

### B.0130. Disciplinary amnesty in illicit drug use cases.

(a) The North Carolina State Bar will not treat as a grievance information that a member has used or is using illicit drugs except as provided in Rules .0130(c), (d) and (e) below. The information will be provided to the director of the lawyer assistance program of the North Carolina State Bar.

(b) If the director of the lawyer assistance program concludes after investigation that a member has used or is using an illicit drug and the member participates and successfully complies with any course of treatment prescribed by the lawyer assistance program, the member will not be disciplined by the North Carolina State Bar for illicit drug use occurring prior to the prescribed course of treatment.

(c) If a member under Rule .0130(b) above fails to cooperate with the Lawyer Assistance Program Board or fails to successfully complete any treatment prescribed for the member's illicit drug use, the director of the lawyer assistance program will report such failure to participate in or complete the prescribed treatment to the chairperson of the Grievance Committee. The chairperson of the Grievance Committee will then treat the information originally received as a grievance.

(d) A member charged with a crime relating to the use or possession of illicit drugs will not be entitled to amnesty from discipline by the North Carolina State Bar relating to the illicit drug use or possession.

(e) If the North Carolina State Bar receives information that a member has used or is using illicit drugs and that the member has violated some other provision of the Revised Rules of Professional Conduct, the information regarding the member's alleged illicit drug use will be referred to the director

of the lawyer assistance program pursuant to Rule .0130(a) above. The information regarding the member's alleged additional misconduct will be reported to the chairperson of the Grievance Committee.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000.

## SECTION .0200. RULES GOVERNING JUDICIAL DISTRICT GRIEVANCE COMMITTEES

### B.0201. Organization of judicial district grievance committees.

(a) *Judicial districts eligible to form district Grievance Committees.*

(1) Any judicial district which has more than 100 licensed attorneys as determined by the North Carolina State Bar's records may establish a judicial district Grievance Committee (hereafter, "district Grievance Committee") pursuant to the rules and regulations set out herein. A judicial district with fewer than 100 licensed attorneys may establish a district Grievance Committee with consent of the Council of the North Carolina State Bar.

(2) One or more judicial districts, including those with fewer than 100 licensed attorneys, may also establish a multi-district Grievance Committee, as set out in Rule .0201(b)(2) below. Such multi-district Grievance Committees shall be subject to all of the rules and regulations set out herein and all references to district Grievance Committees in these rules shall also apply to multi-district Grievance Committees.

(b) *Creation of district Grievance Committees.*

(1) A judicial district may establish a district Grievance Committee at a duly called meeting of the judicial district bar, at which a quorum is present, upon the affirmative vote of a majority of the active members present. Within 30 days of the election, the president of the judicial district bar shall certify in writing the establishment of the district Grievance Committee to the secretary of the North Carolina State Bar.

(2) A multi-district Grievance Committee may be established by affirmative vote of a majority of the active members of each participating judicial district present at a duly called meeting of each participating judicial district bar, at which a quorum is present. Within 30 days of the election, the chairperson of the multi-district Grievance Committee shall certify in writing the establishment of the district Grievance Committee to the secretary of the North Carolina State Bar. The active members of each participating judicial district may adopt a set of by-laws not inconsistent with these rules by majority vote of the active members of each participating judicial district present at a duly called meeting of each participating judicial district bar, at which a quorum is present. The chairperson of the multi-district Grievance Committee shall promptly provide a copy of any such bylaws to the secretary of the North Carolina State Bar.

(c) *Appointment of district Grievance Committee members.*

(1) Each district Grievance Committee shall be composed of not fewer than five nor more than 13 members, all of whom shall be active members in good standing both of the judicial district bar to which they belong and of the North Carolina State Bar. In addition to the attorney members, each district Grievance Committee may also include one to three public members who have never been licensed to practice law in any jurisdiction. Public members shall not perform investigative functions regarding grievances but in all other respects shall have the same authority as the attorney members of the district Grievance Committee.

(2) The chairperson of the district Grievance Committee shall be selected by the president of the judicial district and shall serve at his or her pleasure. Alternatively, the chairperson may be selected and removed as provided in the district bar bylaws.

(3) The attorney and public members of the district Grievance Committee shall be selected by and serve at the pleasure of the president of the judicial district bar and the chairperson of the district Grievance Committee. Alternatively, the district Grievance Committee members may be selected and removed as provided in the district bar bylaws.

(4) The members of the district Grievance Committee, including the chairperson, shall be appointed for staggered three-year terms, except that the president and chairperson shall appoint some of the initial committee members to terms of less than three years, to effectuate the staggered terms. No member shall serve more than one term, without first having rotated off the committee for a period of at least one year between three-year terms. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced by appointment by the president of the judicial district bar and the chairperson of the committee or as provided in the district bar bylaws as soon as practicable.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## B.0202. Jurisdiction & authority of district grievance committees.

(a) *District Grievance Committees are subject to the rules of the North Carolina State Bar.* The district Grievance Committee shall be subject to the rules and regulations adopted by the Council of the North Carolina State Bar.

(b) *Grievances filed with district Grievance Committee.* A district Grievance Committee may investigate and consider grievances filed against attorneys who live or maintain offices within the judicial district and which are filed in the first instance with the chairperson of the district Grievance Committee. The chairperson of the district Grievance Committee will immediately refer to the State Bar any grievance filed locally in the first instance which

(1) alleges misconduct against a member of the district Grievance Committee;

(2) alleges that any attorney has embezzled or misapplied client funds; or

(3) alleges any other serious violation of the Rules of Professional Conduct which may be beyond the capacity of the district Grievance Committee to investigate.

(c) *Grievances referred to district Grievance Committee.* The district Grievance Committee shall also investigate and consider such grievances as are referred to it for investigation by the counsel of the North Carolina State Bar.

(d) *Grievances involving fee disputes.*

(1) *Notice to complainant of fee arbitration.* If a grievance filed initially with the district bar consists solely or in part of a fee dispute, the chairperson of the district Grievance Committee shall notify the complainant in writing within 10 working days of receipt of the grievance that the complainant may elect to participate in the North Carolina State Bar Fee Dispute Arbitration Program. If the grievance consists solely of a fee dispute, the letter to the complainant shall follow the format set out in Rule .0208 of this subchapter. If the grievance consists in part of matters other than a fee dispute, the letter to the complainant shall follow the format set out in Rule .0209 of this subchapter. A respondent attorney shall not have the right to elect to participate in fee arbitration.

(2) *Handling claims not involving fee dispute.* Where a grievance alleges multiple claims, the allegations not involving a fee dispute will be handled in

the same manner as any other grievance filed with the district Grievance Committee.

(3) *Handling claims not submitted to arbitration by complainant.* If the complainant elects not to participate in the State Bar's Fee Dispute Arbitration Program, or fails to notify the chairperson that he or she elects to participate within 20 days following mailing of the notice referred to in Rule .0202(d)(1) above, the grievance will be handled in the same manner as any other grievance filed with the district Grievance Committee.

(4) *Referral to fee dispute arbitration program.* Where a complainant timely elects to participate in fee arbitration, and the judicial district in which the respondent attorney maintains his or her principal office has a fee arbitration committee, the chairperson of the district Grievance Committee shall refer the portion of the grievance involving a fee dispute to the judicial district fee arbitration committee. If the judicial district in which the respondent attorney maintains his or her principal office does not have a fee arbitration committee, the chairperson of the district Grievance Committee shall refer the portion of the grievance involving a fee dispute to the State Bar Fee Dispute Arbitration Program for resolution. If the grievance consists entirely of a fee dispute, and the complainant timely elects to participate in arbitration, no grievance file will be established.

(e) *Authority of District Grievance Committees.* The district grievance committee shall have authority to

(1) assist a complainant who requests assistance to reduce a grievance to writing;

(2) investigate complaints described in Rule .0202(b) and (c) above by interviewing the complainant, the attorney against whom the grievance was filed and any other persons who may have relevant information regarding the grievance and by requesting written materials from the complainant, respondent attorney, and other individuals;

(3) explain the procedures of the district Grievance Committee to complainants and respondent attorneys;

(4) find facts and recommend whether or not the State Bar's Grievance Committee should find that there is probable cause to believe that the respondent has violated one or more provisions of the Revised Rules of Professional Conduct. The district Grievance Committee may also make a recommendation to the State Bar regarding the appropriate disposition of the case, including referral to the Lawyer Assistance Program pursuant to Rule .0112(j) or to a program of law office management training approved by the State Bar;

(5) draft a written report stating the grounds for the recommended disposition of a grievance assigned to the district Grievance Committee;

(6) notify the complainant and the respondent attorney where the district Grievance Committee recommends that the State Bar find that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct. Where the district Grievance Committee recommends that the State Bar find that there is probable cause to believe that the respondent has violated one or more provisions of the Rules of Professional Conduct, the committee shall notify the respondent attorney of its recommendation and shall notify the complainant that the district Grievance Committee has concluded its investigation and has referred the matter to the State Bar for final resolution. Where the district Grievance Committee recommends a finding of no probable cause, the letter of notification to the respondent attorney and to the complainant shall follow the format set out in Rule .0210 of this subchapter. Where the district Grievance Committee recommends a finding of probable cause, the letter of notification to the respondent attorney shall follow the format set out in Rule .0211 of this subchapter. The letter of

notification to the complainant shall follow the format set out in Rule .0212 of this subchapter;

(7) maintain records of grievances investigated by the district Grievance Committee for at least one year from the date on which the district Grievance Committee makes its final recommendation regarding a grievance to the State Bar.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective March 3, 1999; Amended effective December 20, 2000.

### B.0203. Meetings of the district grievance committees.

(a) *Notice of meeting.* The district Grievance Committee shall meet at the call of the chairperson upon reasonable notice, as often as is necessary to dispatch its business and not less than once every 60 days, provided the committee has grievances pending.

(b) *Confidentiality.* The district Grievance Committee shall meet in private. Discussions of the committee, its records and its actions shall be confidential. The names of the members of the committee shall not be confidential.

(c) *Quorum.* A simple majority of the district Grievance Committee must be present at any meeting in order to constitute a quorum. The committee may take no action unless a quorum is present. A majority vote in favor of a motion or any proposed action shall be required for the motion to pass or the action to be taken.

(d) *Appearances by complainants and respondents.* No complainant nor any attorney against whom a grievance has been filed may appear before the district Grievance Committee, present argument to or be present at the committee's deliberations.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### B.0204. Procedure upon institution of a grievance.

(a) *Receipt of grievance.* A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance must be in writing and signed by the complaining person. A district Grievance Committee may, however, investigate matters which come to its attention during the investigation of a grievance, whether or not such matters are included in the original written grievance.

(b) *Acknowledgment of receipt of grievance from State Bar.* The chairperson of the district Grievance Committee shall send a letter to the complainant within 10 working days of receipt of the grievance from the State Bar, acknowledging that a grievance file has been set up. The acknowledgment letter shall include the name of the district Grievance Committee member assigned to investigate the matter and shall follow the format set out in Rule .0213 of this subchapter. A copy of the letter shall be sent contemporaneously to the office of counsel of the State Bar.

(c) *Notice to State Bar of locally filed grievances.*

(1) Where a grievance is filed in the first instance with the district Grievance Committee, the chairperson of the district Grievance Committee shall notify the office of counsel of the State Bar of the name of the complainant, respondent attorney, file number and nature of the grievance within 10 working days of receipt of the grievance.

(2) The chairperson of the district Grievance Committee shall send a letter to the complainant within 10 working days of receipt of the grievance, acknowledging that a grievance file has been set up. The acknowledgment

letter shall include the name of the district grievance committee member assigned to investigate the matter and shall follow the format set out in Rule .0213 of this subchapter.

(3) Grievances filed initially with the district Grievance Committee shall be assigned a local file number which shall be used to refer to the grievance. The first two digits of the file number shall indicate the year in which the grievance was filed, followed by the number of the judicial district, the letters GR, and ending with the number of the file. File numbers shall be assigned sequentially during the calendar year, beginning with the number 1. For example, the first locally filed grievance set up in the 10th judicial district in 1994 would bear the following number: 9410GR001.

(d) *Assignment to investigating member.* Within 10 working days after receipt of a grievance, the chairperson shall appoint a member of the district Grievance Committee to investigate the grievance and shall forward the relevant materials to the investigating member. The letter to the investigating member shall follow the format set out in Rule .0214 of this subchapter.

(e) *Investigation of the grievance.*

(1) The investigating member shall attempt to contact the complainant as soon as possible but no later than 15 working days after receiving notice of the assignment. If the initial contact with the complainant is made in writing, the letter shall follow the format set out in Rule .0215 of this subchapter.

(2) The investigating member shall have the authority to contact other witnesses or individuals who may have information about the subject of the grievance, including the respondent.

(3) The failure of the complainant to cooperate shall not cause a grievance to be dismissed or abated. Once filed, grievances shall not be dismissed or abated upon the request of the complainant.

(f) *Letter of notice to respondent attorney and responses.*

(1) Within 10 working days after receipt of a grievance, the chairperson of the district Grievance Committee shall send a copy of the grievance and a letter of notice to the respondent attorney. The letter to the respondent attorney shall follow the form set out in Rule .0216 of this subchapter and shall be sent by U.S. Mail to the attorney's last known address on file with the State Bar. The letter of notice shall request the respondent to reply to the investigating attorney in writing within 15 days after receipt of the letter of notice.

(2) A substance of grievance will be provided to the district Grievance Committee by the State Bar at the time the file is assigned to the committee. The substance of grievance will summarize the nature of the complaint against the respondent attorney and cite the applicable provisions of the Rules of Professional Conduct, if any.

(3) The respondent attorney shall respond in writing to the letter of notice from the district Grievance Committee within 15 days of receipt of the letter. The chairperson of the district Grievance Committee may allow a longer period for response, for good cause shown.

(4) If the respondent attorney fails to respond in a timely manner to the letter of notice, the chairperson of the district Grievance Committee may seek the assistance of the State Bar to issue a subpoena or take other appropriate steps to ensure a proper and complete investigation of the grievance. District Grievance Committees do not have authority to issue a subpoena to a witness or respondent attorney.

(5) Unless necessary to complete its investigation, the district Grievance Committee should not release copies of the respondent attorney's response to the grievance to the complainant. The investigating attorney may summarize the response for the complainant orally or in writing.

(g) *District grievance committee deliberations.*

(1) Upon completion of the investigation, the investigating member shall promptly report his or her findings and recommendations to the district Grievance Committee in writing.

(2) The district Grievance Committee shall consider the submissions of the parties, the information gathered by the investigating attorney and such other material as it deems relevant in reaching a recommendation. The district Grievance Committee may also make further inquiry as it deems appropriate, including investigating other facts and possible violations of the Rules of Professional Conduct discovered during its investigation.

(3) The district Grievance Committee shall make a determination as to whether or not it finds that there is probable cause to believe that the respondent violated one or more provisions of the Rules of Professional Conduct.

(h) *Report of committee's decision.*

(1) Upon making a decision in a case, the district Grievance Committee shall submit a written report to the office of counsel, including its recommendation and the basis for its decision. The original file and grievance materials of the investigating attorney shall be sent to the State Bar along with the report. The letter from the district bar Grievance Committee enclosing the report shall follow the format set out in Rule .0217 of this subchapter.

(2) The district Grievance Committee shall submit its written report to the office of counsel no later than 180 days after the grievance is initiated or received by the district committee. The State Bar may recall any grievance file which has not been investigated and considered by a district Grievance Committee within 180 days after the matter is assigned to the committee. The State Bar may also recall any grievance file for any reason.

(3) Within 10 working days of submitting the written report and returning the file to the office of counsel, the chairperson of the district Grievance Committee shall notify the respondent attorney and the complainant in writing of the district Grievance Committee 's recommendation, as provided in Rule .0202(d)(6) of this subchapter.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## B.0205. Record keeping.

The district Grievance Committee shall maintain records of all grievances referred to it by the State Bar and all grievances initially filed with the district Grievance Committee for at least one year. The district Grievance Committee shall provide such reports and information as are requested of it from time to time by the State Bar.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## B.0206. Miscellaneous.

(a) *Assistance and questions.* The office of counsel, including the staff attorneys and the grievance coordinator, are available to answer questions and provide assistance regarding any matters before the district Grievance Committee.

(b) *Missing attorneys.* Where a respondent attorney is missing or cannot be located, the district Grievance Committee shall promptly return the grievance file to the office of counsel for appropriate action.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**B.0207. Conflicts of interest.**

(a) No district Grievance Committee shall investigate or consider a grievance which alleges misconduct by any current member of the committee. If a file is referred to the committee by the State Bar or is initiated locally which alleges misconduct by a member of the district Grievance Committee, the file will be sent to the State Bar for investigation and handling within 10 working days after receipt of the grievance.

(b) A member of a district Grievance Committee shall not investigate or participate in deliberations concerning any of the following matters:

(1) alleged misconduct of an attorney who works in the same law firm or office with the committee member;

(2) alleged misconduct of a relative of the committee member;

(3) a grievance involving facts concerning which the committee member or a partner or associate in the committee member's law firm acted as an attorney.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**B.0208. Letter to complainant where local grievance alleges fee dispute only.**

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe

Dear Mr. Smith:

The [ ] district Grievance Committee has received your complaint against above-listed attorney. Based upon our initial review of the materials which you submitted, it appears that your complaint involves a fee dispute. Accordingly, I would like to take this opportunity to notify you of the North Carolina State Bar Fee Dispute Arbitration Program. The program is designed to provide citizens with a means of resolving disputes over attorney fees at no cost to them and without going to court. A pamphlet which describes the program in greater detail is enclosed, along with an application form.

If you would like to participate in the fee arbitration program, please complete and return the form to me within 20 days of the date of this letter. If you decide to go through arbitration, no grievance file will be opened and the [ ] district bar Grievance Committee will take no other action against the attorney.

If you do not wish to participate in fee arbitration program, you may elect to have your complaint investigated by the [ ] district Grievance Committee. If we do not hear from you within 20 days of the date of this letter, we will assume that you do not wish to participate in fee arbitration, and we will handle your complaint like any other grievance. However, the [ ] district Grievance Committee has no authority to attempt to resolve a fee dispute between an attorney and his or her client. Its sole function is to investigate your complaint and make a recommendation to the North Carolina State Bar regarding whether there is probable cause to believe that the attorney has violated one or more provisions of the Rules of Professional Conduct which govern attorneys in this state.

Thank you for your cooperation.

Sincerely yours,

[ ] Chairperson
[ ] District Bar Grievance Committee

cc: PERSONAL & CONFIDENTIAL
Director of Investigations
The N.C. State Bar

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**B.0209. Letter to complainant where local grievance alleges fee dispute and other violations.**

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe

Dear Mr. Smith:

The [ ] district Grievance Committee has received your complaint against above-listed attorney. Based upon our initial review of the materials which you submitted, it appears that your complaint involves a fee dispute as well as other possible violations of the rules of ethics. Accordingly, I would like to take this opportunity to notify you of the North Carolina State Bar Fee Dispute Arbitration Program. The program is designed to provide citizens with a means of resolving disputes over attorney fees at no cost to them and without going to court. A pamphlet which describes the program in greater detail is enclosed, along with an application form.

If you would like to participate in the fee arbitration program, please complete and return the form to me within 20 days of the date of this letter. If you decide to go through arbitration, the fee arbitration committee will handle those portions of your complaint which involve an apparent fee dispute. The remaining parts of your complaint which do not involve a fee dispute will be investigated by the [ ] district Grievance Committee.

If you do not wish to participate in fee arbitration program, you may elect to have your entire complaint investigated by the [ ] district Grievance Committee . If we do not hear from you within 20 days of the date of this letter, we will assume that you do not wish to participate in fee arbitration, and we will handle your entire complaint like any other grievance. However, the [ ] district Grievance Committee has no authority to attempt to resolve a fee dispute between an attorney and his or her client. Its sole function is to investigate your complaint and make a recommendation to the North Carolina State Bar regarding whether there is probable cause to believe that the attorney has violated one or more provisions of the Rules of Professional Conduct which govern attorneys in this state.

Thank you for your cooperation.

Sincerely yours,

[ ] Chairperson
[ ] District Bar Grievance Committee

cc: PERSONAL & CONFIDENTIAL
Director of Investigations
The N. C. State Bar

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**B.0210. Letter to complainant/respondent where district committee recommends finding of no probable cause.**

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe
Our File No. [ ]

Dear Mr. Smith:

The [ ] district Grievance Committee has completed its investigation of your grievance. Based upon its investigation, the committee does not believe that there is probable cause to find that the attorney has violated any provisions of the Rules of Professional Conduct. The committee will forward a report with its recommendation to the North Carolina State Bar Grievance Committee . The final decision regarding your grievance will be made by the North Carolina State Bar Grievance Committee . You will be notified in writing of the State Bar's decision.

If you have any questions or wish to communicate further regarding your grievance, you may contact the North Carolina State Bar at the following address:

The North Carolina State Bar
Grievance Committee
P.O. Box 25908
Raleigh, N.C. 27611

Neither I nor any member of the [ ] district Grievance Committee can give you any advice regarding any legal rights you may have regarding the matters set out in your grievance. You may pursue any questions you have regarding your legal rights with an attorney of your choice.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chairperson
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
[ ] Respondent Attorney
PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**B.0211. Letter to respondent where district committee recommends finding of probable cause.**

Ms. Jane Doe
Anywhere, N.C.

Re: Grievance of John Smith
Our File No. [ ]

Dear Ms. Doe:

The [ ] district Grievance Committee has completed its investigation of Mr. Smith's grievance and has voted to recommend that the North Carolina State Bar Grievance Committee find probable cause to believe that you violated one

or more provisions of the Rules of Professional Conduct. Specifically, the [ ] district Grievance Committee found that there is probable cause to believe that you may have violated [set out brief description of rule allegedly violated and pertinent facts].

The final decision in this matter will be made by the North Carolina State Bar Grievance Committee and you will be notified in writing of the State Bar's decision. The complainant has been notified that the [ ] district Grievance Committee has concluded its investigation and that the grievance has been sent to the North Carolina State Bar for final resolution, but has not been informed of the [ ] district committee's specific recommendation.

If you have any questions or wish to communicate further regarding this grievance, you may contact the North Carolina State Bar at the following address:

The North Carolina State Bar
Grievance Committee
P.O. Box 25908
Raleigh, N.C. 27611
Tel. 919-828-4620

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chairperson
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**B.0212. Letter to complainant where district committee recommends finding of probable cause.**

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe
Our File No. [ ]

Dear Mr. Smith:

The [ ] district Grievance Committee has completed its investigation of your grievance and has forwarded its file to the North Carolina State Bar Grievance Committee in Raleigh for final resolution. The final decision in this matter will be made by the North Carolina State Bar Grievance Committee and you will be notified in writing of the State Bar's decision.

If you have any questions or wish to communicate further regarding your grievance, you may contact the North Carolina State Bar at the following address:

The North Carolina State Bar
Grievance Committee
P.O. Box 25908
Raleigh, N.C. 27611

Neither I nor any member of the [ ] district Grievance Committee can give you any advice regarding any legal rights you may have regarding the matters set out in your grievance. You may pursue any questions you have regarding your legal rights with an attorney of your choice.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chairperson
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
[ ] Respondent Attorney
PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**B.0213. Letter to complainant acknowledging grievance.**

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe
Our File No. [ ]

Dear Mr. Smith:

I am the chairperson of the [ ] district Grievance Committee. Your grievance against [respondent attorney] [was received in my office]/[has been forwarded to my office by the North Carolina State Bar] on [date]. I have assigned [investigator's name], a member of the [ ] district Grievance Committee, to investigate your grievance. [ ]'s name, address and telephone number are as follows: [ ].

Please be sure that you have provided all information and materials which relate to or support your complaint to the [ ] district Grievance Committee. If you have other information which you would like our committee to consider, or if you wish to discuss your complaint, please contact the investigating attorney by telephone or in writing as soon as possible.

After [ ]'s investigation is complete, the [ ] district Grievance Committee will make a recommendation to the North Carolina State Bar Grievance Committee regarding whether or not there is probable cause to believe that [respondent attorney] violated one or more provisions of the Rules of Professional Conduct. Your complaint and the results of our investigation will be sent to the North Carolina State Bar at that time. The [ ] district Grievance Committee 's recommendation is not binding upon the North Carolina State Bar Grievance Committee, which will make the final determination. You will be notified in writing when the [ ] district Grievance Committee 's investigation is concluded.

Neither the investigating attorney nor any member of the [ ] district Grievance Committee can give you any legal advice or represent you regarding any underlying legal matter in which you may be involved. You may pursue any questions you have about your legal rights with an attorney of your own choice.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chairperson
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### B.0214. Letter to investigating attorney assigning grievance.

James Roe
[ ] District Grievance Committee Member
Anywhere, N.C.

Re: Grievance of John Smith against Jane Doe
Our File No. [ ]
Dear Mr. Roe:

Enclosed you will find a copy of the grievance which I recently received regarding the above-captioned matter. Please investigate the complaint and provide a written report with your recommendations by [deadline].

Thank you very much.

Sincerely yours,

[ ] Chairperson
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### B.0215. Letter to complainant from investigating attorney.

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe
Our File No. [ ]
Dear Mr. Smith:

I am the member of the [ ] district Grievance Committee assigned to investigate your grievance against [respondent attorney]. It is part of my job to ensure that you have had a chance to explain your complaint and that the [ ] district Grievance Committee has copies of all of the documents which you believe relate to your complaint.

If you have other information or materials which you would like the [ ] district Grievance Committee to consider, or if you would like to discuss this matter, please contact me as soon as possible.

If you have already fully explained your complaint, you do not need to take any additional action regarding your grievance. The [ ] district Grievance Committee will notify you in writing when its investigation is complete. At that time, the matter will be forwarded to the North Carolina State Bar Grievance Committee in Raleigh for its final decision. You will be notified in writing of the North Carolina State Bar's decision.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Investigating Member
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Chairperson, [ ] District Grievance Committee

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### B.0216. Letter of notice to respondent attorney.

Ms. Jane Doe
Anywhere, N.C.

Re: Grievance of John Smith
Our File No. [ ]

Dear Ms. Doe:

Enclosed you will find a copy of a grievance which has been filed against you by [complainant] and which was received in my office on [date]. As chairperson of the [ ] district Grievance Committee, I have asked [investigating attorney], a member of the committee, to investigate this grievance.

Please file a written response with [investigating attorney] within 15 days from receipt of this letter. Your response should provide a full and fair disclosure of all of the facts and circumstances relating to the matters set out in the grievance.

Thank you.

Sincerely yours,

[ ] Chairperson
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
[ ] Investigating member
[ ] District Grievance Committee
PERSONAL AND CONFIDENTIAL
Director of Investigations
N.C. State Bar

PERSONAL AND CONFIDENTIAL
[ ] Complainant

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### B.0217. Letter transmitting completed file to North Carolina State Bar.

Director of Investigations
N.C. State Bar
P.O. Box 25908
Raleigh, N.C. 27611

Re: Grievance of John Smith File No. [ ]

Dear Director:

The [ ] district Grievance Committee has completed its investigation in the above-listed matter. Based upon our investigation, the committee determined in its opinion that there is/is not probable cause to believe that the respondent violated one or more provisions of the Rules of Professional Conduct for the reasons set out in the enclosed report.

We are forwarding this matter for final determination by the North Carolina State Bar Grievance Committee along with the following materials:

1. The original grievance of [complainant].

2. A copy of the file of the investigating attorney.
3. The investigating attorney's report, which includes a summary of the facts and the reason(s) for the committee's decision.

Please let me know if you have any questions or if you need any additional information.

Thank you.

Sincerely yours,

[ ] Chairperson
[ ] District Grievance Committee

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

# SUBCHAPTER 1C. RULES GOVERNING THE BOARD OF LAW EXAMINERS AND THE TRAINING OF LAW STUDENTS

## SECTION .0100. BOARD OF LAW EXAMINERS

### C.0101. Election.

(a) At the first meeting of the council, it shall elect as members of the Board of Law Examiners, two members of the State Bar to serve for a term of one year from July 1, 1933; and two members of the State Bar to serve for a term of two years from July 1, 1933; and two members of the State Bar to serve for a term of three years from July 1, 1933.

The council, at its regular meeting, in April of each year, beginning in 1934, shall elect two members of the Board of Law Examiners to take office on the 1st day of July of the year in which they are elected, and such members shall serve for a term of three years or until their successors are elected and qualified. Beginning with the year 1935 and every third year thereafter the council shall elect three members for a term of three years or until their successors are elected and qualified.

(b) No member of the council shall be a member of the Board of Law Examiners, and no member of the Board of Law Examiners shall be a member of the council.

**History Note:** Statutory Authority G.S. 84-24, Readopted Effective December 8, 1994.

### C.0102. Examination of applicants for license.

All applicants for admission to the Bar shall first obtain a certificate or license from the Board of Law Examiners in accordance with the rules and regulations of that board.

**History Note:** Statutory Authority G.S. 84-24, Readopted Effective December 8, 1994.

### C.0103. Admission to practice.

Upon receiving license to practice law from the Board of Law Examiners, the applicant shall be admitted to the practice thereof by taking the oath in the manner and form now provided by law.

**History Note:** Statutory Authority G.S. 84-24, Readopted Effective December 8, 1994.

### C.0104. Approval of rules and regulations of Board of Law Examiners.

The council shall, as soon as possible, after the presentation to it of rules and regulations for admission to the Bar, approve or disapprove such rules and regulations. The rules and regulations approved shall immediately be certified to the Supreme Court. Such rules and regulations as may not be approved by the council shall be the subject of further study and action, and for the purpose of study, the council and Board of Law Examiners may sit in joint session. No action, however, shall be taken by the joint meeting, but each shall act separately, and no rule or regulation shall be certified to the Supreme Court until approved by the council.

**History Note:** Statutory Authority G.S. 84-24, Readopted Effective December 8, 1994.

### C.0105. Approval of Law Schools.

Every applicant for admission to the North Carolina State Bar must meet the requirements set out in at least one of the numbered paragraphs below:

(1) The applicant holds an LL.B, J.D., LL.M. or S.J.D. degree from a law school that was approved by the American Bar Association at the time the degree was conferred;

(2) Prior to August 1995, the applicant received an LL.B., J.D., LL.M. or S.J.D. degree from a law school that was approved by the Council of the N.C. State Bar at the time the degree was conferred;

(3) The applicant holds a professional degree from a foreign law school and an LL.B., J.D., LL.M. or S.J.D. degree from a law school that was approved by the Council of the North Carolina State Bar at the time the degree was conferred or a law school which was approved by the American Bar Association at the time the degree was conferred.

**History Note:** Added effective March 3, 1999.

## SECTION .0200. RULES GOVERNING PRACTICAL TRAINING OF LAW STUDENTS

### C.0201. Purpose.

The following rules are adopted to encourage law schools to provide their students with supervised practical training of varying kinds during the period of their formal legal education.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective June 7, 2001.

### C.0202. Definitions.

The following definitions shall apply to the terms used in this section:

(1) *Legal aid clinic.* A department, division, program or course in a law school, approved by the Council of the North Carolina State Bar, which

operates under the supervision [of] an active member of the State Bar and renders legal services to indigent persons.

(2) *Indigent persons.* Persons who are financially unable to pay for the legal services of an attorney as determined by a standard established by a judge of the General Court of Justice, a legal services corporation, or the legal aid clinic providing representation.

(3) *Legal intern.* A law student who is certified to provide supervised representation to clients under the provisions of the rules of this Subchapter.

(4) *Legal services corporation.* A nonprofit North Carolina corporation organized exclusively to provide representation to indigent persons.

(5) *Supervising attorney.* An active member of the North Carolina State Bar who satisfies the requirements of Rule .0205 of this Subchapter and who supervises one or more legal interns.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective June 7, 2001.

## C.0203. Eligibility.

To engage in activities permitted by these rules, a law student must satisfy the following requirements;

(1) be enrolled in a law school approved by the Council of the North Carolina State Bar;

(2) have completed at least three semesters of the requirements for a professional degree in law (J.D. or its equivalent);

(3) be certified in writing by a representative of his or her law school authorized by the dean of the law school to provide such certification as being of good character with requisite legal ability and training to perform as a legal intern;

(4) be introduced to the court in which he or she is appearing by an attorney admitted to practice in that court;

(5) neither ask for nor receive any compensation or remuneration of any kind from any client for whom he or she renders services, but this shall not prevent an attorney, legal services corporation, law school, public defender agency, or the state from paying compensation to the law student or charging or collecting a fee for legal services performed by such law student;

(6) certify in writing that he or she has read and is familiar with the North Carolina Revised Rules of Professional Conduct and the opinions interpretive thereof.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective June 7, 2001.

## C.0204. Certification as Legal Intern.

Upon receipt of the written materials required by Rule .0203(3) and (6) and Rule .0205(6), the North Carolina State Bar shall certify that the law student may serve as a legal intern. The certification shall be subject to the following limitations:

(a) *Duration.* The certification shall be effective for 18 months or until the announcement of the results of the first bar examination following the legal intern's graduation whichever is earlier. If the legal intern passes the bar examination, the certification shall remain in effect until the legal intern is sworn-in by a court and admitted to the bar.

(b) *Withdrawal of Certification.* The certification shall be withdrawn by the State Bar, without hearing or a showing of cause, upon receipt of

(1) notice from a representative of the legal intern's law school, authorized to act by the dean of the law school, that the legal intern has not graduated but is no longer enrolled;

(2) notice from a representative of the legal intern's law school, authorized to act by the dean of the law school, that the legal intern is no longer in good standing at the law school;

(3) notice from a supervising attorney that the supervising attorney is no longer supervising the legal intern and that no other qualified attorney has assumed the supervision of the legal intern; or

(4) notice from a judge before whom the legal intern has appeared that the certification should be withdrawn.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective June 7, 2001.

## C.0205. Supervision.

(a) A supervising attorney shall

(1) be an active member of the North Carolina State Bar who practiced law as a full-time occupation for at least two years;

(2) supervise no more than five legal interns concurrently, unless such attorney is a full-time member of a law school's faculty or staff whose primary responsibility is supervising legal interns in a legal aid clinic;

(3) assume personal professional responsibility for any work undertaken by a legal intern while under his or her supervision;

(4) assist and counsel with a legal intern in the activities permitted by these rules and review such activities with the legal intern, all to the extent required for the proper practical training of the legal intern and the protection of the client;

(5) read, approve and personally sign any pleadings or other papers prepared by a legal intern prior to the filing thereof, and read and approve any documents prepared by a legal intern for execution by a client or third party prior to the execution thereof;

(6) prior to commencing the supervision, assume responsibility for supervising a legal intern by filing with the North Carolina State Bar a signed notice setting forth the period during which [the] supervising attorney expects to supervise the activities of an identified legal intern, and acknowledging that the supervising attorney will adequately supervise the legal intern in accordance with these rules;

(7) notify the North Carolina State Bar in writing promptly whenever the supervision of a legal intern ceases.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective June 7, 2001.

## C.0206. Activities.

(a) A properly certified legal intern may engage in the activities provided in this rule under the supervision of an attorney qualified and acting in accordance with the provisions of Rule .0205 of this subchapter.

(b) Without the presence of the supervising attorney, a legal intern may give advice to a client on legal matters provided that the legal intern gives a clear prior explanation to the client that the legal intern is not an attorney and the

supervising attorney has given the legal intern permission to render legal advice in the subject area involved.

(c) A legal intern may represent an indigent person, or the state in criminal prosecutions, in any proceeding before a federal, state or local tribunal, including an administrative agency, if prior consent is obtained from the tribunal or agency upon application of the supervising attorney. Each appearance before the tribunal or agency shall be subject to any limitations imposed by the tribunal or agency including, but not limited to, the requirement that the supervising attorney physically accompany the legal intern.

(d) In all cases under this rule in which a legal intern makes an appearance before a tribunal or agency on behalf of a client, the legal intern shall have the written consent in advance of the client. The client shall be given a clear explanation, prior to the giving of his or her consent, that the legal intern is not an attorney. This consent shall be filed with the tribunal and made a part of the record in the case.

(e) In all cases under this rule in which a legal intern is permitted to make an appearance before a tribunal or agency, subject to any limitations imposed by the tribunal, the legal intern may engage in all activities appropriate to the representation of the client, including, without limitation, selection of and argument to the jury, examination and cross-examination of witnesses, motions and arguments thereon, and giving notices of appeal.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective June 7, 2001.

**CASE NOTES**

**Presentation of Evidence by Law Student Without Written Consent.** — Presentation of evidence by a law student, instead of the student's supervising attorney who was present at the hearing, did not rise to prejudicial error, although the written consents required by subdivision (g) were not made a part of the record. In re Joseph Children, 122 N.C. App. 468, 470 S.E.2d 539 (1996).

## C.0207. Use of student's name.

(a) A legal intern's name may properly

(1) be printed or typed on briefs, pleadings, and other similar documents on which the legal intern has worked with or under the direction of the supervising attorney, provided the legal intern is clearly identified as a legal intern certified under these rules, and provided further that the legal intern shall not sign his or her name to such briefs, pleadings, or other similar documents;

(2) be signed to letters written on the letterhead of the supervising attorney, legal aid clinic, or district attorney's office, provided there appears below the legal intern's signature a clear identification that the legal intern is certified under these rules. An appropriate designation is "Certified Legal Intern under the Supervision of [Supervising attorney.]

(b) A student's name may not appear

(1) on the letterhead of a supervising attorney, legal aid clinic, or district attorney's office;

(2) on a business card bearing the name of a supervising attorney, legal aid clinic, or district attorney's office; or

(3) on a business card identifying the legal intern as certified under these rules.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended effective June 7, 2001.

# SUBCHAPTER 1D. RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

## SECTION .0100. PROCEDURES FOR RULING ON QUESTIONS OF LEGAL ETHICS

### D.0101. Definitions.

(1) "Assistant executive director" shall mean the assistant executive director of the Bar.

(2) "Attorney" shall mean any active member of the Bar.

(3) "Bar" shall mean the North Carolina State Bar.

(4) "Chairperson" shall mean the chairperson, or in his or her absence, the vice-chairperson of the Ethics Committee of the Bar.

(5) "Committee" shall mean the Ethics Committee of the Bar.

(6) "Council" shall mean the council of the Bar.

(7) "Ethics advisory" shall mean a legal ethics opinion issued in writing by the executive director, the assistant executive director, or a designated member of the Bar's staff counsel. All ethics advisories shall be subsequently reviewed and approved, withdrawn or modified by the committee. Ethics advisories shall be designated by the letters "EA", numbered by year and order of issuance, and kept on file at the Bar.

(8) "Ethics decision" shall mean a written ethics opinion issued by the council in response to a request for an ethics opinion which, because of its special facts or for other reasons, does not warrant issuance of a formal ethics opinion. Ethics decisions shall be designated by the letters "ED", numbered by year and order of issuance, and kept on file at the Bar.

(9) "Executive director" shall mean the executive director of the Bar.

(10) "Formal ethics opinion" shall mean a published opinion issued by the council to provide ethical guidance for attorneys and to establish a principle of ethical conduct. A formal ethics opinion adopted under the Revised Rules of Professional Conduct (effective July 24, 1997) shall be designated as a "Formal Ethics Opinion" and numbered by year and order of issuance. Formal ethics opinions adopted under the repealed Rules of Professional Conduct (effective October 7, 1985 to July 23, 1997) are designated by the letters "RPC" and numbered serially. Formal ethics opinions adopted under the repealed Code of Professional Conduct (effective January 1, 1974 to October 6, 1985) are designated by the letters "CPR" and numbered serially. Formal ethics opinions adopted under the repealed Rules of Professional Conduct and the repealed Code of Professional Conduct are binding unless overruled by a provision of the Bar's current code of ethics, a revision of the rule of ethics upon which the opinion is based, or a subsequent formal ethics opinion on point.

(11) "Grievance Committee" shall mean the Grievance Committee of the Bar.

(12) "Informal ethics advisory" shall mean an informal ethics opinion communicated orally or via electronic mail by the executive director, the assistant executive director, or a designated member of the Bar's legal staff counsel. A written record documenting the name of the inquiring attorney, the date of the informal ethics advisory, and the substance of the advice given shall

be kept on file at the Bar. An informal ethics advisory is not binding upon the Bar in a subsequent disciplinary proceeding.

(13) "President" shall mean the president of the Bar or, in his or her absence, the presiding officer of the council.

(14) "Published" shall mean published for comment in the North Carolina State Bar *Newsletter* (prior to fall 1996), the North Carolina State Bar *Journal* (fall 1996 and thereafter) or other appropriate publication of the North Carolina State Bar.

(15) "Revised Rules of Professional Conduct" shall mean the code of ethics of the Bar effective July 24, 1997.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended March 5, 1998.

## D.0102. General provisions.

(a) An attorney may ask the Bar to rule on actual or contemplated professional conduct of an attorney as provided in Section .0100 of this subchapter. In special circumstances, a ruling on the contemplated professional conduct of an attorney may be provided in response to the request of a person who is not a member of the Bar. The grant or denial of a request rests within the discretion of the executive director, assistant executive director, designated staff counsel, the chairperson, the committee, or the council as appropriate.

(b) An attorney may request an informal ethics advisory by letter, electronic mail, telephone, or personal meeting with an appropriate member of the Bar staff. The executive director, assistant executive director, or designated staff counsel may provide an informal ethics advisory to guide the inquiring attorney's own prospective conduct if the inquiry is routine, the responsive advice is readily ascertained from the Revised Rules of Professional Conduct and formal ethics opinions, or the inquiry requires urgent action to protect some legal right, privilege, or interest.

(c) An attorney may request an ethics advisory or formal ethics opinion by sending a written inquiry to the Bar. The executive director, assistant executive director, or designated staff counsel may issue an ethics advisory to guide the inquiring attorney's own prospective conduct if the inquiry is routine, the responsive advice is readily ascertained from the Revised Rules of Professional Conduct and formal ethics opinions, or the inquiry requires urgent action to protect some legal right, privilege, or interest. An inquiry requesting an opinion about the professional conduct of another attorney, past conduct, or that presents a matter of first impression or of general interest to the Bar shall be referred to the committee for response by ethics decision or formal ethics opinion.

(d) All ethics inquiries, whether written or oral, shall present in detail all operative facts upon which the request is based. Inquiries should not disclose client confidences or other sensitive information not necessary to the resolution of the ethical question presented.

(e) Any attorney, who requests an ethics opinion on the acts or contemplated professional conduct of another attorney, shall state, in the written inquiry, the name of the attorney and identify all persons whom the requesting attorney has reason to believe may be substantially affected by a response to the inquiry. The inquiry shall also provide evidence that the attorney whose conduct is at issue and all other identified interested persons have received copies of the inquiry from the requesting attorney.

(f) When a written ethics inquiry discloses conduct which may be actionable as a violation of the Revised Rules of Professional Conduct, the executive

director, the assistant executive director, chairperson or the committee may refer the matter to the Grievance Committee for investigation.

(g) In general, no response shall be provided to an ethics inquiry that seeks an opinion on an issue of law.

(h) A decision not to issue a response to an ethics inquiry, whether by the executive director, assistant executive director, designated staff counsel, chairperson or the committee, shall not be appealable.

(i) Except as provided in Rule .0103(b) of this subchapter, the information contained in a request for an ethics opinion shall not be confidential.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended March 5, 1998.

## D.0103. Informal Ethics Advisories and Ethics advisories.

(a) The executive director, assistant executive director, or designated staff counsel may honor or deny a request for an informal ethics advisory. Except as provided in Rule.0102(b), an attorney requesting an opinion concerning another attorney's professional conduct, past conduct, or matters of first impression shall be asked to submit a written inquiry for referral to the committee. An attorney requesting an opinion involving matters of widespread interest to the Bar or particularly complex factual circumstances may also be asked to submit a written inquiry for referral to the committee.

(b) The Bar's program for providing informal ethics advisories to inquiring attorneys is a designated lawyers' assistance program approved by the Bar and information received by the executive director, assistant executive director, or designated staff counsel from an attorney seeking an informal ethics advisory shall be confidential information as defined in Rule 1.6(a) and (b) of the Revised Rules of Professional Conduct; provided, however, such confidential information may be disclosed as allowed by Rule 1.6(d) and as necessary to respond to a false or misleading statement made about an informal ethics advisory. Further, if an attorney's response to a grievance proceeding relies in whole or in part upon the receipt of an informal ethics advisory, confidential information may be disclosed to Bar counsel, the Grievance Committee or other appropriate disciplinary authority.

(c) An ethics advisory issued by the executive director, assistant executive director, or designated staff counsel shall be promulgated under the authority of the committee and in accordance with such guidelines as the committee may establish and prescribe from time to time.

(d) An ethics advisory shall sanction or disapprove only the matter in issue, shall not otherwise serve as precedent and shall not be published.

(e) Ethics advisories shall be reviewed periodically by the committee. If, upon review, a majority of the committee present and voting decides that an ethics advisory should be withdrawn or modified, the requesting attorney shall be notified in writing of the committee's decision by the executive director or assistant executive director. Until such notification, the attorney shall be deemed to have acted ethically and in good faith if he or she acts pursuant to the ethics advisory which is later withdrawn or modified.

(f) If an inquiring attorney disagrees with the ethics advisory issued to him or her, the attorney may request reconsideration of the ethics advisory by writing to the committee prior to the next regularly scheduled meeting of the committee.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended March 5, 1998.

**D.0104. Formal ethics opinions and ethics decisions.**

(a) Requests for formal ethics opinions or ethics decisions shall be made in writing and submitted to the executive director or assistant executive director who, after determining that a request is in compliance with Rule .0102 of this subchapter, shall transmit the requests to the chairperson of the committee.

(b) If a formal ethics opinion or ethics decision is requested concerning contemplated or actual conduct of another attorney, that attorney shall be given an opportunity to be heard by the committee, along with the person who requested the opinion, under such guidelines as may be established by the committee. At the discretion of the chairperson and the committee, additional persons or groups shall be notified by the method deemed most appropriate by the chairperson and provide them an opportunity to be heard by the committee.

(c) The committee shall prepare a written proposed formal ethics opinion or ethics decision which shall state its conclusion in respect to the question asked and the reasons therefor.

(d) The committee shall determine whether to issue an ethics decision or a formal ethics opinion in response to an inquiry.

(e) A proposed formal ethics opinion or ethics decision shall be provided to interested persons by the method deemed most appropriate by the chairperson and shall also be transmitted to the president for consideration by the council. All proposed formal ethics opinions shall be published.

(f) Prior to the next regularly scheduled meeting of the committee, any interested person or group may submit a written request to reconsider a proposed or final formal ethics opinion or ethics decision and may ask to be heard by the committee. The committee, under such guidelines as it may adopt, may allow or deny such request. If a proposed or final ethics decision is withdrawn or revised, interested persons shall be notified by the method deemed most appropriate by the chairperson. If a proposed or final formal ethics opinion is withdrawn or revised, notice of the action and any proposed revised formal ethics opinion shall be published.

(g) If the committee declines to revise a proposed formal ethics opinion or ethics decision in response to a written request, any interested person or group may request to be heard by the council prior to a vote on the adoption of the proposed formal ethics opinion or ethics decision. Whether permitted to appear before the council or not, the person or group has the right to file a written brief with the council under such rules as may be established by the council.

(h) The council's action on the proposed formal ethics opinion or ethics decision shall be determined by vote of the majority of the council present and voting. Notice of such action shall be provided to interested persons by the method deemed most appropriate by the chairperson.

(i) A formal ethics opinion or ethics decision may be reconsidered or withdrawn by the council pursuant to rules which it may establish from time to time.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended March 5, 1998.

## SECTION .0200. PROCEDURES FOR THE AUTHORIZED PRACTICE COMMITTEE

**D.0201. General provisions.**

The purpose of the committee on the authorized practice of law is to protect

the public from being unlawfully advised and represented in legal matters by unqualified persons.

**History Note:** Statutory Authority G.S. 84-37, Readopted effective December 8, 1994; Amended effective February 3, 2000.

### D.0202. Procedure.

(a) The procedure to prevent and restrain the unauthorized practice of law shall be in accordance with the provisions hereinafter set forth.

(b) District bars shall not conduct separate proceedings into unauthorized practice of law matters but shall assist and cooperate with the North Carolina State Bar in reporting and investigating matters of alleged unauthorized practice of law.

**History Note:** Statutory Authority G.S. 84-37, Readopted Effective December 8, 1994.

### D.0203. Definitions.

Subject to additional definitions contained in other provisions of this subchapter, the following words and phrases, when used in this subchapter, have the meanings set forth in this rule, unless the context clearly indicates otherwise.

(1) *Appellate division.* The appellate division of the General Court of Justice.

(2) *Chairperson of the Authorized Practice Committee.* The councilor appointed to serve as chairperson of the Authorized Practice Committee of the State Bar.

(3) *Complainant or the complaining witness.* Any person who has complained of the conduct of any person, firm or corporation as relates to alleged unauthorized practice of law.

(4) *Complaint.* A formal pleading filed in the name of the North Carolina State Bar in the superior court against a person, firm or corporation after a finding of probable cause.

(5) *Council.* The Council of the North Carolina State Bar.

(6) *Councilor.* A member of the Council of the North Carolina State Bar.

(7) *Counsel.* The counsel of the North Carolina State Bar appointed by the council.

(8) *Court or courts of this state.* A court authorized and established by the Constitution or laws of the state of North Carolina.

(9) *Defendant.* Any person, firm or corporation against whom a complaint is filed after a finding of probable cause.

(10) *Investigation.* The gathering of information with respect to alleged unauthorized practice of law.

(11) *Investigator.* Any person designated to assist in investigation of alleged unauthorized practice of law.

(12) *Letter of caution.* A communication from the Authorized Practice Committee to any person stating that past conduct of the person, while not the basis for formal action, is questionable as relates to the practice of law or may be the basis for injunctive relief if continued or repeated.

(13) *Letter of notice.* A communication to an accused individual or corporation setting forth the substance of alleged conduct involving unauthorized practice of law.

(14) *Office of the counsel.* The office and staff maintained by the Counsel of the North Carolina State Bar.

(15) *Office of the secretary.* The office and staff maintained by the secretary of the North Carolina State Bar.

(16) *Party.* After a complaint has been filed, the North Carolina State Bar as plaintiff and the accused individual or corporation as defendant.

(17) *Plaintiff.* After a complaint has been filed, the North Carolina State Bar.

(18) *Preliminary hearing.* Hearing by the Authorized Practice Committee to determine whether probable cause exists.

(19) *Cause.* A finding by the Authorized Practice Committee that there is reasonable cause to believe that a person or corporation is guilty of unauthorized practice of law justifying legal action against such person or corporation.

(20) *Secretary.* The secretary of the North Carolina State Bar.

(21) *Supreme Court.* The Supreme Court of North Carolina.

**History Note:** Statutory Authority G.S. 84-37, Readopted effective December 8, 1994; Amended effective February 3, 2000.

### D.0204. State Bar Council — Powers and duties.

The Council of the North Carolina State Bar shall have the power and duty:

(1) to supervise the administration of the Authorized Practice Committee in accordance with the provisions of this subchapter;

(2) to appoint a counsel. The counsel shall serve at the pleasure of the council. The counsel shall be a member of the North Carolina State Bar but shall not be permitted to engage in the private practice of law.

**History Note:** Statutory Authority G.S. 84-37, Readopted effective December 8, 1994; Amended effective February 3, 2000.

### D.0205. Chairperson of the Authorized Practice Committee — Powers and duties.

(a) The chairperson of the Authorized Practice Committee shall have the power and duty:

(1) to supervise the activities of the counsel;

(2) to recommend to the Authorized Practice Committee that an investigation be initiated;

(3) to recommend to the Authorized Practice Committee that a complaint be dismissed;

(4) to direct a letter of notice to an accused person or corporation or direct the counsel to issue letters of notice in such cases or under such circumstances as the chairperson deems appropriate;

(5) to notify the accused and any complainant that a complaint has been dismissed;

(6) to call meetings of the Authorized Practice Committee for the purpose of holding preliminary hearings;

(7) to issue subpoenas in the name of the North Carolina State Bar or direct to the secretary to issue such subpoenas;

(8) to administer oaths or affirmations to witnesses;

(9) to file and verify complaints and petitions in the name of the North Carolina State Bar.

(b) The president, vice-chairperson or senior council member of the Authorized Practice Committee shall perform the functions of the chairperson of the

committee in any matter when the chairperson or vice-chairperson is absent or disqualified.

**History Note:** Statutory Authority G.S. 84-37, Readopted effective December 8, 1994; Amended effective February 3, 2000.

### D.0206. Authorized Practice Committee — Powers and duties.

The Authorized Practice Committee shall have the power and duty:

(1) to direct to the counsel to investigate any alleged unauthorized practice of law by any person, firm, or corporation in this State;

(2) to hold preliminary hearings, find probable cause, and recomend to the Executive Committee that complaints be filed;

(3) to dismiss complaints upon a finding of no probable cause;

(4) to issue a letter of caution to an [a] respondent in cases wherein probable cause is not established but the activities of the respondent are deemed to be improper or may become the basis for injunctive relief if continued or repeated;

(5) to issue advisory opinions in accordance with procedures adopted by the Council as to whether the actual or contemplated conduct of nonlawyers would constitute the unauthorized practice of law in North Carolina.

**History Note:** Statutory Authority G.S. 84-37, Readopted effective December 8, 1994, Amended effective February 20, 1995; Amended effective February 3, 2000.

### D.0207. Counsel — Powers and duties.

The counsel shall have the power and duty:

(1) to initiate an investigation concerning the alleged unauthorized practice of law;

(2) to direct a letter of notice to a respondent when authorized by the chairperson of the Authorized Practice Committee;

(3) to investigate all matters involving alleged unauthorized practice of law whether initiated by the filing of complaint or otherwise;

(4) to recommend to the chairperson of the Authorized Practice Committee that a matter be dismissed because the complaint is frivolous or falls outside the council's jurisdiction; that a letter of notice be issued; or that the matter be considered by the Authorized Practice Committee to determine whether probable cause exists;

(5) to prosecute all unauthorized practice of law proceedings before the Authorized Practice Committee and the courts;

(6) to represent the State Bar in any trial or other proceedings concerned with the alleged unauthorized practice of law;

(7) to employ assistant counsel, investigators, and other administrative personnel in such numbers as the council may from time to time authorize;

(8) to maintain permanent records of all matters processed and the disposition of such matters;

(9) to perform such other duties as the council may from time to time direct.

**History Note:** Statutory Authority G.S. 84-37, Readopted effective December 8, 1994; Amended effective February 3, 2000.

### D.0208. Suing for injunctive relief.

(a) Upon receiving a recommendation from the Authorized Practice Committee that a complaint seeking injunctive relief be filed, the Executive Committee shall review the matter at the same quarterly meeting and

determine whether the recommended action is necessary to protect the public interest and ought to be prosecuted.

(b) If the Executive Committee decides to follow the Authorized Practice Committee's recommendation, it shall direct the counsel to prepare the necessary pleadings as soon as practical for signature by the chairperson and filing with the appropriate tribunal.

(c) If the Executive Committee decides not to follow the Authorized Practice Committee's recommendation, the matter shall go before the council at the same quarterly meeting to determine whether the recommended action is necessary to protect the public interest and ought to be prosecuted.

(d) If the council decides not to follow the Authorized Practice Committee's recommendation, the matter shall be referred back to the Authorized Practice Committee for alternative disposition.

(e) If probable cause exists to believe that a respondent is engaged in the unauthorized practice of law and action is needed to protect the public interest before the next quarterly meeting of the Authorized Practice Committee, the chairperson, with the approval of the president, may file and verify a complaint or petition in the name of the North Carolina State Bar.

**History Note:** Effective February 3, 2000.

## SECTION .0300. DISASTER RESPONSE PLAN

### D.0301. The disaster response team.

(a) The disaster response team should be composed of the following:

(1) the president of the State Bar, or if the president is unavailable, another officer of the State Bar;

(2) the counsel or his or her designee;

(3) the director of communications or his or her designee;

(4) the president of the Young Lawyers Division of the North Carolina Bar Association ("YLD") or his or her designee;

(5) the chairperson of the Client Assistance Committee; and

(6) other persons, such as the applicable local bar president(s), appointed by the president as necessary or appropriate for response in each individual situation.

(b) Implementation of the disaster response plan shall be the decision of the president or, if he or she is unavailable, the president-elect, vice-president or immediate past-president.

(c) The counsel, or his or her designee, shall be the coordinator of the disaster response team ("coordinator"). If the president or other officer is unavailable to decide whether to implement the disaster response plan for a particular event, then and only then shall the coordinator be authorized to make the decision to implement the disaster response plan.

(d) It shall be the responsibility of the coordinator to conduct periodic educational programs regarding the disaster response plan and to report regularly to the Client Assistance Committee.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000.

### D.0302. General policy and objectives.

(a) *Rapid response.*

(1) It is essential that the State Bar establish an awareness and sensitivity to disaster situations.

(2) The disaster response plan will be disseminated through the publications of the State Bar and continuing legal education programs.

(3) The disaster response team shall be properly trained to respond to initial inquiries and appear at the site.

(4) The disaster response team will provide victims and/or their families with written materials when requested.

(b) *Effective mobilization of resources.*

(1) An appropriate press release shall be prepared and disseminated.

(2) The coordinator shall confirm the individuals who will make up the disaster response team.

(3) Individual assignments of responsibilities shall be made to members of the team by the coordinator.

(4) The coordinator shall arrange for the State Bar to be represented at any victims' assistance center established at the disaster site. The coordinator will request the YLD to assist the State Bar by providing additional staffing.

(5) The coordinator shall contact the local district attorney(s) and request that he or she prosecute any persons engaging in the unauthorized practice of law (N.C.G.S. 84-2.1, 84-4, 84-7 and 84-8); improper solicitation (N.C.G.S. 84-38); division of fees (N.C.G.S. 84-38); and/or the common law crime of barratry (frequently stirring up suits and quarrels between persons).

(c) *Publicity.*

(1) It is important to focus on the fact that disaster response is a public service effort.

(2) The disaster response team shall ensure approval and dissemination of an even-handed press release.

(3) The director of communications will be utilized for press contacts.

(4) It is important to ensure that the press release indicates that the State Bar is a resource designed to assist victims, if requested.

(d) *On-site representation.*

(1) It is normally desirable for the disaster response team to arrive at the site of the disaster as soon as possible.

(2) Only the president or president-elect or their designee will conduct press interviews on behalf of the State Bar.

(3) The availability of the State Bar at the site of the disaster should be made known to victims.

(4) The disaster response team shall establish a liaison with the State Emergency Management Division, Red Cross, Salvation Army, and other such organizations to provide assistance to victims and furnish written materials to these organizations.

(5) It is crucial that the State Bar not become identified with either side of any potential controversy.

(6) All members of the disaster response team must avoid making comments on the merits of claims that may arise from the disaster.

(e) *Dissemination of information to affected individuals.*

(1) The team shall emphasize in all public statements that the State Bar's major and only legitimate concern is for those persons affected by the disaster and the public interest.

(2) The State Bar's role is limited to monitoring compliance with its disciplinary rules, to requesting reports of any violation needing investigation, and to informing victims of rules concerning client solicitation.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.0303. Report on results.

(a) The coordinator will promptly convene a meeting of groups involved in the disaster to review the effectiveness of the plan in that particular disaster.
(b) The coordinator shall prepare a written report concerning significant matters relating to the disaster.
(c) The written report shall be submitted to the Client Assistance Committee as well as other involved organizations.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000.

## SECTION .0400. RULES AND REGULATIONS RELATING TO THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CERTAIN CRIMINAL CASES

### D.0401. Authority.

These rules and regulations are issued pursuant to the authority contained in G.S. 7A-459, Chapter 1013 of the Session Laws of 1969.

**History Note:** Statutory Authority G.S. 7A-459, Readopted Effective December 8, 1994.

### D.0402. Determination of indigency.

(a) Prior to the appointment of counsel on grounds of indigency, the court shall require the defendant to complete and sign under oath an affidavit of indigency in a form approved by the director of the Administrative Office of the Courts.
(b) Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally under oath to determine the truth of the statements made in the affidavit of indigency.
(c) The defendant's affidavit of indigency shall be filed in the records of the case.
(d) Upon the basis of the defendant's affidavit of indigency, his statements to the court on this subject, and such other information as may be brought to the attention of the court which shall be made a part of the record in the case, the court shall determine whether or not the defendant is in fact indigent.

**History Note:** Statutory Authority G.S. 7A-459, Readopted Effective December 8, 1994.

### D.0403. Waiver of counsel.

(a) Any defendant desiring to waive the right to counsel as provided in G.S. 7A-457 shall complete and sign under oath a waiver of counsel in a form approved by the director of the Administrative Office of the Courts. If such defendant waives the right to counsel but refuses to execute such waiver, the court shall so certify in a form approved by the director of the Administrative Office of the Courts.

(b) Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally to determine that the defendant has understandingly waived his or her right to counsel.

(c) The judge, upon being so satisfied, shall accept the waiver of counsel executed by the defendant, sign the same, and cause it to be filed in the record of the case.

**History Note:** Statutory Authority G.S. 7A-459, Readopted Effective December 8, 1994.

### D.0404. Appointment of counsel.

(a) The North Carolina State Bar shall adopt a model plan for the appointment of counsel for indigent persons charged with certain crimes or otherwise entitled to representation. Each judicial district bar shall adopt a plan or plans for the appointment of counsel by the public defender and/or the court to represent indigent persons which provides for the appointment of experienced counsel for persons charged with serious crimes, with respect to which the model plan may serve as a guide or example. A plan may be applicable to the entire district, or, at the election of the district bar, separate plans may be adopted by the district bar for use in each separate county within the district.

(b) Such plan or plans as adopted by the judicial district bar shall be certified to the council of the North Carolina State Bar for its approval, following which the plan or plans shall be certified to the clerk of superior court of each county to which each plan is applicable by the secretary of the North Carolina State Bar and shall constitute the method by which counsel shall be selected in said district for appointment to indigent defendants. Thereafter all appointments of counsel for indigent defendants in said district shall be made in conformity with such plan or plans, unless the trial judge or, where authorized, the public defender, in the exercise of his or her discretion deems it proper in furtherance of justice to appoint as counsel for an indigent defendant or defendants some lawyer or lawyers residing and practicing in the judicial district who is or are not on the plan or list certified to the clerk of superior court, and if so, the trial judge or, where authorized, the public defender, may appoint as counsel to represent an indigent defendant some lawyer or lawyers not on said plan or list residing and practicing in the judicial district.

(c) No attorney shall be appointed as counsel for an indigent defendant in a court of any district except the district in which he or she resides or maintains an office except by consent of counsel so appointed.

(d) No indigent defendant shall be entitled or permitted to select or specify the attorney who shall be assigned to defend him or her.

(e) The clerk of superior court of each county shall file or record in his or her office, maintain and keep current the plan for the assignment of counsel applicable to said county as certified to him by the secretary of the North Carolina State Bar.

(f) The clerk of superior court of each county shall keep a record of all counsel eligible for appointment under the plan applicable to said county as certified to him or her by the secretary of the North Carolina State Bar.

(g) Orders for the appointment of counsel shall be entered by the court in a form approved by the director of the Administrative Office of the Courts.

(h) Notwithstanding any other provision of this section or any plans or assigned counsel lists adopted by a district bar pursuant thereto, two counsel shall be appointed to represent an indigent defendant charged with murder where the state is seeking the death penalty.

(i)(1) Notwithstanding any other provisions of this section or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney

shall be appointed to represent at the trial level any indigent defendant charged with a capital crime

(A) who does not have a minimum of five years of experience in the general practice of law, provided that the court or, where authorized, the public defender, may in its or his or her discretion appoint as assistant counsel an attorney who has less experience;

(B) who has not been found by the court or, where authorized, the public defender, appointing him to have a demonstrated proficiency in the field of criminal trial practice.

(2) For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any district attorney's office.

(j)(1) Notwithstanding any other provision of this section or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime

(A) who does not have a minimum of five years of experience in the general practice of law, provided, that the court or, where authorized, the public defender, may in its or his or her discretion appoint as assistant counsel an attorney who has less experience;

(B) who has not been found by the trial judge or, where authorized, the public defender, to have a demonstrated proficiency in the field of appellate practice.

(2) For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any district attorney's office.

(3) Unless good cause is shown, an attorney representing the indigent defendant at the trial level shall represent him or her at the appellate level if the attorney is otherwise qualified under the provisions of this section.

(k) In those cases in which a public defender has authority to appoint a member of a judicial district bar to represent an indigent person, the public defender shall make the appointment pursuant to the procedures set out herein.

(l) It is contemplated that in those districts with a public defender, additional outside counsel will be appointed in those instances in which the volume of work handled by the public defender necessitates additional counsel and in those instances where a conflict of interest exists as regards the public defender and multiple defendants. Provided, when a conflict of interest on the part of the public defender necessitates additional counsel, the court shall appoint outside counsel.

(m) Nothing in these regulations or in the model plan shall be construed to prohibit assignment of otherwise qualified counsel to represent indigent defendants pursuant to specialized programs, plans or contracts which may be implemented from time to time to improve efficiency and economy where such programs, plans or contracts are consistent with the ends of justice and are approved by the Council of the North Carolina State Bar.

**History Note:** Statutory Authority G.S. 7A-459, Readopted Effective December 8, 1994.

### D.0405. Withdrawal by counsel.

(a) At any time during or pending the trial or retrial of a case, the trial judge, the appointing judge, or the resident judge of the district, upon application of the attorney, and for good cause shown, may permit said attorney to withdraw from the defense of the case.

(b) At any time after the trial of a case and during the pendency of an appeal, the trial attorney, for good cause shown, may apply to the appellate court for permission to withdraw from the defense of the case upon the appeal.

(c) Applications for permission to withdraw as counsel shall be made only for good cause where compelling reasons or actual hardship exists.

**History Note:** Statutory Authority G.S. 7A-459, Readopted Effective December 8, 1994.

### D.0406. Procedure for payment of compensation.

(a) Upon completion of the representation of an indigent defendant by appointed counsel in the trial court, the trial judge shall, upon application, enter an order allowing such compensation as is provided in G.S. 7A-458.

(b) Upon the completion of any appeal, the trial judge, the resident judge or the judge holding the courts of the district, shall, upon application, enter a supplemental order in the cause allowing the appointed attorney upon the appeal such additional compensation as may be appropriate. This rule does not prohibit payment of interim fees pending final determination of any appeal.

(c) Orders for the payment of compensation to counsel for representation of indigent defendants shall be entered by the judge in a form approved by the director of the Administrative Office of the Courts.

(d) Two certified copies of the order for the payment of fees shall be forwarded by the clerk of the superior court to the Administrative Office of the Courts, attention: assistant director, Raleigh, North Carolina, for payment.

(e) Upon the entry of the order for the payment of counsel fees, the court shall upon final conviction likewise enter a judgment against the defendant for whom counsel was assigned in the amount allowed as counsel fees, said judgment to be in the form approved by the director of the Administrative Office of the Courts.

(f) Counsel appointed for the representation of indigent defendants shall not accept any compensation other than that awarded by the court.

**History Note:** Statutory Authority G.S. 7A-459, Readopted Effective December 8, 1994; Amended effective May 4, 2000.

## SECTION .0500. MODEL PLAN FOR APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CERTAIN CRIMINAL CASES

### D.0501. Purpose.

The purpose of these regulations is to provide for effective representation of indigent criminal defendants at all stages of trial and appellate proceedings.

**History Note:** Statutory Authority G.S. 7A-459, Readopted Effective December 8, 1994.

### D.0502. Applicability.

These regulations apply to any criminal case arising in the _____ Judicial District in which the court has determined that the defendant is entitled to the appointment of counsel. Reference to the singular shall, as appropriate, be construed to include the plural.

**History Note:** Statutory Authority G.S. 7A-459, Readopted Effective December 8, 1994.

**D.0503. Lists of attorneys.**

(a) Any attorney engaged in the private practice of law primarily in the judicial district who

(1) maintains an office in the judicial district; and

(2) practices criminal law in the courts of the _____ Judicial District to any appreciable extent, or intends or desires to do so, may be placed on one of three lists governing the appointment of counsel in criminal cases involving indigent persons. No other attorney will be placed on the lists.

(b) Attorneys included on the first list may only be appointed to represent defendants charged with misdemeanors or felonies classified as Class H or Class I.

(c) Attorneys on the second list may be appointed to represent defendants charged with misdemeanors or felonies other than capital crimes, provided that an attorney may request the Committee on Indigent Appointments that he not be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

(d) Attorneys on the third list may be appointed to represent defendants charged with any crimes, provided that an attorney may request the Committee on Indigent Appointments that he or she not be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

(e) The Committee on Indigent Appointments shall, prior to the effective date of these regulations, meet and develop three lists of attorneys of the types described herein from the roster of attorneys currently accepting appointments in indigent cases in the _____ Judicial District. The first list shall include all such attorneys who have been licensed less than two years or who have been admitted by comity. The second list shall include all such attorneys who have been licensed for two years or more. The third list shall include all such attorneys who have had not less than five years experience in the general practice of law and who have demonstrated proficiency in the field of criminal trial practice. With respect to these initial lists, any other requirement not otherwise met by any listed attorney is hereby waived unless the committee determines that it ought not to be waived.

(f) Subject to the exceptions contained in Rule .0503(e) above, requirements for inclusion on the three lists are as follows:

(1) an attorney licensed to practice law in North Carolina may be included on the first list if the Committee on Indigent Appointments finds that

(A) the attorney is competent to represent criminal defendants charged with misdemeanors and felonies;

(B) two attorneys who have engaged in the practice of law in the _____ Judicial District for not less than three years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he or she is competent to represent criminal defendants charged with misdemeanors and felonies and that they recommend that he or she be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation.

(2) an attorney who has been licensed to practice law in North Carolina for not less than two years or who has been admitted to the North Carolina State Bar by comity may be included on the second list if the committee finds that

(A) the attorney has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters;

(B) two attorneys who have engaged in the private practice of law in the _____ Judicial District for not less than four years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he or she is competent to represent criminal defendants charged with felonies and that they recommend that he or she be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation;

(C) the attorney is competent to represent criminal defendants charged with felonies.

(3) an attorney who has been licensed to practice law in North Carolina for not less than five years may be included on the third list if the committee finds that

(A) the attorney has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters;

(B) two attorneys who have engaged in the private practice of law in the _____ Judicial District for not less than five years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he or she is competent to represent defendants charged with capital crimes and that they recommend that he or she be included on the third list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation;

(C) the attorney has not less than five years experience in the general practice of law, provided that the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office;

(D) the attorney is competent to represent criminal defendants charged with capital crimes.

(g) The Committee on Indigent Appointments shall review the lists not less than once a year to ensure that the lists are current and that the attorneys whose names appear on the lists meet the qualifications set out herein.

**History Note:** Statutory Authority G.S. 7A-459, Readopted effective December 8, 1994; Amended effective November 7, 1996; Amended effective May 4, 2000.

### D.0504. Committee on indigent appointments.

(a) A Committee on Indigent Appointments is hereby established to assist in the implementation of these regulations. The committee shall have authority to act when the regulations become effective.

(b) All members of the committee shall be attorneys who

(1) are included on one of the appointment lists;

(2) have practiced criminal law in the judicial district, whether as a prosecutor or defense counsel, for not less than five years;

(3) are knowledgeable about practicing attorneys in the _____ Judicial District.

(c) The committee shall consist of members appointed by the president of the judicial district bar. At least one member shall be appointed from each county in the district. Members of the committee shall be appointed for terms of two years, except that initially a minority of the members shall be designated to serve one year terms in order to stagger terms. The appointments shall be made by letter, a copy of which shall be maintained in the records of the committee. No member shall serve two consecutive terms, except that a person who has been appointed to replace a member who did not

complete his term may be appointed to a full term following his completion of the partial term. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced for his term as soon as practicable.

(d) The president of the judicial district bar shall appoint one of the members as chairperson of the committee, who shall serve at the pleasure of the president as shall all other members of the committee.

(e) The committee shall meet at the call of the chairperson upon reasonable notice. The first meeting shall be on _____. Thereafter, the committee shall meet as often as is necessary to dispatch its business.

(f) The committee shall have complete authority to accomplish the following:

(1) supervise the administration of these regulations;

(2) review requests from attorneys concerning their placement on any list and obtain information pertaining to such placement;

(3) approve or disapprove an attorney's addition to or deletion from any list or the transfer of any attorney from one list to another, provided that an attorney's request to be deleted from a list or transferred to a lower numbered list shall not require committee approval;

(4) establish procedures with which to carry out its business;

(5) interview attorneys seeking placement on any list and witnesses for or against such placement.

(g) A majority of the committee must be present at any meeting in order to constitute a quorum. The committee may take no action unless a quorum is present. A majority vote in favor of a motion or any proposed action shall be required in order for the motion to pass or for the action to be taken.

(h) The committee shall meet in private, except it may invite persons to make limited appearances to be interviewed. Discussions of the committee, its records, and its actions shall be treated as confidentially as possible. The names of the members of the committee shall not be confidential.

**History Note:** Statutory Authority G.S. 7A-459, Readopted Effective December 8, 1994.

### D.0505. Placement of attorneys on list.

(a) Any attorney who wishes to have his or her name added to or deleted from any list, or to have his or her name transferred from one list to another, shall file a written request with the administrator. The request shall include information that will facilitate the committee's determination whether the attorney meets the standards set forth in Rule .0503 above for placement on a certain list. The written statements of competency required by Rule .0503 above must be attached to the request.

(b) The administrator shall maintain records for the committee and shall advise each member of the committee of the name of the requesting attorney and the nature of this request before the committee meets to review the request. The administrator shall assure that all requests properly filed are brought to the committee's attention at the next meeting at which it is practicable for the committee to review the request.

(c) The administrator shall assure that all district court judges, resident superior court judges, any special superior court judge with a permanent office in the judicial district, and the district attorney for the _____ Judicial District, and the district's public defender, if any, are advised of any request concerning placement on any list so that such officials will have an opportunity to comment on the request to the committee.

(d) When the committee meets to review placement requests, it may require any requesting attorney to appear before it to be interviewed and may require

information in addition to that submitted in the request. Any member of the committee may discuss requests with other members of the bar in a confidential manner and may relate information obtained thereby to the other members. Rules of evidence do not apply with respect to the review of requests. The committee may hold a request in abeyance for a reasonable period of time while obtaining additional information.

(e) The committee shall determine whether an attorney requesting to be added to a list when he or she is not currently on any list or to be transferred from a lower numbered list to a higher numbered list (such as from the first list to the second list) meets all the applicable standards set out in Rule .0503 above. The request shall be granted or the addition or transfer allowed if the committee finds that he or she does meet all the standards. Conversely, the request shall be denied if the committee does not find that he or she meets all the standards. The findings shall be reduced to writing and kept in the regular records of the committee by the administrator. The committee shall assure that the requesting attorney is given prompt notice of the action taken with respect to his or her request and is advised of the basis for denial if the request is not granted.

(f) If at any time it reasonably appears to the committee that an attorney no longer meets a standard set forth in Rule .0503 above for the list on which he or she is placed or that he or she can no longer meet the responsibilities of representing indigent defendants with respect to such list, the committee shall direct the attorney to show cause why he or she should not be deleted from the list or transferred from a higher numbered list to a lower numbered list. If the attorney cannot show sufficient cause, the committee may take appropriate action, including suspending the attorney from receiving appointments in indigent cases for a definite or indefinite time, or deleting his or her name from the list he or she is on, or transferring him or her from a higher numbered list to a lower numbered list. Appropriate written findings shall be made by the committee in this regard, and the attorney shall be informed of the basis of any action taken.

(g) An attorney whose name is deleted from a list or who is transferred to another list by the committee may appeal the committee's action to the senior resident superior court judge of the _____ Judicial District. In such a case the resident superior court judge will make the final decision regarding the deletion or transferral of the attorney.

(h) Whenever an attorney who provides information to the committee, collectively or through any member, requests that his or her name not be used or that his or her information be treated confidentially, his or her request shall be granted unless doing so results in manifest unfairness.

**History Note:** Statutory Authority G.S. 7A-459, Readopted Effective December 8, 1994.

## D.0506. Appointment procedure (noncapital cases).

(a) The administrator shall provide the clerk in each courtroom in the district and superior criminal courts of the _____ Judicial District with current lists of attorneys subject to appointment in indigent cases. Attorneys shall be appointed only in accordance with the lists on which they appear and only in cases to be tried in counties in which they maintain offices unless they agree in advance to accept cases from other counties.

(b) Each courtroom clerk shall maintain a record of attorneys subject to appointment to represent indigents. Beside each attorney's name shall appear the number of any list he or she is on. The court shall proceed in alphabetical sequence in appointing attorneys. If an attorney's name is passed over because he or she is not on a list relating to a particular charge, the court shall return

to his or her name for the next appointment consistent with his or her lists. The court may pass over the name of any attorney known not to be reasonably available because of vacation, illness, or other reasons.

(c) In its discretion, the court may appoint an attorney in any case without regard to sequence or an attorney not maintaining an office in the county where the case is to be tried.

(d) The clerk shall provide notice of the appointment to the attorney concerned as soon as possible. Further, the clerk shall advise the defendant of the name of his or her attorney.

(e) The court may appoint an attorney to represent more than one defendant in a single case.

(f) In those cases in which the public defender cannot serve, and is authorized to appoint a substitute member of the bar to represent an indigent defendant, the public defender shall consult the current lists of attorneys subject to appointment in indigent cases maintained by the court administrator and referred to in Rule .0503 above and shall appoint the next eligible attorney on the list. The public defender shall proceed in sequence in appointing attorneys but may pass over the name of any attorney known to be unavailable because of vacation, illness, or other reasons, or, in his or her discretion, where justice so requires.

(g) If a judge is not reasonably available to appoint counsel to represent an indigent defendant, the clerk of court shall appoint the next eligible attorney on the list. Appointments of counsel by the clerk shall be subject to review and approval by the judge.

**History Note:** Statutory Authority G.S. 7A-459, Readopted Effective December 8, 1994.

### D.0507. Appointments in capital cases.

(a) In addition to the provisions of Rule .0506 above, the provisions of this rule shall apply to the appointment of counsel in capital cases.

(b) A counsel and an assistant counsel shall be appointed to represent an indigent defendant charged with murder, in cases in which the state is seeking the death penalty. The assistant counsel may be on the second list or the third list of attorneys.

(c)(1) No attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime

(A) who has less than five years experience in the general practice of law, provided that the court may, in its discretion, appoint as assistant counsel an attorney who has less experience; or

(B) who has not been found by the court appointing him or her to have a demonstrated proficiency in the field of criminal trial practice.

(2) For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office.

**History Note:** Statutory Authority G.S. 7A-459, Readopted Effective December 8, 1994.

### D.0508. Appellate appointments.

(a) If a criminal defendant who has given notice of appeal from a conviction is found to be eligible, because of indigency, for appointment of counsel at the appellate level, the attorney representing the defendant at the trial level may be appointed to represent the defendant at the appellate level. If the attorney representing the defendant at the trial level was retained, he may be appointed

to represent the defendant at the appellate level even though he or she does not meet all the requirements of Rule .0503 above or the other pertinent provisions of these regulations. For good cause, the attorney at the trial level may be relieved of responsibility for the appeal. Whenever it is otherwise necessary to appoint an attorney to represent an indigent person at the appellate level, the attorney appointed shall be selected in a manner consistent with appointment of counsel at the trial level. If the trial attorney is not appointed, the appellate defender's office or any other qualified attorney may be appointed, in a manner consistent with these rules, to represent the defendant at the appellate level.

(b)(1) No attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime

(A) who has less than five years of experience in the general practice of law, provided, however, that the court or, where authorized, the public defender, may, as a matter of discretion, appoint as assistant counsel an attorney who has less experience; or

(B) who has not been found by the court or the public defender to have a demonstrated proficiency in the field of appellate practice.

(2) For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office.

**History Note:** Statutory Authority G.S. 7A-459, Readopted Effective December 8, 1994.

## D.0509. Administration.

(a) The senior resident superior court judge for the judicial district shall designate a person to serve as administrator of these regulations.

(b) The administrator will perform the duties described previously and particularly shall

(1) maintain records relating to these regulations and to the actions of the Committee on Indigent Appointments;

(2) keep current the three lists of attorneys;

(3) assist the courtroom clerks and the clerk of superior court in carrying out these regulations;

(4) attend meetings of the committee as appropriate;

(5) inform the judges of the district and the district attorney and the members of the committee of requests by attorneys concerning placement on any lists;

(6) perform other administrative tasks necessary to the implementation of these regulations.

(c) The administrator shall have such office, supplies, and equipment as can be provided by the senior resident superior court judge or the committee.

(d) The clerk of superior court of each county in the judicial district shall file and keep current these regulations for the assignment of counsel as certified to him or her by the secretary of the North Carolina State Bar.

(e) The clerk of superior court of each county in the _____ Judicial District shall keep a record of all counsel eligible for appointment under these regulations and a permanent record of all appointments made in his or her county.

**History Note:** Statutory Authority G.S. 7A-459, Readopted Effective December 8, 1994.

### D.0510. Miscellaneous.

(a) These regulations are issued pursuant to Rule .0404, Subchapter D, Chapter 1, Title 27 of the North Carolina Administrative Code in accordance with G.S. 7A-459. Nothing contained herein shall be construed or applied inconsistently with the regulations established by the North Carolina State Bar Council or with other provisions of state law.

(b) It is recognized that the court has the inherent discretionary power in any case to decline to appoint a particular attorney to represent an indigent person. It is also recognized that occasionally the court may determine that the interests of justice would be best served by appointing a particular lawyer to handle a particular case even though he or she is not next in sequence or does not maintain an office in the county where the case is to be tried.

(c) These regulations shall be construed liberally in order to carry out the purpose stated in Rule .0501 above.

(d) These regulations shall become effective on _____, and shall supersede any existing regulations or plan concerning the appointment of counsel in indigent cases.

APPROVED AND PROMULGATED THIS _____ DAY OF _____, 199__.

**History Note:** Statutory Authority G.S. 7A-459, Readopted Effective December 8, 1994.

## SECTION .0600. RULES GOVERNING THE LAWYER ASSISTANCE PROGRAM

### D.0601. Purpose.

The purpose of the lawyer assistance program is to: (1) protect the public by assisting lawyers and judges who are professionally impaired by reason of substance abuse, addiction, or debilitating mental condition; (2) assist impaired lawyers and judges in recovery; and (3) educate lawyers and judges concerning the causes of and remedies for such impairment.

**History Note:** Statutory Authority G.S. 84-22; G.S. 84-23, Readopted Effective December 8, 1994; Amended effective February 3, 2000.

### D.0602. Authority.

The council of the North Carolina State Bar hereby establishes the Lawyer Assistance Program Board (the board) as a standing committee of the council. The board has the authority to establish policies governing the State Bar's lawyer assistance program as needed to implement the purposes of this program. The authority conveyed is not limited by, but is fully coextensive with, the authority previously vested in State Bar's predecessor program, the Positive Action for Lawyers (PALS) program.

**History Note:** Statutory Authority G.S. 84-22; G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000.

### D.0603. Operational responsibility.

The board shall be responsible for operating the lawyer assistance program subject to the statutes governing the practice of law, the authority of the council, and the rules of the board.

**History Note:** Adopted February 3, 2000.

### D.0604. Size of board.

The board shall have nine members. Three of the members shall be councilors of the North Carolina State Bar at the time of appointment; three of the members shall be non-lawyers or lawyers with experience and training in the fields of mental health, substance abuse or addiction; and three of the members shall be lawyers who are currently volunteers to the lawyer assistance program. No member of the Grievance Committee shall be a member of the board.

**History Note:** Adopted February 3, 2000.

### D.0605. Appointment of members; When; Removal.

The initial members of the board shall be appointed at the next meeting of the council following the creation of the board. Thereafter, members shall be appointed or reappointed, as the case may be, at the first quarterly meeting of the council each calendar year, provided that a vacancy occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

**History Note:** Adopted February 3, 2000.

### D.0606. Term of office and succession.

The members of the board shall be divided into three classes of equal size to serve in the first instance for terms expiring one, two and three years, respectively, after the first quarterly meeting of the council following creation of the board. Of the initial board, three members (one councilor, one mental health, substance abuse or addiction professional, and one lawyer-volunteer to the lawyer assistance program) shall be appointed to terms of one year; three members (one councilor, one mental health, substance abuse or addiction professional, and one lawyer-volunteer) shall be appointed to terms of two years; and three members (one councilor, one mental health, substance abuse or addiction professional, and one lawyer-volunteer) shall be appointed to terms of two years; and three members (one councilor, one mental health, substance abuse or addiction professional, and one lawyer-volunteer) shall be appointed to terms of three years. Thereafter, the successors in each class of board members shall be appointed to serve for terms of three years. No member shall serve more than two consecutive three-year terms, in addition to service prior to the beginning of a full three-year term, without having been off the board for at least three years.

**History Note:** Adopted February 3, 2000.

### D.0607. Appointment of chairperson.

The chairperson of the board shall be appointed by the council annually at he time of its appointment of board members. The chairperson may be re-appointed for an unlimited number of one-year terms. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and shall represent the board in its dealings with the public. A vacancy occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

**History Note:** Adopted February 3, 2000.

### D.0608. Appointment of vice-chairperson.

The vice-chairperson of the board shall be appointed by the council annually at the time of its appointment of board members. The vice-chairperson may be reappointed for an unlimited number of one-year terms. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board. A vacancy occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

**History Note:** Adopted February 3, 2000.

### D.0609. Source of funds.

Funding for the program shall be provided from the general and appropriate special funds of the North Carolina State Bar and such other funds as may become available by grant or otherwise.

**History Note:** Adopted February 3, 2000.

### D.0610. Meetings.

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Carolina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson, or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, electronic mail or telephone. A quorum of the board for conducting its official business shall be a majority of the members serving at a particular time.

**History Note:** Adopted February 3, 2000.

### D.0611. Annual report.

The board shall prepare at least annually a report of its activities and shall present the same at the annual meeting of the council.

**History Note:** Adopted February 3, 2000.

### D.0612. Powers and duties of the board.

In addition to the powers and duties set forth elsewhere in these rules, the board shall have the following powers and duties:

(1) to exercise general supervisory authority over the administration of the lawyer assistance program consistent with these rules;

(2) to implement programs to investigate and evaluate reports that a lawyer's ability to practice law is impaired because of substance abuse, depression, or other debilitating mental condition; to confer with any lawyer who is the subject of such a report; and, if the report is verified, to provide referrals and assistance to the impaired lawyer;

(3) to adopt and amend regulations consistent with these rules with the approval of the council;

(4) to delegate authority to the staff of the lawyer assistance program subject to the review of the council;

(5) to delegate authority to investigate, evaluate, and intervene with impaired lawyers to committees composed of qualified volunteer lawyers and non-lawyers;

(6) to submit an annual budget for the lawyer assistance program to the council for approval and to ensure that expenses of the board do not exceed the annual budget approved by the council;

(7) to report annually on the activities and operations of the board to the council and make any recommendations for changes in the rules or methods of operation of the lawyer assistance program;

(8) to implement programs to investigate, evaluate, and intervene in cases referred to it by a disciplinary body, and to report the results of the investigation and evaluation to the referring body;

(9) to promote programs of education and awareness for lawyers, law students, and judges about the causes and remedies of lawyer impairment;

(10) to train volunteer lawyers to provide peer support, assistance and monitoring for impaired lawyers; and

(11) to administer the PALS revolving loan fund or other similar fund that may be established for the board's program to assist lawyers who are impaired because of a debilitating mental condition.

**History Note:** Adopted February 3, 2000.

### D.0613. Confidentiality.

The lawyer assistance program is an approved lawyers' assistance program in accordance with the requirements of Rule 1.6(b) of the Revised Rules of Professional Conduct. Except as noted herein and otherwise required by law, information received during the course of investigating, evaluating, and assisting an impaired lawyer shall be privileged and held in the strictest confidence by the staff of the lawyer assistance program, the members of the board and the members of any committee of the board. If a report of impaired condition is made by members of a lawyers's family, and there is good cause shown, the board may, in its discretion, release information to appropriate members of the lawyer's family if the board or its duly authorized committee determines that such disclosure is in the best interest of the impaired lawyer.

**History Note:** Statutory Authority G.S. 84-22; G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000.

### D.0614. Referral to the Grievance Committee.

If an investigation and evaluation clearly indicate that a lawyer's impairment due to substance abuse or mental condition is detrimental to the public, the courts, or the legal profession, the board shall take appropriate action, including, if warranted, the filing of a grievance. Notwithstanding the foregoing, no grievance shall be filed by the board or any member thereof against a lawyer using information received by the board or one of its committees if the lawyer, or a member of the lawyer's family, initially sought the assistance of a program administered by the board or the lawyer is cooperating in good faith with a program administered by the board.

**History Note:** Statutory Authority G.S. 84-22; G.S. 84-23; G.S. 84-28, Readopted effective December 8, 1994; Amended effective February 3, 2000.

### D.0615. Regional chapters.

A committee may, under appropriate rules and regulations promulgated by the board, establish regional chapters, composed of qualified volunteer lawyers and non-lawyers. A regional chapter may perform any or all of the duties and functions set forth in Section .0600 of this subchapter to the extent provided by the rules of the board.

**History Note:** Statutory Authority G.S. 84-22; G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000.

### D.0616. Suspension for impairment, reinstatement.

If it appears that a lawyer's ability to practice law is impaired by substance abuse and/or chemical addiction, the board, or its duly authorized committee, may petition any superior court judge to issue an order pursuant to the court's inherent authority, suspending the lawyer's license to practice law in this state for up to 180 days.

(a) The petition shall be supported by affidavits of at least two persons setting out the evidence of the lawyer's impairment.

(b) The petition shall be signed by the executive director of the lawyer assistance program and the executive director of the State Bar.

(c) The petition shall contain a request for a protective order sealing the petition and all proceedings respecting it.

(d) Except as set out in Rule .0606(j) below, the petition shall request the court to issue an order requiring the attorney to appear in not less than 10 days and show cause why the attorney should not be suspended from the practice of law. No order suspending an attorney's license shall be entered without notice and a hearing, except as provided in Rule .0606(j) below.

(e) The order to show cause shall be served upon the attorney, along with the State Bar's petition and supporting affidavits, as provided in Rule 4 of the North Carolina Rules of Civil Procedure.

(f) At the show cause hearing, the State Bar shall have the burden of proving by clear, cogent, and convincing evidence that the lawyer's ability to practice law is impaired.

(g) If the court finds that the attorney is impaired, the court may enter an order suspending the attorney from the practice of law for up to 180 days. The order shall specifically set forth the reasons for its issuance.

(h) At any time following entry of an order suspending an attorney, the attorney may petition the court for an order reinstating the attorney to the practice of law.

(i) A hearing on the reinstatement petition will be held no later than 10 days from the filing of the petition, unless the suspended lawyer agrees to a continuance. At the hearing, the suspended lawyer will have the burden of establishing by clear, cogent, and convincing evidence the following: (1) the lawyer's ability to practice law is no longer impaired; (2) the lawyer's debilitating condition is being treated and/or managed; (3) it is unlikely that the inability to practice law due to the impairment will recur; and (4) it is unlikely that the interest of the public will be unduly threatened by the reinstatement of the lawyer.

(j) No suspension of an attorney's license shall be allowed without notice and a hearing unless

(1) the State Bar files a petition with supporting affidavits, as provided in Rule .0606(a)-(c) above.

(2) the State Bar's petition and supporting affidavits demonstrate by clear, cogent, and convincing evidence that immediate and irreparable harm, injury, loss, or damage will result to the public, to the lawyer who is the subject of the petition, or to the administration of justice before notice can be given and a hearing had on the petition.

(3) the State Bar's petition specifically seeks the temporary emergency relief of suspending ex parte the attorney's license for up to 10 days or until notice be given and a hearing held, whichever is shorter, and the State Bar's petition requests the court to endorse an emergency order entered hereunder with the hour and date of its entry.

(4) the State Bar's petition requests that the emergency suspension order expire by its own terms 10 days from the date of entry, unless, prior to the expiration of the initial 10-day period, the court agrees to extend the order for an additional 10-day period for good cause shown or the respondent attorney agrees to an extension of the suspension period.

(k) The respondent attorney may apply to the court at any time for an order dissolving the emergency suspension order. The court may dissolve the emergency suspension order without notice to the State Bar or hearing, or may order a hearing on such notice as the court deems proper.

(l) The North Carolina State Bar shall not be required to provide security for payment of costs or damages prior to entry of a suspension order with or without notice to the respondent attorney.

(m) No damages shall be awarded against the State Bar in the event that a restraining order entered with or without notice and a hearing is dissolved.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-28(i), Readopted effective December 8, 1994; Amended July 21, 1995; Amended effective February 3, 2000.

## D.0617. Consensual suspension.

Notwithstanding the provisions of Rule .0616 of this subchapter, the court may enter an order suspending a lawyer's license if the lawyer consents to such suspension. The order may contain such other terms and provisions as the parties agree to and which are necessary for the protection of the public.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-28(i), Readopted effective December 8, 1994; Amended effective February 3, 2000.

## D.0618. Agents of the State Bar.

All members of the board and its duly appointed committees shall be deemed to be acting as agents of the State Bar when performing the functions and duties set forth in this subchapter.

**History Note:** Statutory Authority G.S. 84-22; G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000.

### D.0619. Judicial Committee.

The Judicial Committee of the Lawyer Assistance Program Board shall implement a program of intervention for members of the judiciary with substance abuse problems affecting their professional conduct. The committee shall consist of at least two members of the state's judiciary. The committee will be governed by the rules of the Lawyers Assistance Program Board where applicable. Rules .0616 and .0617 of this subchapter are not applicable to the committee.

**History Note:** Statutory Authority G.S. 84-22; G.S. 84-23, Readopted effective December 8, 1994; Amended effectivce February 3, 2000.

### D.0620. Rehabilitation contracts for lawyers impaired by substance abuse.

The board, or its duly authorized committee has the authority to enter into rehabilitation contracts with lawyers suffering from substance abuse including contracts that provide for alcohol and/or drug testing. Such contracts may include the following conditions among others:

(a) that upon receipt of a report of a positive alcohol or drug test for a substance prohibited under the contract, the contract may be amended to include additional provisions considered to be in the best rehabilitative interest of the lawyer and the public; and

(b) that the lawyer stipulates to the admission of any alcohol and/or drug-testing results into evidence in any in camera proceeding brought under this section without the necessity of further authentication.

**History Note:** Adopted March 7, 1996; Amended effective February 3, 2000.

### D.0621. Evaluations for substance abuse, alcoholism and/or other chemical addictions.

(a) *Notice of Need for Evaluation.* The Lawyer Assistance Program Board, or its duly authorized committee, may demand that a lawyer obtain a comprehensive evaluation of his or her condition by an approved addiction specialist if the lawyer's ability to practice law is apparently being impaired by substance abuse, alcoholism and/or other chemical addictions. This authority may be exercised upon recommendation of the director of the lawyer assistance program and the approval of at least three members of the board or appropriate committee, which shall include at least one person with professional expertise in chemical addiction. Written notice shall be provided to the lawyer informing the lawyer that the board has determined that an evaluation is necessary and demanding that the lawyer obtain the evaluation by a date set forth in the written notice.

(b) *Failure to Comply.* If the lawyer does not obtain an evaluation, the director of the lawyer assistance program shall obtain the approval of the chairperson of the board, or the chairperson of the appropriate committee of the board, to file a motion to compel an evaluation pursuant to the authority set forth in G.S. § 84-28(i) and (j) and in accordance with the procedure set forth in Rule 35 of the North Carolina Rules of Civil Procedure. All pleadings

in such a proceeding shall be filed under seal and all hearings shall be held in camera. Written notice of a motion to compel an examination shall be served upon the lawyer in accordance with the North Carolina Rules of Civil Procedure at least ten days before the hearing on the matter.

**History Note:** Adopted February 3, 2000.

### D.0622. Grounds for compelling an evaluation.

An order compelling the lawyer to obtain a comprehensive evaluation by an addiction specialist may be issued if the board established that the evaluation will assist the lawyer and the lawyer assistance program to assess the lawyer's condition and any risk that the condition may present to the public, and to determine an appropriate treatment for the lawyer.

**History Note:** Adopted February 3, 2000.

### D.0623. Failure to comply with an order compelling an evaluation.

If a lawyer fails to comply with an order compelling a comprehensive evaluation by an addiction specialist, the board, or its duly authorized committee, may file a contempt proceeding to be held in camera. If the lawyer fails to comply with a contempt order, the lawyer shall be deemed to have waived confidentiality respecting communications made by the lawyer to the board or its committee. The board, or its duly authorized committee, may seek further relief and may file motions or proceedings in open court.

**History Note:** Adopted February 3, 2000.

## SECTION .0700. PROCEDURES FOR FEE DISPUTE RESOLUTION

### D.0701. Purpose and implementation.

The purpose of the Fee Dispute Resolution Program shall be to determine the appropriate fee for legal services rendered. The State Bar shall implement a fee dispute resolution program under the auspices of the Client Assistance Committee (the committee), which shall be offered to clients and their lawyers at no cost.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000; Amended effective May 4, 2000.

### D.0702. Jurisdiction.

The committee shall have jurisdiction over all disagreements concerning the fees and expenses charged or incurred for legal services provided by an attorney licensed to practice law in North Carolina arising out of a client-lawyer relationship. Jurisdiction shall also extend to any person, other than the client, who pays the fee of such an attorney.

The committee shall not have jurisdiction over the following:

(1) disputes concerning fees or expenses established by a court, federal or state administrative agency, or federal or state official;

(2) disputes involving services that are the subject of a pending grievance complaint alleging the violation of the Revised Rules of Professional Conduct;

(3) fee disputes that are or were the subject of litigation;

(4) fee disputes between lawyers and service providers, such as court reporters and expert witnesses;

(5) fee disputes between lawyers and individuals with whom the lawyer had no client-lawyer relationship, except in those case where the fee has been paid by a person other than the client; and

(6) disputes concerning fees charged for ancillary services provided by the lawyer not involving the practice of law.

The committee shall encourage mediated settlement of fee disputes falling within its jurisdiction pursuant to Rule .0706 of this subchapter.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000; Amended effective May 4, 2000.

### D.0703. Coordinator of fee dispute resolution.

The secretary-treasurer of the North Carolina State Bar shall designate a member of the staff to serve as coordinator of the fee dispute program. The coordinator shall develop forms, maintain records, and provide statistics on the fee dispute resolution program. The coordinator shall also assist the chairperson of the committee in developing an annual report to the council.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000; Amended effective May 4, 2000.

### D.0704. Reserved.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective February 3, 2000; Amended effective May 4, 2000.

### D.0705. Selection of mediators.

The State Bar will select a pool of qualified mediators. Selected mediators shall be certified by the North Carolina Dispute Resolution Commission or have a minimum of three (3) years experience as a mediator.

**History Note:** Statutory Authority G.S. 84-23, Adopted May 4, 2000.

### D.0706. Processing requests for fee dispute resolution.

(a) Requests for fee dispute resolution shall be timely submitted in writing to the coordinator of fee dispute resolution addressed to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. The attorney must allow at least 30 days after the client shall have received written notice of the fee dispute resolution program before filing a lawsuit. An attorney may file a lawsuit prior to expiration of the required 30-day notice period or after the petition is filed by the client if such is necessary to preserve a claim. However, the attorney must not take any further steps to pursue the litigation until he/she complies with the provision of the fee dispute resolution rules. Clients may request fee dispute resolution at any time prior to the filing of a lawsuit. No filing fee shall be required. The request should state with clarity and brevity the facts of the fee dispute and the names and addresses of the parties. It should also state that, prior to requesting fee dispute resolution, a reasonable attempt was made to resolve the dispute by agreement, the matter has not been adjudicated, and the matter is not presently the subject of litigation.

(b) The coordinator of fee dispute resolution or his/her designee shall investigate the request to determine its suitability for fee dispute resolution. If

it is determined that the matter is not suitable for fee dispute resolution, the coordinator shall prepare a brief written report setting forth the facts and a recommendation for dismissal. Grounds for dismissal include, but are not limited to, the following:

(1) the request is frivolous or moot;

(2) the absence of jurisdiction; or

(3) the facts as stated support the conclusion that the fee was earned and is not excessive.

The report shall be forwarded to the chairperson of the committee. If the chairperson of the Client Assistance Committee of the State Bar concurs with the recommendation, the matter shall be dismissed and the parties notified.

(c) If the chairperson disagrees with the recommendation for dismissal, or the fee dispute coordinator concludes that a matter is suitable for fee dispute resolution, an attempt will be made through informal means to resolve the issue. If informal methods are not successful, the parties will be notified and the case scheduled for mediation.

**History Note:** Statutory Authority G.S. 84-23, Adopted May 4, 2000.

## D.0707. Mediation proceedings.

(a) The coordinator shall assign the case to a mediator who shall conduct a mediated settlement conference. The fee dispute coordinator or mediator shall be responsible for reserving a place and making arrangements for the conference at a time and place convenient to all parties.

(b) The attorney against whom a request for fee arbitration is filed must attend the mediated settlement conference in person and may not send another representative of his or her law firm. If a party fails to attend a mediated settlement conference without good cause, the mediator may either reschedule the conference or recommend dismissal.

(c) The mediator shall at all times be in control of the conference and the procedures to be followed. The mediator may communicate privately with any participant prior to and during the conference. Any private communication with a participant shall be disclosed to all other participants at the beginning of the conference. The mediator shall define and describe the following at the beginning of the conference:

(1) the process of mediation;

(2) the differences between mediation and other forms of conflict resolution;

(3) that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(4) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(5) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(6) The duties and responsibilities of the mediator and the participants; and

(7) That any agreement reached will be reached by mutual consent, reduced to writing and signed by all parties.

The mediator has a duty to be impartial and advise all participants of any circumstance bearing on possible bias, prejudice, or partiality. It is the duty of the mediator timely to determine and declare that an impasse exists and that the conference should end.

**History Note:** Statutory Authority G.S. 84-23, Adopted May 4, 2000.

### D.0708. Finalizing the agreement.

If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel, if any, prior to leaving the conference.

**History Note:** Statutory Authority G.S. 84-23, Adopted May 4, 2000.

### D.0709. Record keeping.

The coordinator of fee dispute resolution shall keep a record of each request for fee dispute resolution. The record must contain the following information:
(1) the client's name;
(2) date of the request;
(3) the lawyer's name;
(4) the district in which the lawyer resides or maintains a place of business;
(5) how the dispute was resolved (dismissed for non-merit, mediated agreement, arbitration, etc.); and
(6) the time necessary to resolve the dispute.

**History Note:** Statutory Authority G.S. 84-23, Adopted May 4, 2000.

### D.0710. District bar fee dispute resolution.

For the purpose of resolving disputes involving attorneys residing or doing business in the district, any district bar may adopt a fee dispute resolution program, subject to the approval of the council, which shall operate in lieu of the program described herein. Although such programs may be tailored to accommodate local conditions, they must be offered without cost, comply with the jurisdictional restrictions set forth in Rule .0702 of this subchapter, and be consistent with the provisions of Rules .0706 and .0707.

**History Note:** Statutory Authority G.S. 84-23, Adopted May 4, 2000.

## SECTION .0800. RESERVED

**Editor's note.** — Former Section .0800, Model Plan for District Bar Fee Arbitration, was replaced by, present Section .0700, Procedures for Fee Dispute Resolution, effective May 4, 2000.

## SECTION .0900. PROCEDURES FOR THE ADMINISTRATIVE COMMITTEE

### D.0901. Transfer to inactive status.

(a) *Petition for transfer to inactive status.*
Any member who desires to be transferred to inactive status shall file a petition with the secretary addressed to the council setting forth fully
(1) the member's name and current address;
(2) the date of the member's admission to the North Carolina State Bar;
(3) the reasons why the member desires transfer to inactive status;
(4) that at the time of filing the petition the member is in good standing having paid all membership fees, Client Security Fund assessments, late fees

and costs assessed by the North Carolina State Bar, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal Education and without any grievances or disciplinary complaints pending against him or her;

(5) any other matters pertinent to the petition.

(b) *Conditions upon transfer.*

No member may be voluntarily transferred to disability-inactive status or retired/nonpracticing inactive status until:

(1) the member has paid all membership fees, Client Security Fund assessments, late fees and costs assessed by the North Carolina State Bar, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal Education, and

(2) all grievances and disciplinary matters pending against the member have been finally resolved.

(c) *Order transferring member to inactive status.*

Upon receipt of a petition which satisfies the provisions of Rule .0901(a) above, the council may, in its discretion, enter an order transferring the member to inactive status. The order shall become effective immediately upon entry by the council. A copy of the order shall be mailed to the member.

**History Note:** Statutory Authority G.S. 84-16; G.S. 84-23, Readopted effective December 8, 1994; Amended March 7, 1996; Amended effective February 3, 2000.

## D.0902. Reinstatement from inactive status.

(a) *Eligibility to apply for reinstatement.*

Any member who has been transferred to inactive status may petition the council for an order reinstating the member as an active member of the North Carolina State Bar.

(b) *Contents of reinstatement petition.*

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in an application form prescribed by the council and has signed the form under oath;

(2) that the member satisfied the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was transferred to inactive status, unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter;

(3) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of the practice of law within this state will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest;

(4) [this provision shall be effective for all members who are transferred to inactive status on or after January 1, 1996] if 2 or more years have elapsed between the date of the entry of the order transferring the member to inactive status and the date the petition is filed with the secretary of the State Bar, that during the period of inactive status, the member has completed 15 hours of continuing legal education (CLE) approved by the Board of Continuing Legal Education pursuant to Rule .1519 of this subchapter. Of the required 15 CLE hours, 3 hours must be earned by attending a 3 hour block course of instruction devoted exclusively to the area of professional responsibility; and

(5) that the member has paid all of the following:

(A) a $125.00 reinstatement fee;

(B) the membership fee and Client Security Fund assessment for the year in which the application is filed;

(C) the annual membership fee, if any, of the member's district bar for the year in which the application is filed and any past due annual membership fees

for any district bar with which the member was affiliated prior to transferring to inactive status;

(D) all attendee fees owed the Board of Continuing Legal Education for CLE courses taken to satisfy the requirements of Rule .0902(b)(2) and (4) above;

(E) any costs previously assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar; and

(F) all costs incurred by the North Carolina State Bar in investigating and processing the application for reinstatement.

The reinstatement fee, costs, and any past due district bar annual membership fees shall be retained but the State Bar and district bar membership fees assessed for the year in which the application is filed shall be refunded if the petition is denied.

(c) *Service of reinstatement petition.*

The petitioner shall serve the petition on the secretary. The secretary shall transmit a copy of the petition to the members of the Administrative Committee and to the counsel.

(d) *Investigation by counsel.*

The counsel may conduct any necessary investigation regarding the petition and shall advise the members of the Administrative Committee of any findings from such investigation.

(e) *Response by Administrative Committee.*

After any investigation of the petition by the counsel is complete, the Administrative Committee will consider the petition at its next meeting and shall make a recommendation to the council regarding whether the petition should be granted.

(f) *Hearing upon denial of petition for reinstatement.*

(1) Notice of Council Action and Request for Hearing

If the council denies a petition for reinstatement from inactive status, the member shall be notified in writing within 14 days after such action by the council. The notice shall be served upon the member pursuant to Rule 4 of the N.C. Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the N.C. Rules of Civil Procedure to serve process.

(2) The member shall have 30 days from the date of service of the notice to file a written request for hearing upon the secretary. The request shall be served upon the secretary pursuant to Rule 4 of the N.C. Rules of Civil Procedure.

(3) Hearing Procedure

The procedure for the hearing shall be as provided in Section .1000 of this subchapter.

**History Note:** Statutory Authority G.S. 84-16; G.S. 84-23, Readopted effective December 8, 1994; Amended July 21, 1995; Amended March 7, 1996; Amended March 5, 1998; Amended effective March 3, 1999; Amended effective February 3, 2000.

## D.0903. Suspension for non-payment of membership fee, late fee, client security fund assessment, or assessed costs.

(a) *Notice of overdue fees or costs.*

Whenever it appears that a member has failed to comply, in a timely fashion, with the rules regarding payment of the annual membership fee, late fee, the Client Security Fund assessment, and/or any district bar annual membership fee, or that the member has failed to pay, in a timely fashion, the costs of a disciplinary, disability, reinstatement, show cause, or other proceeding of the North Carolina State Bar as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, or a

notice of the secretary or the council of the North Carolina State Bar, the secretary shall prepare a written notice

(1) directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law, and

(2) demanding payment of a $30 late fee for the failure to pay the annual membership fee to the North Carolina State Bar and/or Client Security Fund assessment in a timely fashion.

(b) *Service of the notice.*

The notice shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(c) *Entry of order of suspension upon failure to respond to notice to show cause.*

Whenever a member fails to respond in writing within 30 days of the service of the notice to show cause upon the member and it appears that the member has failed to comply with the rules regarding payment of the annual membership fee, any late fee imposed pursuant to Rule .0203(b) of subchapter A, the Client Security Fund assessment, and/or any district bar annual membership fee, and/or it appears that the member has failed to pay any costs assessed against the member as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, and/or a notice of the secretary or council of the North Carolina State Bar, the council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(d) *Procedure upon submission of a timely response to a notice to show cause.*

(1) *Consideration by Administrative Committee.*

If a member submits a written response to a notice to show cause within 30 days of the service of the notice upon the member, the Administrative Committee shall consider the matter at its next regularly schedule meeting. The member may personally appear at the meeting and be heard, may be represented by counsel, and may offer witnesses and documents. The counsel may appear at the meeting on behalf of the State Bar and be heard, and may offer witnesses and documents. The burden of proof shall be upon the member to show cause by clear, cogent and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules regarding payment of the annual membership fee, late fee, Client Security Fund assessment and/or any district bar annual membership fee, and/or the apparent failure to pay costs assessed against the member as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, and/or a notice of the secretary or council of the North Carolina State Bar.

(2) *Recommendation of Administrative Committee.*

The Administrative Committee shall determine whether the member has shown cause why the member should not be suspended. If the committee determines that the member has failed to show cause, the committee shall recommend to the council that the member be suspended.

(3) *Order of suspension.*

Upon the recommendation of the Administrative Committee, the council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil

Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(e) *Late tender of membership fees or assessed costs.*

If a member tenders to the North Carolina State Bar the annual membership fee, the $30 late fee, Client Security Fund assessment, any district bar annual membership fee, and/or any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar before a suspension order is entered by the council, no order of suspension will be entered.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-34, Readopted effective December 8, 1994; Amended December 7, 1995; Amended March 7, 1996; Amended March 5, 1998; Amended effective February 3, 2000.

**D.0904. Reinstatement after suspension for failure to pay fees or assessed costs.**

(a) *Reinstatement within 30 days of service of suspension order.*

A member who has been suspended for nonpayment of the annual membership fees, late fee Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar, may petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after service of the suspension order upon the member. The secretary shall enter an order reinstating the member to active status upon receipt of a timely written request and satisfactory showing by the member of payment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, assessed costs, and the costs of the suspension and reinstatement procedure, including the costs of service. Such member shall not be required to file a formal reinstatement petition or pay a $125 reinstatement fee.

(b) *Reinstatement more than 30 days after service of suspension order.*

At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for nonpayment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar, may petition the council for an order of reinstatement.

(c) *Contents of reinstatement petition.*

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in a form to be prescribed by the council and has signed the form under oath;

(2) that the member satisfied the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was suspended and for any calendar year which has elapsed since the date of the entry of the order of suspension unless the member was exempt from such requirement pursuant to Rule .1517 of this subchapter;

(3) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of the practice of law will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest; and

(4) that the member has paid all of the following:
(A) a $125.00 reinstatement fee;
(B) all past and current membership fees and late fees;
(C) all annual Client Security Fund assessments;
(D) all past and current district bar annual membership fees;
(E) all attendee fees, fines and penalties owed the Board of Continuing Legal Education, including attendee fees for CLE courses taken to satisfy the requirements of Rule .0904(c)(2) above;
(F) any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar; and
(G) all costs incurred by the North Carolina State Bar in suspending the member, including the costs of service, and in investigating and processing the application for reinstatement.
(d) *Procedure for review of reinstatement petition.*
The Procedure for review of reinstatement petition shall be as set forth in Rule .0902(c)-(f) above.

**History Note:** Statutory Authority G.S. 84-16; G.S. 84-23; G.S. 84-34, Readopted Effective December 8, 1994; Amended July 21, 1995; Amended March 7, 1996; Amended March 5, 1998.

## SECTION .1000. RULES GOVERNING REINSTATEMENT HEARINGS BEFORE THE ADMINISTRATIVE COMMITTEE

### D.1001. Reinstatement hearings.

(a) *Notice; Time and place of hearing.*
(1) *Time and place of hearing.*
The chairperson of the Administrative Committee (the committee) shall fix the time and place of the hearing within 30 days after the member's request for hearing is filed with the secretary. The hearing shall be held as soon as practicable after the request for hearing is filed but in no event more than 90 days after such request is filed unless otherwise agreed by the member and the chairperson of the committee.
(2) *Notice to member.*
The notice of the hearing shall include the date, time and place of the hearing and shall be served upon the member at least 10 days before the hearing date.
(b) *Hearing panel.*
(1) *Appointment.*
The chairperson of the committee shall appoint a hearing panel consisting of three members of the committee to consider the petition and make a recommendation to the council.
(2) *Presiding panel member.*
The chairperson shall appoint one of the three members of the panel to serve as the presiding member. The presiding member shall rule on any question of procedure that may arise in the hearing; preside at the deliberations of the panel; sign the written determination of the panel; and report the panel's determination to the council.
(3) *Quorum.*
A majority of the panel members is necessary to decide the matter.
(4) *Panel recommendation.*
Following the hearing on a contested reinstatement petition, the panel will make a written recommendation to the council on behalf of the committee regarding whether the member's license should be reinstated. The recommendation shall include appropriate findings of fact and conclusions of law.

(c) *Burden of proof.*

(1) *Reinstatement from inactive status.*

The burden of proof shall be upon the member to show by clear, cogent and convincing evidence that he or she has satisfied the requirements for reinstatement as set forth in Rule .0902(b) of this subchapter.

(2) *Reinstatement from suspension for nonpayment of membership fees, late fee, client security fund assessment, district bar membership fees, or assessed costs.*

The burden of proof shall be upon the member to show by clear, cogent and convincing evidence that he or she has satisfied the requirements for reinstatement as set forth in Rule .0904(c) of this subchapter.

(3) *Reinstatement from suspension for failure to comply with the rules governing the administration of the continuing legal education program.*

The burden of proof shall be upon the member to show by clear, cogent and convincing evidence that he or she has

(A) satisfied the requirements for reinstatement as set forth in Rule .0904(c) of this subchapter,

(B) cured any continuing legal education deficiency for which the member was suspended, and

(C) paid the reinstatement fee required by Rule .1512 and Rule .1609(a) of this subchapter.

(d) *Conduct of hearing.*

(1) *Member's rights.*

The member shall have these rights at the hearing:

(A) to appear personally and be heard;

(B) to be represented by counsel;

(C) to call and examine witnesses;

(D) to offer exhibits; and

(E) to cross-examine witnesses.

(2) *State Bar appears through counsel.*

The counsel shall appear at the hearing on behalf of the State Bar and shall have the right

(A) to be heard;

(B) to call and examine witnesses;

(C) to offer exhibits; and

(D) to cross-examine witnesses.

(3) *Rules of procedure and evidence.*

The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as practicable and the Rules of Evidence applicable in superior court, unless otherwise provided by this subchapter or the parties agree to other rules.

(4) *Report of hearing; Costs.*

The hearing shall be reported by a certified court reporter. The member shall pay the costs associated with obtaining the court reporter's services for the hearing. The member shall pay the costs of the transcript and shall arrange for the preparation of the transcript with the court reporter. The member shall be taxed with all other costs of the hearing, but such costs shall not include any compensation to the members of the hearing panel.

(e) *Hearing panel recommendation.*

The written recommendation of the hearing panel shall be served upon the member within seven days of the date of the hearing.

**History Note:** Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Readopted March 7, 1996; Amended March 5, 1998; Amended effective February 3, 2000.

### D.1002. Review and order of council.

(a) *Review by council of recommendation of hearing panel.*

(1) *Record to council.*

(A) *Compilation of record.*

The member will compile a record of the proceedings before the hearing panel, including a legible copy of the complete transcript, all exhibits introduced into evidence and all pleadings, motions and orders, unless the member and counsel agree in writing to shorten the record. Any agreements regarding the record shall be included in the record transmitted to the council.

(B) *Transmission of record to council.*

The member shall provide a copy of the record to the counsel not later than 90 days after the hearing unless an extension is granted by the president of the State Bar for good cause shown. The member will transmit a copy of the record to each member of the council no later than 30 days before the council meeting at which the petition is to be considered.

(C) *Costs.*

The member shall bear all of the costs of transcribing, copying and transmitting the record to the members of the council.

(D) *Dismissal for failure to comply.*

If the member fails to comply fully with any of the provisions of this rule, the counsel may file a motion the secretary to dismiss the petition.

(2) *Oral or written argument.*

In his or her discretion, the president of the State Bar may permit counsel for the State Bar and the member to present oral or written argument, but the council will not consider additional evidence not in the record transmitted from the hearing panel, absent a showing that the ends of justice so require or that undue hardship will result if the additional evidence is not presented.

(b) *Order by council.*

The council will review the recommendation of the hearing panel and the record and will determine whether and upon what conditions the member will be reinstated.

(c) *Costs.*

The council may tax the costs attributable to the proceeding against the member.

**History Note:** Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711; Readopted Effective December 8, 1994; Readopted March 7, 1996.

### D.1003. Referral from the board.

When the board refers a matter to the council for determination after a hearing by the committee, the board shall transmit to the committee

(1) a notice of referral from the board to the committee, clearly identifying the member whose license is in question and the nature of the matter being referred;

(2) copies of all relevant written materials accumulated or created by the board;

(3) copies of all written materials submitted to the board by the member whose license is in question;

(4) a written statement of the board's findings and determinations in the matter that is being referred.

**History Note:** Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1004. Time of hearing.

A matter referred to the committee for hearing shall be heard not less than 30 days and not more than 90 days after the date the notice of referral is received from the board by the committee.

**History Note:** Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1005. Notice of hearing.

(a) *Time of notice to member.* A member with respect to whom a matter has been referred for hearing shall receive notice of the hearing at least 20 days prior to the hearing.

(b) *Service of notice on member.* The notice of hearing shall be served on the member by registered mail.

(c) *Content of notice to member.* The notice of the hearing shall include

(1) notice of the date, time, and place of the hearing;

(2) notice to the member that he or she may submit for consideration written materials, including a written statement of explanation, at any time prior to or during the hearing;

(3) notice to the member that he or she may personally appear and be heard during the hearing;

(4) notice to the member that he or she may be represented by counsel at the hearing.

(d) *Notice to the board.* Notice shall be transmitted to the board at least 20 days prior to the hearing of the date, time, and place of the hearing.

**History Note:** Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1006. The hearing.

(a) *Nature of inquiry: Suspension.* When the matter being heard involves the question of whether a member's license shall be suspended for noncompliance, the purpose of the hearing shall be to determine, as a matter of fact,

(1) whether the member was in compliance with the requirements of the rules at the time the board made its determination;

(2) if the member was not in compliance, whether there is good cause why his or her license should not be suspended.

(b) *Nature of inquiry: Reinstatement.* When the matter being heard involves the question of whether the license of a suspended member shall be reinstated, the purpose of the hearing shall be to determine, as a matter of fact,

(1) whether the continuing legal education deficiency which gave rise to the member's suspension had been cured at the time the board made its determination that it had not been cured;

(2) if the deficiency had been cured at the time the board made its determination, whether the suspended member had paid the required reinstatement fee at the time the board made its determination.

(c) *The forum.* A matter before the committee for a hearing shall be heard by a panel of three members of the committee, one of whom shall serve as the presiding member, designated as provided in Rule .1007 of this subchapter.

(d) *Member's right to be heard.* A member whose license is the subject of a hearing shall have the right to

(1) to appear personally at the hearing;

(2) to speak and be heard at the hearing on any aspect of the matter being heard;

(3) submit for consideration relevant written materials, including a written statement of explanation, at any time prior to or during the hearing;

(4) be represented by counsel at the hearing.

(e) *Information from the board.*

(1) The panel shall consider the written materials described in Rule .1003 of this subchapter transmitted by the board to the committee.

(2) A member of the board, or other person authorized by the board, may attend the hearing and may present oral or written information and argument on any aspect of the matter being heard.

(f) *Effect of board's findings on issues of accreditation and approval.* When the board has determined that a member has failed to comply with the requirements of the rules or that a suspended member has failed to cure a deficiency, upon its finding that credits essential to compliance or reinstatement were acquired in a course or program that was not properly accredited or approved,

(1) the board's finding that the course or program was not properly accredited or approved shall be presumed by the panel to be correct; and

(2) the member may rebut the presumption of correctness by satisfying the panel that the course or program had in fact been properly accredited or approved; or

(3) the member may rebut the presumption of correctness by satisfying the panel that the board acted contrary to its rules in failing to accredit or approve the course or program.

(g) *Deliberations of the panel.* The panel shall conduct its deliberations, make its determinations, and adopt its recommendations in private.

(h) *Decision of the panel.* The panel shall consider a matter in accord with the process described in Rules .1008 and .1009 of this subchapter and shall put its determinations and recommendations in writing.

**History Note:** Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

## D.1007. The panel.

(a) *Assignment of matter to panel.* A matter referred by the board for hearing and determination shall be assigned to a panel for hearing.

(b) *Members of the panel.* A hearing panel shall consist of three members of the committee.

(c) *Designation of members.* The members of a hearing panel shall be designated by the chairperson of the committee.

(d) *Designation of presiding member.* The chairperson of the committee shall designate one of the three members of a panel to serve as the presiding member.

(e) *Duties of presiding member.* The presiding member shall

(1) timely schedule the hearing;

(2) assure that proper and timely notice of hearing is given to the member and the board;

(3) preside at the hearing and rule on any question of procedure that may arise;

(4) preside at the deliberations of the panel;

(5) sign the written determinations and recommendations of the panel;

(6) report the panel's determinations and recommendations to the committee.

**History Note:** Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

**D.1008. Suspension hearing: Process for determining a matter involving the question of suspension.**

When the matter before the panel is one involving the question of whether a member shall be suspended for failing to comply with the requirements of the rules, the panel shall proceed as follows:

(a) *Examination for basis for noncompliance determination.* The panel first shall examine the written information transmitted by the board to the committee, and shall determine whether that information provides a basis for the board's determination that the member had failed to comply with the requirements of the rules at the time the board made its determination.

(b) *When there is no basis for noncompliance determination.* If the written information from the board provides no basis for a determination of noncompliance, the panel shall determine that the member is in compliance and shall report to the committee a recommendation that the member not be suspended.

(c) *When there is some basis for noncompliance determination.* If the written information from the board provides some basis for a determination of noncompliance, the panel then shall consider all information submitted to the panel or to the board by the member bearing on the issue of whether the member was in compliance with the requirements of the rules at the time the board made its determination.

(d) *Assessing the information on the issue of compliance.*

(1) Based on all the information before it, the panel shall determine whether it is persuaded that the member was not in compliance with the requirements of the rules at the time the board made its determination.

(2) In assessing the information on compliance, when the board's determination of noncompliance is based upon its finding that credits essential to compliance were acquired in a course or program that was not properly accredited or approved, the panel shall give that finding and any rebuttal information from the member the consideration described in Rule .1006(f) of this subchapter.

(e) *When the panel makes a determination of compliance.* If the panel is not persuaded that the member was not in compliance with the requirements of the rules at the time the board made its determination it shall determine that the member is in compliance and shall report to the committee a recommendation that the member not be suspended.

(f) *When the panel makes a determination of noncompliance.* If the panel is persuaded that the member was not in compliance with the requirements of the rules at the time the board made its determination, the panel then shall consider all information submitted to the panel or to the board by the member and submitted by the board to the panel bearing on the issue of whether there is good cause why the member's license should not be suspended.

(g) *When the panel determines that there is good cause.* If the panel is satisfied that there is good cause that the member's license should not be suspended, it shall determine that there is good cause and shall report to the committee a recommendation that the member's license not be suspended.

(h) *When the panel determines that there is not good cause.* If the panel is not satisfied that there is good cause why the member's license should not be suspended, it shall determine that there is not good cause and shall report to the committee a recommendation that the member's license be suspended.

**History Note:** Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

**D.1009. Reinstatement hearing: Process for determining a matter involving the question of reinstatement.**

When the matter before the panel is one involving the question of whether a suspended member shall be reinstated following a suspension for noncompliance with the rules, the panel shall proceed as follows:

(a) *Examination of the basis for determination that deficiency not cured.* The panel first shall examine the written information transmitted by the board to the committee and shall determine whether that information provides a basis for the board's determination that the deficiency for which the member's license was suspended had not been cured at the time the board made its determination.

(b) *When there is no basis for determination that deficiency not cured.* If the written information from the board provides no basis for a determination that the suspended member's deficiency had not been cured at the time the board made its determination, the panel shall determine that the deficiency had been cured and shall report to the committee a recommendation that the suspended member be reinstated.

(c) *When there is some basis for determination that deficiency not cured.* If the written information from the board provides some basis for a determination that the suspended member's deficiency had not been cured at the time the board made its determination, the panel shall consider all information submitted to the panel or to the board by the member bearing on the issue of whether the deficiency had been cured at the time the board made its determination.

(d) *Assessing the information on the issue of cure.*

(1) Based upon all the information before it, the panel shall determine whether it is persuaded that the suspended member's deficiency had not been cured at the time the board made its determination.

(2) In assessing the information on cure, when the board's determination that the deficiency had not been cured is based upon its finding that credits essential to cure were acquired in a course or program that was not properly accredited or approved, the panel shall give that finding and any rebuttal information from the member the consideration described in Rule .1006(f) of this subchapter.

(e) *When the panel determines that the deficiency had not been cured.* If the panel is persuaded that the suspended member's deficiency had not been cured at the time the board made its determination, it shall determine that the deficiency had not been cured and shall report to the committee a recommendation that the suspended member not be reinstated.

(f) *When the panel determines that the deficiency had been cured.* If the panel is persuaded that the suspended member's deficiency had been cured at the time the board made its determination, it shall determine that the deficiency had been cured and then shall consider all information submitted to the panel or to the board by the member and all information submitted by the board to the panel bearing on the issue of whether the reinstatement fee had been paid at the time the board made its determination.

(g) *When the panel determines that reinstatement fee had been paid.* If the panel is not persuaded that the reinstatement fee had not been paid at the time the board made its determination, the panel shall determine that the fee had been paid and shall report to the committee a recommendation that the member be reinstated.

(h) *When the panel determines that Reinstatement fee had not been paid.* If the panel has determined that the reinstatement fee had not been paid at the time the board made its determination, the panel shall determine that the fee had not been paid and shall report to the committee a recommendation that the member not be reinstated.

(i) *When the member submits information indicating remedial intervening events.* When a suspended member submits information indicating that, after the board's determination and prior to the hearing before the panel, the suspended member cured the deficiency (if failure to cure was a basis for the denial), the panel shall remand the matter to the board with a request that it reconsider the matter in light of the new information.

**History Note:** Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1010. Report by the panel to the committee.

(a) *Report by the panel.* At the first meeting of the committee following a panel's hearing a matter, the panel shall report to the committee its determinations and recommendations.

(b) *When report recommends reinstatement or no suspension.* If the panel reports to the committee, in a matter involving the question of suspension, a recommendation that the member not be suspended, or, in a matter involving the question of reinstatement, a recommendation that the member be reinstated, the committee shall accept the report, and the panel's recommendation shall be the recommendation of the committee.

(c) *When report recommends suspension or no reinstatement.* If the panel reports to the committee, in a matter involving the question of suspension, a recommendation that the member be suspended, or, in a matter involving the question of reinstatement, a recommendation that the member not be reinstated, the committee shall consider the information reported by the panel and shall determine whether there is any basis for the panel's recommendation.

(d) *When information contains no basis for panel's recommendation.* If the information reported by the panel contains no basis for the panel's recommendation of suspension or its recommendation of no reinstatement, the committee shall reject the panel's recommendation and shall recommend, in a suspension matter, that the member not be suspended or, in a reinstatement matter, that the member be reinstated.

(e) *When information contains some basis for panel's recommendation.* If the information reported by the panel contains some basis for the panel's recommendation of suspension, or its recommendation of no reinstatement, the committee shall accept the panel's recommendation and shall recommend, in a suspension matter, that the member be suspended or, in a reinstatement matter, that the member not be reinstated.

**History Note:** Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1011. Report by the committee to the council.

At the first meeting of the council following the committee's receiving the report of a panel on a matter, the committee shall report to the council for final action the committee's recommendation in the matter.

**History Note:** Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

## SECTION .1100. RESERVED

## SECTION .1200. RESERVED

## SECTION .1300. RULES GOVERNING THE ADMINISTRATION OF THE PLAN FOR INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

### D.1301. Purpose.

The IOLTA Board of Trustees (board) shall carry out the provisions of the Plan for Disposition of Funds Received by the North Carolina State Bar from Interest on Trust Accounts. The plan is: Any funds remitted to the North Carolina State Bar from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 10.3 of the Rules of Professional Conduct shall be deposited by the North Carolina State Bar through the board in a special account or accounts which shall be segregated from other funds of whatever nature received by the State Bar.

The funds received, and any interest, dividends, or other proceeds received thereafter with respect to these funds shall be used for programs concerned with the improvement of the administration of justice, under the supervision and direction of the board established under this plan to administer the funds. The board will award grants or noninterest bearing loans under the four categories approved by the North Carolina Supreme Court being mindful of its tax exempt status and the IRS rulings that private interests of the legal profession are not to be funded with IOLTA funds.

The programs for which the funds may be utilized shall consist of

(1) providing civil legal services for indigents;

(2) enhancement and improvement of grievance and disciplinary procedures to protect the public more fully from incompetent or unethical attorneys;

(3) development and maintenance of a fund for student loans to enable meritorious persons to obtain a legal education when otherwise they would not have adequate funds for this purpose;

(4) such other programs designed to improve the administration of justice as may from time to time be proposed by the board and approved by the Supreme Court of North Carolina.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended April 3, 1996; Amended effective March 6, 1997.

### D.1302. Jurisdiction: Authority.

The Board of Trustees of the North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts (IOLTA) is created as a standing committee by the North Carolina State Bar Council pursuant to Chapter 84 of the North Carolina General Statutes for the disposition of funds received by the North Carolina State Bar from interest on trust accounts.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1303. Operational responsibility.

The responsibility for operating the program of the board rests with the governing body of the board, subject to the statutes governing the practice of law, the authority of the council and the rules of governance of the board.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1304. Size of board.

The board shall have nine members, at least six of whom must be attorneys in good standing and authorized to practice law in the state of North Carolina.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1305. Lay participation.

The board may have no more than three members who are not licensed attorneys.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1306. Appointment of members; When; Removal.

The members of the board shall be appointed by the Council of the North Carolina State Bar. The July quarterly meeting is when the appointments are made. Vacancies occurring by reason of death, resignation or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1307. Term of office.

Each member who is appointed to the board shall serve for a term of three years beginning on September 1.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1308. Staggered terms.

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1309. Succession.

Each member of the board shall be entitled to serve for two full three-year terms. No member shall serve more than two consecutive three-year terms, in addition to service prior to the beginning of a full three-year term, without having been off the board for at least three years.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1310. Appointment of chairperson.

The chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as chairperson shall be for one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1311. Appointment of vice-chairperson.

The vice chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as vice chairperson shall be one year. The vice-chairperson may be reappointed thereafter during tenure on the board. The vice chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1312. Source of funds.

Funding for the program carried out by the board shall come from funds remitted from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 10.3 of the Rules of Professional Conduct, voluntary contributions from lawyers, and interest, dividends or other proceeds earned on the board's funds from investments.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1313. Fiscal responsibility.

All funds of the board shall be considered funds of the North Carolina State Bar, with the beneficial interest in those funds being vested in the board for grants to qualified applicants in the public interest, less administrative costs. These funds shall be administered and disbursed by the board in accordance with rules or policies developed by the North Carolina State Bar and approved by the North Carolina Supreme Court. The funds shall be used to pay the administrative costs of the IOLTA program and to fund grants approved by the board under the six categories approved by the North Carolina Supreme Court as outlined above.

(a) *Maintenance of accounts: Audit.* The funds of the IOLTA program shall be maintained in a separate account from funds of the North Carolina State Bar such that the funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis. The audit will be conducted after the books are closed at a time determined by the auditors, but not later than March 31 of the year following the year for which the audit is to be conducted.

(b) *Investment criteria.* The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the Council of the North Carolina State Bar for handling of dues, rents, and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) *Disbursements.* Disbursement of funds of the board in the nature of grants to qualified applicants in the public interest, less administrative costs, shall be made by the board in accordance with policies developed by the North Carolina State Bar and approved by the North Carolina Supreme Court. The board shall adopt an annual operational budget and disbursements shall be made in accordance with the budget as adopted. The board shall determine the signatories on the IOLTA accounts.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1314. Meetings.

The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be a majority of the total membership of the board.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1315. Annual report.

The board shall prepare at least annually a report of its activities and shall present same to the council one month prior to its annual meeting.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1316. Severability.

If any provision of this plan or the application thereof is held invalid, the invalidity does not affect other provisions or application of the plan which can be given effect without the invalid provision or application, and to this end the provisions of the plan are severable.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SECTION .1400. RULES GOVERNING THE ADMINISTRATION OF THE CLIENT SECURITY FUND OF THE NORTH CAROLINA STATE BAR

### D.1401. Purpose; Definitions.

(a) The Client Security Fund of the North Carolina State Bar was established by the Supreme Court of North Carolina pursuant to an order dated August 29, 1984. The fund is a standing committee of the North Carolina State Bar Council pursuant to an order of the Supreme Court dated October 10, 1984, as amended. Its purpose is to reimburse, in whole or in part in appropriate cases and subject to the provisions and limitations of the Supreme Court's orders and these rules, clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina, which conduct occurred on or after January 1, 1985.

(b) As used herein the following terms have the meaning indicated.

(1) "Applicant" shall mean a person who has suffered a reimbursable loss because of the dishonest conduct of an attorney and has filed an application for reimbursement.

(2) "Attorney" shall mean an attorney who, at the time of alleged dishonest conduct, was licensed to practice law by the North Carolina State Bar. The fact that the alleged dishonest conduct took place outside the state of North Carolina does not necessarily mean that the attorney was not engaged in the practice of law in North Carolina.

(3) "Board" shall mean the Board of Trustees of the Client Security Fund.

(4) "Council" shall mean the North Carolina State Bar Council.

(5) "Dishonest conduct" shall mean wrongful acts committed by an attorney against an applicant in the nature of embezzlement from the applicant or the wrongful taking or conversion of monies or other property of the applicant, which monies or other property were entrusted to the attorney by the applicant by reason of an attorney-client relationship between the attorney and the applicant or by reason of a fiduciary relationship between the attorney and the applicant customary to the practice of law.

(6) "Fund" shall mean the Client Security Fund of the North Carolina State Bar.

(7) "Reimbursable losses" shall mean only those losses of money or other property which meet all of the following tests:

(A) the dishonest conduct which occasioned the loss occurred on or after January 1, 1985;

(B) the loss was caused by the dishonest conduct of an attorney acting either as an attorney for the applicant or in a fiduciary capacity for the benefit of the applicant customary to the private practice of law in the matter in which the loss arose;

(C) the applicant has exhausted all viable means to collect applicant's losses and has complied with these rules.

(8) The following shall not be deemed "reimbursable losses":

(A) losses of spouses, parents, grandparents, children and siblings (including foster and half relationships), partners, associates or employees of the attorney(s) causing the losses;

(B) losses covered by any bond, security agreement or insurance contract, to the extent covered thereby;

(C) losses incurred by any business entity with which the attorney or any person described in Rule .1401(b)(8)(A) above is an officer, director, shareholder, partner, joint venturer, promoter or employee;

(D) losses, reimbursement for which has been otherwise received from or paid by or on behalf of the attorney who committed the dishonest conduct;

(E) losses arising in investment transactions in which there was neither a contemporaneous attorney-client relationship between the attorney and the applicant nor a contemporaneous fiduciary relationship between the attorney and the applicant customary to the practice of law. By way of illustration but not limitation, for purposes of this rule (Rule .1401(b)(8)(E)), an attorney authorized or permitted by a person or entity other than the applicant as escrow or similar agent to hold funds deposited by the applicant for investment purposes shall not be deemed to have a fiduciary relationship with the applicant customary to the practice of law.

(9) "State Bar" shall mean the North Carolina State Bar.

(10) "Supreme Court" shall mean the North Carolina Supreme Court.

(11) "Supreme Court orders" shall mean the orders of the Supreme Court dated August 29, 1984, and October 10, 1984, as amended, authorizing the establishment of the Client Security Fund of the North Carolina State Bar and approving the rules of procedure of the Fund.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1402. Jurisdiction: Authority.

(a) Chapter 84 of the General Statutes vests in the State Bar authority to control the discipline, disbarment, and restoration of licenses of attorneys; to formulate and adopt rules of professional ethics and conduct; and to do all such things necessary in the furtherance of the purposes of the statutes governing the practice of the law as are not themselves prohibited by law. G.S. 84-22 authorizes the State Bar to establish such committees, standing or special, as from time to time the council deems appropriate for the proper discharge of its duties; and to determine the number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act, and other matters relating to such committees. The rules of the State Bar, as adopted and amended from time to time, are subject to approval by the Supreme Court under G.S. 84-21.

(b) The Supreme Court orders, entered in the exercise of the Supreme Court's inherent power to supervise and regulate attorney conduct, authorized the establishment of the Fund, as a standing committee of the council, to be administered by the State Bar under rules and regulations approved by the Supreme Court.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1403. Operational responsibility.

The responsibility for operating the Fund and the program of the board rests with the board, subject to the Supreme Court orders, the statutes governing the practice of law, the authority of the council, and the rules of the board.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1404. Size of board.

The board shall have five members, four of whom must be attorneys in good standing and authorized to practice law in the state of North Carolina.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1405. Lay participation.

The board shall have one member who is not a licensed attorney.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1406. Appointment of Members; When; Removal.

The members of the board shall be appointed by the council. Any member of the board may be removed at any time by the affirmative vote of a majority of the members of the council at a regularly called meeting. Vacancies occurring by reason of death, disability, resignation, or removal of a member shall be filled by appointment of the president of the State Bar with the approval of the council at its next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1407. Term of office.

Each member who is appointed to the board, other than a member appointed to fill a vacancy created by the death, disability, removal or resignation of a member, shall serve for a term of five years beginning as of the first day of the month following the date upon which the appointment is made by the council. A member appointed to fill a vacancy shall serve the remainder of the vacated term.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1408. Staggered terms.

It is intended that members of the board shall be elected to staggered terms such that one member is appointed in each year.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1409. Succession.

Each member of the board shall be entitled to serve for one full five-year term. A member appointed to fill a vacated term may be appointed to serve one full five-year term immediately following the expiration of the vacated term but shall not be entitled as of right to such appointment. No person shall be reappointed to the board until the expiration of three years following the last day of the previous term of such person on the board.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1410. Appointment of chairperson.

The chairperson of the board shall be appointed from the members of the board annually by the council. The term of the chairperson shall be one year. The chairperson may be reappointed by the council thereafter during tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1411. Appointment of vice-chairperson.

The vice-chairperson of the board shall be appointed from the members of the board annually by the council. The term of the vice-chairperson shall be one year. The vice-chairperson may be reappointed by the council thereafter during tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him by the chairperson or by the board.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1412. Source of funds.

Funds for the program carried out by the board shall come from assessments of members of the State Bar as ordered by the Supreme Court, from voluntary contributions, and as may otherwise be received by the Fund.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

**Editor's note.** — By order of the North Carolina Supreme Court (November 4, 1999), a $20.00 fee shall be assessed to active members of the North Carolina State Bar to support the Client Security Fund in the year 2000 and in each year thereafter until further order of the court.

### D.1413. Fiscal responsibility.

All funds of the board shall be considered funds of the State Bar and shall be maintained, invested, and disbursed as follows:

(a) *Maintenance of accounts; Audit.* The State Bar shall maintain a separate account for funds of the board such that such funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited annually in connection with the audits of the State Bar.

(b) *Investment criteria.* The funds of the board shall be kept, invested, and reinvested in accordance with investment policies adopted by the council for dues, rents, and other revenues received by the State Bar in carrying out its official duties. In no case shall the funds be invested or reinvested in investments other than such as are permitted to fiduciaries under the General Statutes of North Carolina.

(c) *Disbursement.* Disbursement of funds of the board shall be made by or under the direction of the secretary of the State Bar.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1414. Meetings.

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the State Bar. The board by resolution may set other regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson, or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission or telephone. A quorum of the board for conducting its official business shall be a majority of the members serving at a particular time. Written minutes of all meetings shall be prepared and maintained.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1415. Annual report.

The board shall prepare at least annually a report of its activities and shall present the same to the council at the annual meeting of the State Bar.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1416. Appropriate uses of the client security fund.

(a) The board may use or employ the Fund for any of the following purposes within the scope of the board's objectives as heretofore outlined:

(1) to make reimbursements on approved applications as herein provided;

(2) to purchase insurance to cover such losses in whole or in part as is deemed appropriate;

(3) to invest such portions of the Fund as may not be needed currently to reimburse losses, in such investments as are permitted to fiduciaries by the General Statutes of North Carolina;

(4) to pay the administrative expenses of the board, including employment of counsel to prosecute subrogation claims.

(b) The board with the authorization of the council shall, in the name of the North Carolina State Bar, enforce any claims which the board may have for restitution, subrogation, or otherwise, and may employ and compensate consultants, agents, legal counsel, and such other employees as it deems necessary and appropriate.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1417. Applications for reimbursement.

(a) The board shall prepare a form of application for reimbursement which shall require the following minimum information, and such other information as the board may from time to time specify:

(1) the name and address of the applicant;

(2) the name and address of the attorney who is alleged to have engaged in dishonest conduct;

(3) the amount of the alleged loss for which application is made;

(4) the date on or period of time during which the alleged loss occurred;

(5) a general statement of facts relative to the application;

(6) a description of any relationship between the applicant and the attorney of the kinds described in Rules .1401 (b)(8)(A) and (C) of this subchapter;

(7) verification by the applicant;

(8) all supporting documents, including (A) copies of any court proceedings against the attorney;

(B) copies of all documents showing any reimbursement or receipt of funds in payment of any portion of the loss.

(b) The application shall contain the following statement in boldface type:

"IN ESTABLISHING THE CLIENT SECURITY FUND PURSUANT TO ORDER OF THE SUPREME COURT OF NORTH CAROLINA, THE NORTH CAROLINA STATE BAR DID NOT CREATE OR ACKNOWLEDGE ANY LEGAL RESPONSIBILITY FOR THE ACTS OF INDIVIDUAL ATTORNEYS IN THE PRACTICE OF LAW. ALL REIMBURSEMENTS OF LOSSES FROM THE CLIENT SECURITY FUND SHALL BE A MATTER OF GRACE IN THE SOLE DISCRETION OF THE BOARD ADMINISTERING THE FUND AND NOT A MATTER OF RIGHT. NO APPLICANT OR MEMBER OF THE PUBLIC SHALL HAVE ANY RIGHT IN THE CLIENT SECURITY FUND AS A THIRD PARTY BENEFICIARY OR OTHERWISE."

(c) The application shall be filed in the office of the State Bar in Raleigh, North Carolina, attention Client Security Fund Board, and a copy shall be transmitted by such office to the chairperson of the board.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

## D.1418. Processing applications.

(a) The board shall cause an investigation of all applications filed with the State Bar to determine whether the application is for a reimbursable loss and the extent, if any, to which the application should be paid from the Fund.

(b) The chairperson of the board shall assign each application to a member of the board for review and report. Wherever possible, the member to whom such application is referred shall practice in the county wherein the attorney practices or practiced.

(c) A copy of the application shall be served upon or sent by registered mail to the last known address of the attorney who it is alleged committed an act of dishonest conduct.

(d) After considering a report of investigation as to an application, any board member may request that testimony be presented concerning the application. In all cases, the alleged defalcating attorney or his or her representative will be given an opportunity to be heard by the board if the attorney so requests.

(e) The board shall operate the Fund so that, taking into account assessments ordered by the Supreme Court but not yet received and anticipated investment earnings, a principal balance of approximately $1,000,000 is maintained. Subject to the foregoing, the board shall, in its discretion, determine the amount of loss, if any, for which each applicant should be reimbursed from the Fund. In making such determination, the board shall consider, inter alia, the following:

(1) the negligence, if any, of the applicant which contributed to the loss;

(2) the comparative hardship which the applicant suffered because of the loss;

(3) the total amount of reimbursable losses of applicants on account of any one attorney or firm or association of attorneys;

(4) the total amount of reimbursable losses in previous years for which total reimbursement has not been made and the total assets of the Fund;

(5) the total amount of insurance or other source of funds available to compensate the applicant for any reimbursable loss.

(f) The board may, in its discretion, allow further reimbursement in any year of a reimbursable loss reimbursed in part by it in prior years.

(g) Provided, however, and the foregoing notwithstanding, in no case shall the Fund reimburse the otherwise reimbursable losses sustained by any one applicant as a result of the dishonest conduct of one attorney in an amount in excess of $100,000.

(h) No reimbursement shall be made to any applicant unless reimbursement is approved by a majority vote of the entire board at a duly held meeting at which a quorum is present.

(i) No attorney shall be compensated by the board for prosecuting an application before it.

(j) An applicant may be advised of the status of the board's consideration of the application and shall be advised of the final determination of the board.

(k) All applications, proceedings, investigations, and reports involving applicants for reimbursement shall be kept confidential until and unless the board authorizes reimbursement to the applicant, or the attorney alleged to have engaged in dishonest conduct requests that the matter be made public. All participants involved in an application, investigation, or proceeding (including the applicant) shall conduct themselves so as to maintain the confidentiality of the application, investigation or proceeding. This provision shall not be construed to deny relevant information to be provided by the board to disciplinary committees or to anyone else to whom the council authorizes release of information.

(l) The board may, in its discretion, for newly discovered evidence or other compelling reason, grant a request to reconsider any application which the board has denied in whole or in part; otherwise, such denial is final and no further consideration shall be given by the board to such application or another application upon the same alleged facts.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984; October 10, 1984; Readopted effective December 8, 1994; Amended effective March 6, 1997.

## D.1419. Subrogation for reimbursement.

(a) In the event reimbursement is made to an applicant, the State Bar shall be subrogated to the amount reimbursed and may bring an action against the attorney or the attorney's estate either in the name of the applicant or in the name of the State Bar. As a condition of reimbursement, the applicant may be required to execute a "subrogation agreement" to such effect. Filing of an application constitutes an agreement by the applicant that the North Carolina State Bar shall be subrogated to the rights of the applicant to the extent of any reimbursement. Upon commencement of an action by the State Bar pursuant to its subrogation rights, it shall advise the reimbursed applicant at his or her last known address. A reimbursed applicant may then join in such action to recover any loss in excess of the amount reimbursed by the Fund. Any amounts recovered from the attorney by the board in excess of the amount to which the Fund is subrogated, less the board's actual costs of such recovery, shall be paid to or retained by the applicant as the case may be.

(b) Before receiving a payment from the Fund, the person who is to receive such payment or his or her legal representative shall execute and deliver to the board a written agreement stating that in the event the reimbursed applicant or his or her estate should ever receive any restitution from the attorney or his or her estate, the reimbursed applicant agrees that the Fund shall be repaid up to the amount of the reimbursement from the Fund plus expenses.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

### D.1420. Authority reserved by the Supreme Court.

The Fund may be modified or abolished by the Supreme Court. In the event of abolition, all assets of the Fund shall be disbursed by order of the Supreme Court.

**History Note:** Authority — Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984, Readopted Effective December 8, 1994.

## SECTION .1500. RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

### D.1501. Purpose and definitions.

(a) *Purpose.*

The purpose of these continuing legal education rules is to assist lawyers licensed to practice and practicing law in North Carolina in achieving and maintaining professional competence for the benefit of the public whom they serve. The North Carolina State Bar, under Chapter 84 of the General Statutes of North Carolina, is charged with the responsibility of providing rules of professional conduct and with disciplining attorneys who do not comply with such rules. The Rules of Professional Conduct adopted by the North Carolina State Bar and approved by the Supreme Court of North Carolina require that lawyers adhere to important ethical standards, including that of rendering competent legal services in the representation of their clients.

At a time when all aspects of life and society are changing rapidly or becoming subject to pressures brought about by change, laws and legal principles are also in transition (through additions to the body of law, modifications and amendments) and are increasing in complexity. One cannot render competent legal services without continuous education and training.

The same changes and complexities, as well as the economic orientation of society, result in confusion about the ethical requirements concerning the practice of law and the relationships it creates. The data accumulated in the discipline program of the North Carolina State Bar argue persuasively for the establishment of a formal program for continuing and intensive training in professional responsibility and legal ethics.

It has also become clear that in order to render legal services in a professionally responsible manner, a lawyer must be able to manage his or her law practice competently. Sound management practices enable lawyers to concentrate on their clients' affairs while avoiding the ethical problems which can be caused by disorganization. These rules therefore provide for the administration of a law practice assistance program which is expected to emphasize training in law office management.

It is in response to such considerations that the North Carolina State Bar has adopted these minimum continuing legal education requirements. The purpose of these minimum continuing legal education requirements is the same as the purpose of the Rules of Professional Conduct themselves—to ensure that the public at large is served by lawyers who are competent and maintain high ethical standards.

(b) *Definitions.*

(1) "Accredited sponsor" shall mean an organization whose entire continuing legal education program has been accredited by the Board of Continuing Legal Education.

(2) "Active member" shall include any person who is licensed to practice law in the state of North Carolina and who is an active member of the North Carolina State Bar.

(3) "Administrative Committee" shall mean the Administrative Committee of the North Carolina State Bar.

(4) "Approved activity" shall mean a specific, individual legal education activity presented by an accredited sponsor or presented by other than an accredited sponsor if such activity is approved as a legal education activity under these rules by the Board of Continuing Legal Education.

(5) "Board" means the Board of Continuing Legal Education created by these rules.

(6) "Continuing legal education" or "CLE" is any legal, judicial or other educational activity accredited by the board. Generally, CLE will include educational activities designed principally to maintain or advance the professional competence of lawyers and/or to expand an appreciation and understanding of the professional responsibilities of lawyers.

(7) "Council" shall mean the North Carolina State Bar Council.

(8) "Credit hour" means an increment of time of 60 minutes which may be divided into segments of 30 minutes or 15 minutes, but no smaller.

(9) "Inactive member" shall mean a member of the North Carolina State Bar who is on inactive status.

(10) "In-house continuing legal education" shall mean courses or programs offered or conducted by law firms, either individually or in connection with other law firms, corporate legal departments, or similar entities primarily for the education of their members. The board may exempt from this definition those programs which it finds

(a) to be conducted by public or quasi-public organizations or associations for the education of their employees or members;

(b) to be concerned with areas of legal education not generally offered by sponsors of programs attended by lawyers engaged in the private practice of law.

(11) "Law practice assistance program" shall mean a program administered by the board to provide training in the area of law office management.

(12) A "newly admitted active member" is one who becomes an active member of the North Carolina State Bar for the first time, has been reinstated, or has changed from inactive to active status.

(13) "Participatory CLE" shall mean courses or segments of courses that encourage the participation of attendees in the educational experience through, for example, the analysis of hypothetical situations, role playing, mock trials, roundtable discussions, or debates.

(14) "Professional responsibility" shall mean those courses or segments of courses devoted to a) the substance, the underlying rationale, and the practical application of the Revised Rules of Professional Conduct; b) the professional obligations of the attorney to the client, the court, the public, and other lawyers; and c) the effects of substance abuse, chemical dependency, or debilitating mental condition on a lawyer's professional responsibilities. This definition shall be interpreted consistent with the provisions of Rule .1501(b)(5) above.

(15) "Professionalism" courses are courses or segments of courses devoted to the identification and examination of, and the encouragement of adherence to, non-mandatory aspirational standards of professional conduct which transcend the requirements of the Revised Rules of Professional Conduct. Such courses address principles of competence and dedication to the service of clients, civility, improvement of the justice system, advancement of the rule of law, and service to the community.

(16) "Rules" shall mean the provisions of the continuing legal education rules established by the Supreme Court of North Carolina (Section .1500 of this subchapter).

(17) "Sponsor" is any person or entity presenting or offering to present one

or more continuing legal education programs, whether or not an accredited sponsor.

(18) "Year" shall mean calendar year.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective March 6, 1997; Amended effective December 30, 1998; Amended effective March 3, 1999; Amended effective June 7, 2001.

### D.1502. Jurisdiction: Authority.

The Council of the North Carolina State Bar hereby establishes the Board of Continuing Legal Education (board) as a standing committee of the council, which board shall have authority to establish regulations governing a continuing legal education program and a law practice assistance program for attorneys licensed to practice law in this state.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1503. Operational responsibility.

The responsibility for operating the continuing legal education program and the law practice assistance program shall rest with the board, subject to the statutes governing the practice of law, the authority of the council, and the rules of governance of the board.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1504. Size of board.

The board shall have nine members, all of whom must be attorneys in good standing and authorized to practice in the state of North Carolina.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1505. Lay participation.

The board shall have no members who are not licensed attorneys.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1506. Appointment of members; When; Removal.

The members of the board shall be appointed by the council. The first members of the board shall be appointed as of the quarterly meeting of the council following the creation of the board. Thereafter, members shall be appointed annually as of the same quarterly meeting. Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1507. Term of office.

Each member who is appointed to the board shall serve for a term of three years beginning as of the first day of the month following the date on which the appointment is made by the council. See, however, Rule .1508 of this subchapter.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1508. Staggered terms.

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year. Of the initial board, three members shall be elected to terms of one year, three members shall be elected to terms of two years, and three members shall be elected to terms of three years. Thereafter, three members shall be elected each year.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1509. Succession.

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off the board for at least three years.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1510. Appointment of chairperson.

The chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1511. Appointment of vice-chairperson.

The vice-chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as vice-chairperson shall be one year. The vice-chairperson may be reappointed thereafter during tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1512. Source of funds.

(a) Funding for the program carried out by the board shall come from sponsor's fees and attendee's fees as provided below, as well as from duly assessed penalties for noncompliance and from reinstatement fees.

(1) Accredited sponsors located in North Carolina (for courses offered within or outside North Carolina), or accredited sponsors not located in North Carolina (for courses given in North Carolina), or unaccredited sponsors located within or outside of North Carolina (for accredited courses within North Carolina) shall, as a condition of conducting an approved activity, agree to remit a list of North Carolina attendees and to pay a fee for each active member of the North Carolina State Bar who attends the program for CLE credit. The sponsor's fee shall be based on each credit hour of attendance, with a proportional fee for portions of a program lasting less than an hour. The fee shall be set by the board upon approval of the council. Any sponsor, including an accredited sponsor, which conducts an approved activity which is offered without charge to attendees shall not be required to remit the fee under this section. Attendees who wish to receive credit for attending such an approved activity shall comply with Rule .1512(a)(2) below.

(2) The board shall fix a reasonably comparable fee to be paid by individual attorneys who attend for CLE credit approved continuing legal education activities for which the sponsor does not submit a fee under Rule .1512(a)(1) above. Such fee shall accompany the member's annual affidavit. The fee shall be set by the board upon approval of the council.

(b) Funding for a law practice assistance program shall be from user fees set by the board upon approval of the council and from such other funds as the council may provide.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1513. Fiscal responsibility.

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) *Maintenance of accounts: Audit.* The North Carolina State Bar shall maintain a separate account for funds of the board such that such funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(b) *Investment criteria.* The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the council for the handling of dues, rents, and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) *Disbursement.* Disbursement of funds of the board shall be made by or under the direction of the secretary-treasurer of the North Carolina State Bar pursuant to authority of the council. The members of the board shall serve on a voluntary basis without compensation, but may be reimbursed for the reasonable expenses incurred in attending meetings of the board or its committees.

(d) All revenues resulting from the CLE program, including fees received from attendees and sponsors, late filing penalties, late compliance fees, reinstatement fees, and interest on a reserve fund shall be applied first to the expense of administration of the CLE program including an adequate reserve fund; provided, however, that a portion of each sponsor or attendee fee, in an amount to be determined by the council but not to exceed $1.00 for each credit hour, shall be paid to the Chief Justice's Commission on Professionalism for

administration of the activities of the commission. Excess funds may be expended by the council on lawyer competency programs approved by the council.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended effective December 30, 1998.

### D.1514. Meetings.

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Carolina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson, or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission or telephone. A quorum of the board for conducting its official business shall be a majority of the members serving at a particular time.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1515. Annual report.

The board shall prepare at least annually a report of its activities and shall present the same to the council one month prior to its annual meeting.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1516. Powers and duties of the board.

The board shall have the following powers and duties:

(1) to exercise general supervisory authority over the administration of these rules;

(2) to adopt and amend regulations consistent with these rules with the approval of the council;

(3) to establish an office or offices and to employ such persons as the board deems necessary for the proper administration of these rules, and to delegate to them appropriate authority, subject to the review of the council;

(4) to report annually on the activities and operations of the board to the council and make any recommendations for changes in the rules or methods of operation of the continuing legal education program;

(5) to submit an annual budget to the council for approval and to ensure that expenses of the board do not exceed the annual budget approved by the council;

(6) to administer a law office assistance program for the benefit of lawyers who request or are required to obtain training in the area of law office management.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1517. Scope and exemptions.

(a) Except as provided herein these rules shall apply to every active member licensed by the North Carolina State Bar.

(b) The governor, the lieutenant governor, and all members of the council of state, all members of the federal and state judiciary, members of the United States Senate, members of the United States House of Representatives, members of the North Carolina General Assembly and members of the United States Armed Forces on full-time active duty are exempt. All active members, including members of the judiciary, who are exempt are encouraged to attend and participate in legal education programs.

(c) Any active member residing outside of North Carolina or any active member residing inside North Carolina who is a full-time teacher at the Institute of Government of the University of North Carolina at Chapel Hill or at a law school in North Carolina accredited by the American Bar Association and who in each case neither practices in North Carolina nor represents North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these rules upon written application to the board. Such application shall be filed on or before the due date for the payment of annual dues, or sooner as the circumstances may require, and shall be in effect for the year for which the application was made.

(d) The board may exempt an active member from the continuing legal education requirements for a period of not more than one year at a time upon a finding by the board of special circumstances unique to that member constituting undue hardship or other reasonable basis for exemption, or for a longer period upon a finding of a permanent disability.

(e) Nonresident attorneys from other jurisdictions who are temporarily admitted to practice in a particular case or proceeding pursuant to the provisions of G.S. 84-4.1 shall not be subject to the requirements of these rules.

(f) The board may exempt an active member from the continuing legal education requirements if

(1) the member is sixty-five years of age or older and

(2) the member does not render legal advice to or represent a client unless the member associates another active member who assumes responsibility for the advice or representation.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective February 12, 1997.

## D.1518. Continuing legal education program.

(a) Each active member subject to these rules shall complete 12 hours of approved continuing legal education during each calendar year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder.

(b) Of the 12 hours

(1) at least 2 hours shall be devoted to the areas of professional responsibility or professionalism or any combination thereof; and

(2) at least once every three calendar years, each member shall be required to attend a specially designed three-hour block course of instruction devoted to the areas of professional responsibility or professionalism or any combination thereof which will satisfy the requirement of Rule .1518(b)(1) above.

(c) Members may carry over up to 12 credit hours earned in one calendar year to the next calendar year, which may include those hours required by Rule .1518(b)(1) above, but may not include those hours required by Rule .1518(b)(2) above. Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year, any approved CLE hours earned after that member's graduation from law school.

(d) Members may carry over up to 12 credit hours earned in one calendar year to the next calendar year, which may include those hours required by Rule

.1518(b)(1) above, but may not include those hours required by Rule .1518(b)(2) above. Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year, any approved CLE hours earned after that member's graduation from law school.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended effective January 1, 1999; Amended effective March 3, 1999.

## D.1519. Accreditation standards.

The board shall approve continuing legal education activities which meet the following standards and provisions.

(1) They shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence and proficiency as a lawyer.

(2) They shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, professionalism, or ethical obligations of lawyers.

(3) Credit may be given for continuing legal education activities where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape or satellite transmitted programs. Subject to the limitations set forth in Rule .1611 of this subchapter, credit may also be given for continuing legal education activities on CD-ROM and on a computer website accessed via the Internet.

(4) Continuing legal education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience in a setting physically suitable to the educational activity of the program and equipped with suitable writing surfaces or sufficient space for taking notes.

(5) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the course is presented. These may include written materials printed from a computer website or CD-ROM. It is recognized that written materials are not suitable or readily available for some types of subjects. The absence of written materials for distribution should, however, be the exception and not the rule.

(6) Any accredited sponsor must remit fees as required and keep and maintain attendance records of each continuing legal education program sponsored by it, which shall be furnished to the board in accordance with regulations.

(7) Except as provided in Rule .1611 of this subchapter, in-house continuing legal education and self-study shall not be approved or accredited for the purpose of complying with Rule .1518 of this subchapter.

(8) Programs that cross academic lines, such as accounting-tax seminars, may be considered for approval by the board. However, the board must be satisfied that the content of the activity would enhance legal skills or the ability to practice law.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended effective December 30, 1998; Amended effective March 1, 2001.

## D.1520. Accreditation of sponsors and programs.

(a) An organization desiring accreditation as an accredited sponsor of courses, programs, or other continuing legal education activities may apply for accredited sponsor status to the board. The board shall approve a sponsor as an

accredited sponsor if it is satisfied that the sponsor's programs have met the standards set forth in Rule .1519 of this subchapter and regulations established by the board.

(b) Once an organization has been accredited as an accredited sponsor, then the continuing legal education programs sponsored by that organization are presumptively approved for credit, provided that the standards set out in Rule .1519 of this subchapter and the provisions of Rule .1512 of this subchapter are met. The board may at any time reevaluate and grant or revoke the presumptive approval status of an accredited sponsor.

(c) Any organization not accredited as an accredited sponsor which desires approval of a course or program shall apply to the board which shall adopt regulations to administer the accreditation of such programs consistent with the provisions of Rule .1519 of this subchapter. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(d) An active member desiring approval of a course or program which has not otherwise been approved shall apply to the board which shall adopt regulations to administer approval requests consistent with the requirements of Rule .1519 of this subchapter. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of the receipt of the notice of disapproval. The decision by the board on an appeal is final.

(e) The board may provide by regulation for an announcement of accreditation for an approved continuing legal education program.

(f) The board may provide by regulation for the accredited sponsor, sponsor, or active member for whom a continuing legal education program has been approved to maintain and provide such records as required by the board.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1521. Credit hours.

The board may designate by regulation the number of credit hours to be earned by participation, including, but not limited to, teaching, in continuing legal education activities approved by the board.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1522. Annual report.

Commencing in 1989, each active member of the North Carolina State Bar shall make an annual written report to the North Carolina State Bar in such form as the board shall prescribe by regulation concerning compliance with the continuing legal education program for the preceding year or declaring an exemption under Rule .1517 of this subchapter, unless the board's records indicate that such member has been previously exempted and the circumstances resulting in the exemption are unchanged. It shall be the responsibility of any previously exempted member whose circumstances have changed and who is therefore not presently qualified for an exemption to notify the board of such changed circumstances within 30 days after such become apparent and to satisfy fully the requirements of these rules for the year following such change in circumstances.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

## D.1523. Noncompliance.

(a) *Failure to comply with rules may result in suspension.* A member who is required to file a report of CLE credits and does not do so or who fails to meet the minimum requirements of these rules, including the payment of duly assessed penalties and attendee fees, may be suspended from the practice of law in the state of North Carolina.

(b) *Notice of failure to comply.* The board shall notify a member who appears to have failed to meet the requirements of these rules that the member will be suspended from the practice of law in this state, unless the member shows good cause in writing why the suspension should not be made or the member shows in writing that he or she has complied with the requirements within a 90-day period after receiving the notice. Notice shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized thereunder to serve process.

(c) *Entry of order of suspension upon failure to respond to notice to show cause.* Ninety-three days after mailing such notice, if no written response is filed with the board by the member attempting to show good cause or attempting to show that the member has complied with the requirements of these rules, upon the recommendation of the board and the Administrative Committee, the council may enter an order suspending the member from the practice of law. The order shall be entered and served as set forth in Rule .0903(c) of this subchapter.

(d) *Procedure upon submission of a timely response to a notice to show cause.*

(1) *Consideration by the board.* If the member files a timely written response to the notice, the board shall consider the matter at its next regularly scheduled meeting or may delegate consideration of the matter to a duly appointed committee of the board. The board shall review all evidence presented by the member to determine whether good cause has been shown or to determine whether the member has complied with the requirements of these rules within the 90-day period after receiving the notice to show cause.

(2) *Recommendation of the board.* The board shall determine whether the member has shown good cause why the member should not be suspended. If the board determines that good cause has not been shown and that the member has not shown compliance with these rules within the 90-day period after receipt of the notice to show cause, then the board shall refer the matter to the Administrative Committee for hearing together with a written recommendation to the Administrative Committee that the member be suspended.

(3) *Consideration by and recommendation of the Administrative Committee.* The Administrative Committee shall consider the matter at its next regularly scheduled meeting. The burden of proof shall be upon the member to show cause by clear, cogent and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules governing the continuing legal education program. Except as set forth above, the procedure for such hearing shall be as set forth in the Rule .0903(d)(1) and (2) of this subchapter.

(4) *Order of suspension.* Upon the recommendation of the Administrative Committee, the council may determine that the member has not complied with these rules and may enter an order suspending the member from the practice of law. The order shall be entered and served as set forth in the Rule .0903(d)(3) of this subchapter.

(e) *Late compliance fee.* Any member who complies with the requirements of the rules during the 90-day period after receiving the notice to show cause shall pay a late compliance fee as set forth in Rule .1608(b) of this subchapter.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective March 7, 1996; Amended effective March 6, 1997; Amended effective February 3, 2000.

## D.1524. Reinstatement.

(a) *Reinstatement within 30 days of service of suspension order.* A member who is suspended for noncompliance with the rules governing the continuing legal education program may petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after the service of the suspension order upon the member. The secretary shall enter an order reinstating the member to active status upon receipt of a timely written request and satisfactory showing by the member that the member has cured the continuing legal education deficiency for which the member was suspended. Such member shall not be required to file a formal reinstatement petition or pay a $250 reinstatement fee.

(b) *Procedure for reinstatement more than 30 days after service of the order of suspension.* Except as noted below, the procedure for reinstatement more than 30 days after service of the order of suspension shall be as set forth in Rule .0904(c) and (d) of this subchapter, and shall be administered by the Administrative Committee.

(c) *Reinstatement petition.* At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for noncompliance with the rules governing the continuing legal education program may seek reinstatement by filing a reinstatement petition with the secretary. The secretary shall transmit a copy of the petition to each member of the board. The reinstatement petition shall contain the information and be in the form required by Rule .0904(c) of this subchapter. If not otherwise set forth in the petition, the member shall attach a statement to the petition in which the member shall state with particularity the accredited legal education courses which the member has attended and the number of credit hours obtained in order to cure any continuing legal education deficiency for which the member was suspended.

(d) *Reinstatement fee.* In lieu of the $125.00 reinstatement fee required by Rule .0904(c)(4)(A), the petition shall be accompanied by a reinstatement fee payable to the board, in the amount of $250.00 as required by Rule .1609(a) of this subchapter.

(e) *Determination of board; Transmission to Administrative Committee.* Within 30 days of the filing of the petition for reinstatement with the secretary, the board shall determine whether the deficiency has been cured. The board's written determination and the reinstatement petition shall be transmitted to the secretary within five days of the determination by the board. The secretary shall transmit a copy of the petition and the board's recommendation to each member of the Administrative Committee.

(f) *Consideration by Administrative Committee.* The Administrative Committee shall consider the reinstatement petition, together with the board's determination, pursuant to the requirements of Rule .0902(c)-(f) of this subchapter.

(g) *Hearing upon denial of petition for reinstatement.* The procedure for hearing upon the denial by the Administrative Committee of a petition for reinstatement shall be as provided in Section .1000 of this subchapter.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective March 7, 1996; Amended effective March 6, 1997; Amended effective February 3, 2000.

### D.1525. Reserved.

**Editor's note.** — Rule .1525, relating to Confidentiality, was deleted by order of the Court dated October 17, 2001.

### D.1526. Effective date.

(a) The effective date of these rules shall be January 1, 1988.

(b) Active members licensed prior to July 1 of any calendar year shall meet the continuing legal education requirements of these rules for such year.

(c) Active members licensed after June 30 of any calendar year must meet the continuing legal education requirements of these rules for the next calendar year.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1527. Regulations.

The following regulations (Section .1600 of the Rules of the North Carolina State Bar) for the continuing legal education program are hereby adopted and shall remain in effect until revised or amended by the board with the approval of the council. The board may adopt other regulations to implement the continuing legal education program with the approval of the council.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

## SECTION .1600. REGULATIONS GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

### Section D.1601. Organization.

(a) *Quorum.* Five members shall constitute a quorum of the board.

(b) *The executive committee.* The executive committee of the board shall be comprised of the chairperson, a vice-chairperson elected by the members of the board, and a member to be appointed by the chairperson. Its purpose is to conduct all necessary business of the board that may arise between meetings of the full board. In such matters it shall have complete authority to act for the board.

(c) *Other committees.* The chairperson may appoint from time to time any committees he or she deems advisable of not less than three members for the purpose of considering and deciding matters submitted to them.

(d) *Definitions.* As used herein, "board" means the Board of Continuing Legal Education, "CLE" means continuing legal education, and "rules" means the rules for the continuing legal education program adopted by the Supreme Court of North Carolina (Section .1500 of this subchapter). All other definitions shall be as set forth in the rules.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

**D.1602. General course approval.**

(a) *Law school courses.* Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved activities. Computation of CLE credit for such courses shall be as prescribed in Rule .1605(a) of this subchapter. No more than 12 CLE hours in any year may be earned by such courses. No credit is available for law school courses attended prior to becoming an active member of the North Carolina State Bar.

(b) *Bar review/refresher course.* Courses designed to review or refresh recent law school graduates or attorneys in preparation for any bar exam shall not be approved for CLE credit.

(c) *Professional responsibility courses on substance abuse, chemical dependency and debilitating mental conditions.* Accredited professional responsibility courses on substance abuse, chemical dependency and debilitating mental conditions shall concentrate on the relationship between substance abuse, chemical dependency, debilitating mental conditions and a lawyer's professional responsibilities. Such courses may also include (1) education on the prevention, detection, treatment and etiology of substance abuse, chemical dependency, and debilitating mental conditions, and (2) information about assistance for chemically dependent or mentally impaired lawyers available through lawyers' professional organizations.

(d) *Approval.* CLE activities may be approved upon the written application of a sponsor, other than an accredited sponsor, on an individual program basis or of an active member on an individual program basis. An application for such CLE course approval shall meet the following requirements:

(1) If advance approval is requested by a sponsor, the application and supporting documentation, including two substantially complete sets of the written materials to be distributed at the course or program, shall be submitted at least 45 days prior to the date on which the course or program is scheduled. If advance approval is requested by an active member, the application need not include a complete set of written materials.

(2) In all other cases, the application and supporting documentation shall be submitted not later than 45 days after the date the course or program was presented or prior to the end of the calendar year in which the course or program was presented, whichever is earlier.

(3) The application shall be submitted on a form furnished by the board.

(4) The application shall contain all information requested on the form.

(5) The application shall be accompanied by a course outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic and shows each date and location at which the program will be offered.

(6) The application shall include a detailed calculation of the total CLE hours and hours of professional responsibility.

(e) *Course quality.* The application and materials provided shall reflect that the program to be offered meets the requirements of Rule .1519 of this subchapter. Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval. Any sponsor, including an accredited sponsor, who expects to conduct a CLE activity for which suitable written materials will not be made available to all attendees may obtain approval for that activity only by application to the board at least 45 days in advance of the presentation showing why written materials are not suitable or readily available for such a program.

(f) *Records.* Sponsors, including accredited sponsors, shall within 30 days after the course is concluded

(1) furnish to the board a list in alphabetical order, on magnetic tape if available, of the names of all North Carolina attendees and their North Carolina State Bar membership numbers;

(2) remit to the board the appropriate sponsor fee;

(3) furnish to the board a complete set of all written materials distributed to attendees at the course or program.

(g) *Announcement.* Accredited sponsors and sponsors who have advanced approval for courses may include in their brochures or other course descriptions the information contained in the following illustration:

> This course [or seminar or program] has been approved by the Board of Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of ____ hours, of which ____ hours will also apply in the area of professional responsibility. This course is not sponsored by the board.

(h) *Notice.* Sponsors not having advanced approval shall make no representation concerning the approval of the course for CLE credit by the board.

The board will mail a notice of its decision on CLE activity approval requests within 15 days of their receipt when the request for approval is submitted before the program and within 30 days when the request is submitted after the program. Approval thereof will be deemed if the notice is not timely mailed. This automatic approval will not operate if the sponsor contributes to the delay by failing to provide the complete information requested by the board or if the board timely notifies the sponsor that the matter has been tabled and the reason therefor.

(i) *In-House CLE and Self-Study.* No approval will be provided for in-house CLE or self-study by attorneys, except those programs exempted by the board under Rule .1501(b)(9) of this subchapter or as provided in Rule .1611 of this subchapter.

(j) *Facilities.* Sponsors must provide a facility conducive to learning with sufficient space for taking notes.

(k) *Course materials.* In addition to the requirements of Rule .1602(c) and (e) above, sponsors, including accredited sponsors, and active members seeking credit for an approved activity shall furnish upon request of the board a copy of all materials presented and distributed at a CLE course or program.

(l) *Nonlegal educational activities.* A course or segment of a course presented by a bar organization may be granted up to three hours of credit if the bar organization's course trains volunteer attorneys in service to the profession, and if such course or course segment meets the requirements of Rule .1519(2)-(7) and Rule .1602(e), (h)-(j) of this subchapter; if appropriate, up to three hours of professional responsibility credit may be granted for such course or course segment. Except as noted in the preceding sentence or in extraordinary circumstances, approval will not be given for general and personal educational activities. For example, the following types of courses will not receive approval:

(1) courses within the normal college curriculum such as English, history, social studies, and psychology;

(2) courses which deal with the individual lawyer's human development, such as stress reduction, quality of life, or substance abuse unless a course on substance abuse or mental health satisfies the requirements of Rule .1602(c);

(3) courses which deal with the development of personal skills generally, such as public speaking (other than oral argument and courtroom presentation), nonlegal writing, and financial management;

(4) courses designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from courses dealing with development of law office procedures and management designed to raise the level of service provided to clients).

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective March 6, 1997;

Amended effective March 5, 1998; Amended effective March 3, 1999; Amended effective March 1, 2001.

### D.1603. Accredited sponsors.

In order to receive designation as an "accredited sponsor" of courses, programs or other continuing legal education activities under Rule .1520(a) of this subchapter, the application of the sponsor must meet the following requirements:

(1) The application for accredited sponsor status shall be submitted on a form furnished by the board.

(2) The application shall contain all information requested on the form.

(3) The application shall be accompanied by course outlines or brochures that describe the content, identify the instructors, list the time devoted to each topic, show each date and location at which three programs have been sponsored in each of the last three consecutive years, and enclose the actual course materials.

(4) The application shall include a detailed calculation of the total CLE hours specified in each of the programs sponsored by the organization.

(5) The application shall reflect that the previous programs offered by the organization in continuing legal education have been of consistently high quality and would otherwise meet the standards set forth in Rule .1519 of this subchapter.

(6) Notwithstanding the provisions of Rule .1603 (3), (4) and (5) above, any law school which has been approved by the North Carolina State Bar for purposes of qualifying its graduates for the North Carolina bar examination, may become an accredited sponsor upon application to the board.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended effective June 7, 2001.

### D.1604. Accreditation of prerecorded programs and live programs broadcast to remote locations by telephone, satellite or video conferencing equipment.

(a) An active member may receive credit for attendance at, or participation in, a presentation where prerecorded material is used.

(b) An active member may receive credit for participation in a live presentation which is simultaneously broadcast by telephone, satellite or video conferencing equipment. The member may participate in the presentation by listening to or viewing the broadcast from a location that is remote from the origin of the broadcast.

(c) A member attending a prerecorded presentation is entitled to credit if

(1) the presentation from which the program is recorded would, if attended by an active member, be an accredited course;

(2) all other conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, are met.

(d) A member attending a presentation broadcast by telephone, satellite or video conferencing equipment is entitled to credit if

(1) the live presentation of the program would, if attended by an active member, be an accredited course;

(2) there is a question and answer session with the presenter or presenters subject to the limitations set forth in Rule .1605(b)(5) of this subchapter; and

(3) all other conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, are met.

(e) To receive approval for attendance at programs described in paragraphs (a) and (b) above, the following conditions must be met:

(1) Unless the entire program was produced by an accredited sponsor, the person or organization sponsoring the program must receive advance approval and accreditation from the board. Board Form 2 may be utilized for this purpose.

(2) The person or organization sponsoring the program must have a reliable method for recording and verifying attendance. Attendance at a telephone broadcast may be verified by assigning a personal identification number to a member. If attendance is recorded by a person, the person may not earn credit hours by virtue of attendance at that presentation. A copy of the record of attendance of active members must be forwarded to the board within 30 days after the presentation of the program is completed. Proof of attendance may be made by the verifying person on Board Form 5.

(3) Unless clearly inappropriate for the particular course, detailed papers, manuals, study materials, or written outlines are presented to the persons attending the program which substantially pertain to the subject matter of the program. Any materials made available to persons attending the original or live program must be made available to those persons attending the prerecorded or broadcast program who desire to receive credit under these regulations.

(4) A suitable room must be available for viewing the program and taking of notes.

(f) A minimum of five active members must physically attend the presentation of a prerecorded program. This requirement does not apply to participation from a remote location in the presentation of a live program broadcast by telephone, satellite or video conferencing equipment.

(g) EXAMPLES:

EXAMPLE (1): Attorney X, an active member, attends a videotape seminar sponsored by an accredited sponsor. If a person attending the program from which the videotape is made would receive credit, Attorney X is also entitled to receive credit, if the additional conditions under this Rule .1604 are also met.

EXAMPLE (2): Attorney Y, an active member, desires to attend a videotape program. However, the proposed videotape program (a) is not presented by an accredited sponsor, and (b) has not received individual course approval from the board. Attorney Y may not receive any credit hours for attending the videotape presentation without advance approval from the board.

EXAMPLE (3): Attorney Z, an active member, attends a videotape program. The presentation of the program from which the videotape was made has already been held and approved by the board for credit. However, no person is present at the videotape program to record attendance. Attorney Z may not obtain credit for viewing the videotape program unless it is viewed in the presence of a person who is not attending the videotape program for credit and who verifies the attendance of Attorney Z and of other attorneys at the program. All other conditions of this Rule .1604 must also be met.

EXAMPLE (4): Attorney Q, an active member, listens to a live telephone seminar using the telephone in the conference room of her law firm. To record her attendance, Attorney Q was assigned a personal identification number (PIN) by the seminar sponsor. Once connected, Attorney Q punched in the PIN number on her touch tone phone and her attendance was recorded. The seminar received individual course approval from the board. Attorney Q may receive credit if the additional conditions under this Rule .1604 are also met.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711; Readopted effective December 8, 1994; Amended effective March 6, 1997.

### D.1605. Computation of credit.

(a) *Computation formula.* CLE and professional responsibility hours shall be computed by the following formula:

$$\frac{\text{sum of the total minutes of actual instruction}}{60} = \text{Total Hours}$$

For example, actual instruction totaling 195 minutes would equal 3.25 hours toward CLE.

(b) *Actual instruction.* Only actual education shall be included in computing the total hours of actual instruction. The following shall not be included:

(1) introductory remarks;

(2) breaks;

(3) business meetings;

(4) speeches in connection with banquets or other events which are primarily social in nature;

(5) question and answer sessions at a ratio in excess of 15 minutes per CLE hour and programs less than 30 minutes in length provided, however, that the limitation on question and answer sessions shall not limit the length of time that may be devoted to participatory CLE.

(c) *Teaching.* As a contribution to professionalism, credit may be earned for teaching in an approved continuing legal education activity. Presentations accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of three hours of credit for each thirty minutes of presentation. Repeat presentations qualify for one-half of the credits available for the initial presentation. For example, an initial presentation of 45 minutes would qualify for 4.5 hours of credit.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended effective March 3, 1999.

### D.1606. Fees.

(a) *Sponsor fee.* The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved activities presented in North Carolina and by accredited sponsors located in North Carolina for approved activities wherever presented, except that no sponsor fee is required where approved activities are offered without charge to attendees. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee, per approved CLE hour per active member of the North Carolina State Bar in attendance, is $1.25 plus such additional amount as determined by the council as necessary to support the Chief Justice's Commission on Professionalism but not to exceed $1.00. The fee is computed as shown in the following formula and example which assumes a 6-hour course attended by 100 North Carolina lawyers seeking CLE credit and further assumes that the fee-per-hour is $2.25 which includes an assessment of $1.00 for the Chief Justice's Commission on Professionalism:

Fee: $ 2.25
x Total Approved CLE hours (x 6)
x Number of NC Attendees (100)
= Total Sponsor Fee ($1350)

(b) *Attendee fee.* The attendee fee is paid by the North Carolina attorney who requests credit for a program for which no sponsor fee was paid. An attorney

should remit the fees along with his or her affidavit before February 28 following the calendar year for which the report is being submitted. The amount of the fee, per approved CLE hour for which the attorney claims credit, is set at $1.25 plus such additional amount as determined by the council as necessary to support the Chief Justice's Commission on Professionalism but not to exceed $1.00. It is computed as shown in the following formula and example which assumes that the attorney attended an activity approved for 3 hours of CLE credit and that the fee-per-hour is $2.25 which includes an assessment of $1.00 for the Chief Justice's Commission on Professionalism:

Fee: $ 2.25
x Total Approved CLE hours (x 3.0)
= Total Attendee Fee ($6.75)

(c) *Fee review.* The board will review the level of the fee at least annually and adjust it as necessary to maintain adequate finances for prudent operation of the board in a nonprofit manner. The fee of $1.25 charged to sponsors and attendees will be increased only to the extent necessary for those fees to pay the costs of administration of the CLE program. The council shall annually review the assessment for the Chief Justice's Commission on Professionalism and adjust it as necessary to maintain adequate finances for the operation of the commission.

(d) *Uniform application.* The fee shall be applied uniformly without exceptions or other preferential treatment for a sponsor or attendee.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994; Amended effective December 30, 1998.

## D.1607. Special cases and exemptions.

(a) Attorneys who have a permanent disability which makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The board shall review and approve or disapprove such plans on an individual basis and without delay.

(b) Other requests for substitute compliance, partial waivers, other exemptions for hardship or extenuating circumstances may be granted by the board on a yearly basis upon written application of the attorney.

(c) Credit is earned through service as a bar examiner of the North Carolina Board of Law Examiners. The board will award 12 hours of CLE credit for the preparation and grading of a bar examination by a member of the North Carolina Board of Law Examiners.

(d) Newly admitted active members who have previously been licensed to practice law in this state or in some other state and who have actually practiced law for a period of at least five years may apply to the board for an exemption from the practical skills requirement of Rule .1518(c) of this subchapter. This application must be filed prior to July 31 of the year for which the exemption is initially sought.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

## D.1608. General compliance procedures.

(a) *Affidavit.* Prior to January 31 of each year, commencing in 1990, the prescribed affidavit form shall be mailed to all active members of the North

Carolina State Bar concerning compliance with the continuing legal education program for the preceding year.

(b) *Late filing penalty.* Any attorney who, for whatever reasons, files the affidavit showing compliance or declaring an exemption after the February 28 due date shall pay a $75.00 late filing penalty. This penalty shall be submitted with the affidavit. An affidavit that is either received by the board or postmarked on or before February 28 shall be considered to have been timely filed. An attorney who complies with the requirements of the rules during the probationary period under Rule .1523(c) of this subchapter shall pay a late compliance fee of $125.00 pursuant to Rule .1524 of this subchapter.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

### D.1609. Noncompliance procedures.

(a) *Reinstatement fee.* The uniform reinstatement fee is $250 and must accompany the reinstatement petition.

(b) *Petition.* The attachment to the petition for reinstatement required by Rule .1524(b) of this subchapter shall list the CLE activities according to a form provided by the board.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994, Amended March 7, 1996.

### D.1610. Authority for appeals.

(a) *Appeals.* Except as otherwise provided, the board is the final authority on all matters entrusted to it under Section .1500 and Section .1600 of this subchapter. Therefore, any decision by a committee of the board pursuant to a delegation of authority may be appealed to the full board.

(b) *Procedure.* A decision made by the staff of the board pursuant to a delegation of authority may also be reviewed by the full board but should first be appealed to any committee of the board having jurisdiction on the subject involved. All appeals shall be in writing. The board has the discretion to, but is not obligated to, grant a hearing in connection with any appeal regarding the accreditation of a program.

**History Note:** Authority — Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711, Readopted Effective December 8, 1994.

## SECTION .1700. THE PLAN OF LEGAL SPECIALIZATION

### D.1611. Accreditation of Computer-Based CLE.

(a) Effective for courses attended on or after July 1, 2001, a member may receive up to four (4) hours of credit annually for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the Internet.

(b) Any credit hours carried-over from one calendar year to another pursuant to Rule .1518(c) of this subchapter will not be included in calculating the four (4) hours of computer-based CLE allowed in any one calendar year.

(c) To be accredited, a computer-based CLE course must meet all of the conditions imposed by the rules in Section .1600 of this subchapter, or by the

board in advance, except where otherwise noted, and be interactive, permitting the participant to communicate, via telephone, electronic mail or a website bulletin board, with the presenter and/or other participants.

(d) The sponsor of an on-line course must have a reliable method for recording and verifying attendance. The sponsor of a CD-ROM course must demonstrate that there is a reliable method for the user or the sponsor to record and verify participation in the course. A participant may periodically log on and off of a computer-based CLE course provided the total time spent participating in the course is equal to or exceeds the credit hours assigned to the program. A copy of the record of attendance must be forwarded to the board within 30 days after a member completes his or her participation in the course.

**History Note:** Adopted March 1, 2001.

### D.1701. Purpose.

The purpose of this plan of certified legal specialization is to assist in the delivery of legal services to the public by identifying to the public those lawyers who have demonstrated special knowledge, skill, and proficiency in a specific field, so that the public can more closely match its needs with available services; and to improve the competency of the bar by establishing an additional incentive for lawyers to participate in continuing legal education and meet the other requirements of specialization.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1702. Jurisdiction: Authority.

The Council of the North Carolina State Bar (the council) with the approval of the Supreme Court of North Carolina hereby establishes the Board of Legal Specialization (board) as a standing committee of the council, which board shall be the authority having jurisdiction under state law over the subject of specialization of lawyers.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1703. Operational responsibility.

The responsibility for operating the specialization program rests with the board, subject to the statutes governing the practice of law, the authority of the council and the rules of governance of the board.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1704. Size of board.

The board shall have nine members, six of whom must be attorneys in good standing and authorized to practice law in the state of North Carolina. The lawyer members of the board shall be representative of the legal profession and shall include lawyers who are in general practice as well as those who specialize.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1705. Lay participation.

The board shall have three members who are not licensed attorneys.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1706. Appointment of members; When; Removal.

The members of the board shall be appointed by the council. The first members of the board shall be appointed as of the quarterly meeting of the council following the creation of the board. Thereafter, members shall be appointed annually as of the same quarterly meeting. Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1707. Term of office.

Each member who is appointed to the board shall serve for a term of three years beginning as of the first day of the month following the date on which the appointment is made by the council. See, however, Rule .1708 of this subchapter.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1708. Staggered terms.

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year. Of the initial board, three members (two lawyers and one nonlawyer) shall be elected to terms of one year; three members (two lawyers and one nonlawyer) shall be elected to terms of two years; and three members (two lawyers and one nonlawyer) shall be elected to terms of three years. Thereafter, three members (two lawyers and one nonlawyer) shall be elected in each year.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1709. Succession.

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off of the board for at least three years.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1710. Appointment of chairperson.

The chairperson of the board shall be appointed from time to time as necessary by the council from among the lawyer members of the board. The term of such individual as chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1711. Appointment of vice-chairperson.

The vice-chairperson of the board shall be appointed from time to time as necessary by the council from among the lawyer members of the board. The term of such individual as vice-chairperson shall be one year. The vice-chairperson may be reappointed thereafter during his or her tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1712. Source of funds.

Funding for the program carried out by the board shall come from such application fees, examination fees, course accreditation fees, annual fees or recertification fees as the board, with the approval of the council, may establish.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1713. Fiscal responsibility.

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) *Maintenance of accounts: Audit.* The North Carolina State Bar shall maintain a separate account for funds of the board such that such funds and expenditure therefrom can be readily identified. The accounts of the board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(b) *Investment criteria.* The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the council for the handling of dues, rents and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) *Disbursement.* Disbursement of funds of the board shall be made by or under the direction of the secretary-treasurer of the North Carolina State Bar.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1714. Meetings.

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Carolina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be four or more of the members serving at the time of the meeting.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1715. Annual report.

The board shall prepare at least annually a report of its activities and shall present same to the council one month prior to its annual meeting.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1716. Powers and duties of the board.

Subject to the general jurisdiction of the council and the North Carolina Supreme Court, the board shall have jurisdiction of all matters pertaining to regulation of certification of specialists in the practice of law and shall have the power and duty

(1) to administer the plan;

(2) subject to the approval of the council and the Supreme Court, to designate areas in which certificates of specialty may be granted and define the scope and limits of such specialities and to provide procedures for the achievement of these purposes;

(3) to appoint, supervise, act on the recommendations of and consult with specialty committees as hereinafter identified;

(4) to make and publish standards for the certification of specialists, upon the board's own initiative or upon consideration of recommendations made by the specialty committees, such standards to be designed to produce a uniform level of competence among the various specialties in accordance with the nature of the specialties;

(5) to certify specialists or deny, suspend or revoke the certification of specialists upon the board's own initiative, upon recommendations made by the specialty committees or upon requests for review of recommendations made by the specialty committees;

(6) to establish and publish procedures, rules, regulations, and bylaws to implement this plan;

(7) to propose and request the council to make amendments to this plan whenever appropriate;

(8) to cooperate with other boards or agencies in enforcing standards of professional conduct and to report apparent violations of the Rules of Professional Conduct to the appropriate disciplinary authority;

(9) to evaluate and approve, or disapprove, any and all continuing legal education courses, or educational alternatives, for the purpose of meeting the continuing legal education requirements established by the board for the certification of specialists and in connection therewith to determine the specialties for which credit shall be given and the number of hours of credit to

be given in cooperation with the providers of continuing legal education; to determine whether and what credit is to be allowed for educational alternatives, including other methods of legal education, teaching, writing and the like; to issue rules and regulations for obtaining approval of continuing legal education courses and educational alternatives; to publish or cooperate with others in publishing current lists of approved continuing legal education courses and educational alternatives; and to encourage and assist law schools, organizations providing continuing legal education, local bar associations and other groups engaged in continuing legal education to offer and maintain programs of continuing legal education designed to develop, enhance and maintain the skill and competence of legal specialists;

(10) to cooperate with other organizations, boards and agencies engaged in the recognition of legal specialists or concerned with the topic of legal specialization;

(11) notwithstanding any conflicting provision of the certification standards for any area of specialty, to direct any of the specialty committees not to administer a specialty examination if, in the judgment of the board, there are insufficient applicants or such would otherwise not be in the best interest of the specialization program.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1717. Retained jurisdiction of the council.

The council retains jurisdiction with respect to the following matters:

(1) upon recommendation of the board, establishing areas in which certificates of specialty may be granted;

(2) amending this plan;

(3) hearing appeals taken from actions of the board;

(4) establishing or approving fees to be charged in connection with the plan;

(5) regulating attorney advertisements of specialization under the Rules of Professional Conduct.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1718. Privileges conferred and limitations imposed.

The board in the implementation of this plan shall not alter the following privileges and responsibilities of certified specialists and other lawyers.

(1) No standard shall be approved which shall in any way limit the right of a certified specialist to practice in all fields of law. Subject to Canon 6 of the Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he or she is certified as a specialist in a particular field of law.

(2) No lawyer shall be required to be certified as a specialist in order to practice in the field of law covered by that specialty. Subject to Canon 6 of the North Carolina Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in any field of law, or advertise his or her availability to practice in any field of law consistent with Canon 2 of the Rules of Professional Conduct, even though he or she is not certified as a specialist in that field.

(3) All requirements for and all benefits to be derived from certification as a specialist are individual and may not be fulfilled by nor attributed to the law firm of which the specialist may be a member.

(4) Participation in the program shall be on a completely voluntary basis.

(5) A lawyer may be certified as a specialist in no more than two fields of law.

(6) When a client is referred by another lawyer to a lawyer who is a recognized specialist under this plan on a matter within the specialist's field of law, such specialist shall not take advantage of the referral to enlarge the scope of his or her representation and, consonant with any requirements of the Rules of Professional Conduct, such specialist shall not enlarge the scope of representation of a referred client outside the area of the specialty field.

(7) Any lawyer certified as a specialist under this plan shall be entitled to advertise that he or she is a "Board Certified Specialist" in his or her specialty to the extent permitted by the Rules of Professional Conduct.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## D.1719. Specialty committees.

(a) The board shall establish a separate specialty committee for each specialty in which specialists are to be certified. Each specialty committee shall be composed of seven members appointed by the board, one of whom shall be designated annually by the chairperson of the board as chairperson of the specialty committee. Members of each specialty committee shall be lawyers licensed and currently in good standing to practice law in this state who, in the judgment of the board, are competent in the field of law to be covered by the specialty. Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated. Members shall be appointed by the board to staggered terms of office and the initial appointees shall serve as follows: two shall serve for one year after appointment; two shall serve for two years after appointment; and three shall serve for three years after appointment. Appointment by the board to a vacancy shall be for the remaining term of the member leaving the specialty committee. All members shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term, provided, however, that the board may reappoint the chairperson of a committee to a third three-year term if the board determines that the reappointment is in the best interest of the specialization program. Meetings of the specialty committee shall be held at regular intervals at such times, places and upon such notices as the specialty committee may from time to time prescribe or upon direction of the board.

(b) Each specialty committee shall advise and assist the board in carrying out the board's objectives and in the implementation and regulation of this plan in that specialty. Each specialty committee shall advise and make recommendations to the board as to standards for the specialty and the certification of individual specialists in that specialty. Each specialty committee shall be charged with actively administering the plan in its specialty and with respect to that specialty shall

(1) after public hearing on due notice, recommend to the board reasonable and nondiscriminatory standards applicable to that specialty;

(2) make recommendations to the board for certification, continued certification, denial, suspension, or revocation of certification of specialists and for procedures with respect thereto;

(3) administer procedures established by the board for applications for certification and continued certification as a specialist and for denial, suspension, or revocation of such certification;

(4) administer examinations and other testing procedures, if applicable, investigate references of applicants and, if deemed advisable, seek additional information regarding applicants for certification or continued certification as specialists;

(5) make recommendations to the board concerning the approval of and credit to be allowed for continuing legal education courses, or educational alternatives, in the specialty;

(6) perform such other duties and make such other recommendations as may be delegated to or requested of the specialty committee by the board.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective November 7, 1996.

### D.1720. Minimum standards for certification of specialists.

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1) The applicant must be licensed and currently in good standing to practice law in this state.

(2) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement in the specialty during the five years immediately preceding his or her application according to objective and verifiable standards. Such substantial involvement shall be defined as to each specialty from a consideration of its nature, complexity, and differences from other fields and from consideration of the kind and extent of effort and experience necessary to demonstrate competence in that specialty. It is a measurement of actual experience within the particular specialty according to any of several standards. It may be measured by the time spent on legal work within the areas of the specialty, the number or type of matters handled within a certain period of time or any combination of these or other appropriate factors. However, within each specialty, experience requirements should be measured by objective standards. In no event should they be either so restrictive as to unduly limit certification of lawyers as specialists or so lax as to make the requirement of substantial involvement meaningless as a criterion of competence. Substantial involvement may vary from specialty to specialty, but, if measured on a time-spent basis, in no event shall the time spent in practice in the specialty be less than 25 percent of the total practice of a lawyer engaged in a normal full-time practice. Reasonable and uniform practice equivalents may be established including, but not limited to, successful pursuit of an advance educational degree, teaching, judicial, government, or corporate legal experience.

(3) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of continuing legal education in the specialty accredited by the board for the specialty, the minimum being an average of 12 hours of credit for continuing legal education, or its equivalent, for each of the three years immediately preceding application. Upon establishment of a new specialty, this standard may be satisfied in such manner as the board, upon advice from the appropriate specialty committee, may prescribe or may be waived if, and to the extent, accreditable continuing legal education courses have not been available during the three years immediately preceding establishment of the specialty.

(4) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of qualification in the specialty through peer review by providing, as references, the names of at least five lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges, who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant or, at the time of applica-

tion, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the board or appropriate disciplinary body and other persons regarding the applicant's competence and qualifications to be certified as a specialist.

(5) The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability in the specialty for which certification is applied. The examination must be applied uniformly to all applicants within each specialty area. The board shall assure that the contents and grading of the examination are designed to produce a uniform level of competence among the various specialties.

(b) All matters concerning the qualification of an applicant for certification, including, but not limited to, applications, references, tests and test scores, files, reports, investigations, hearings, findings, recommendations, and adverse determinations shall be confidential so far as is consistent with the effective administration of this plan, fairness to the applicant and due process of law.

(c) The board may adopt uniform rules waiving the requirements of Rules .1720(a)(4) and (5) above for members of a specialty committee at the time the initial written examination for that specialty is given and permitting said members to file applications to become a board certified specialist in that specialty upon compliance with all other required minimum standards for certification of specialists.

(d) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the board may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for certification for specialization. However, there shall be no waiver of the requirements that the applicant pass a written examination and be licensed to practice law in North Carolina for five years preceding the application.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## D.1721. Minimum standards for continued certification of specialists.

(a) The period of certification as a specialist shall be five years. During such period the board or appropriate specialty committee may require evidence from the specialist of his or her continued qualification for certification as a specialist, and the specialist must consent to inquiry by the board, or appropriate specialty committee of lawyers and judges, the appropriate disciplinary body, or others in the community regarding the specialist's continued competence and qualification to be certified as a specialist. Application for and approval of continued certification as a specialist shall be required prior to the end of each five-year period. To qualify for continued certification as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the board with respect to the specialty both continued knowledge of the law of this state and continued competence and must comply with the following minimum standards.

(1) The specialist must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement (which shall be determined in accordance with the principles set forth in Rule .1720(a)(2) of this subchapter) in the specialty during the entire period of certification as a specialist.

(2) The specialist must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of continuing legal education accredited by the board for the specialty during the period of

certification as a specialist, the minimum being an average of 12 hours of credit for continuing legal education, or its equivalent, for each year during the entire period of certification as a specialist.

(3) The specialist must comply with the requirements set forth in Rule .1720(a)(1) and (4) of this subchapter.

(b) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the board may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for continued certification.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## D.1722. Establishment of additional standards.

The board may establish, on its own initiative or upon the specialty committee's recommendation, additional or more stringent standards for certification than those provided in Rules .1720 and .1721 of this subchapter. Additional standards or requirements established under this rule need not be the same for initial certification and continued certification as a specialist. It is the intent of the plan that all requirements for certification or recertification in any area of specialty shall be no more or less stringent than the requirements in any other area of specialty.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## D.1723. Suspension or revocation of certification as a specialist.

(a) The board may revoke its certification of a lawyer as a specialist in the specialization program if the specialty is terminated or may suspend or revoke such certification if it is determined, upon the board's own initiative or upon recommendation of the appropriate specialty committee and after hearing before the board on appropriate notice, that

(1) the certification of the lawyer as a specialist was made contrary to the rules and regulations of the board;

(2) the lawyer certified as a specialist made a false representation, omission or misstatement of material fact to the board or appropriate specialty committee;

(3) the lawyer certified as a specialist has failed to abide by all rules and regulations promulgated by the board;

(4) the lawyer certified as a specialist has failed to pay the fees required;

(5) the lawyer certified as a specialist no longer meets the standards established by the board for the certification of specialists; or

(6) the lawyer certified as a specialist has been disciplined, disbarred, or suspended from practice by the Supreme Court of any other state or federal court or agency.

(b) The lawyer certified as a specialist has a duty to inform the board promptly of any fact or circumstance described in Rule .1723(a)(1) through (6) above.

(c) If the board revokes its certification of a lawyer as a specialist, the lawyer cannot again be certified as a specialist unless he or she so qualifies upon application made as if for initial certification as a specialist and upon such other conditions as the board may prescribe. If the board suspends certification of a lawyer as a specialist, such certification cannot be reinstated except upon the lawyer's application therefore and compliance with such conditions and requirements as the board may prescribe.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1724. Right to hearing and appeal to council.

A lawyer who is denied certification or continued certification as a specialist or whose certification is suspended or revoked shall have the right to a hearing before the board and, thereafter, the right to appeal the ruling made thereon by the board to the council under such rules and regulations as the board and council may prescribe. (See Section .1800 of this subchapter.)

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1725. Areas of specialty.

There are hereby recognized the following specialties:
(1) bankruptcy law
(a) consumer bankruptcy law
(b) business bankruptcy law
(2) estate planning and probate law
(3) real property law
(a) real property — residential
(b) real property — business, commercial, and industrial
(4) family law
(5) criminal law
(a) criminal appellate practice
(b) state criminal law
(6) immigration law.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended April 17, 1998.

### D.1726. Certification standards of the specialties of bankruptcy law, estate planning and probate law, real property law, family law, and criminal law.

Previous decisions approving the certification standards for the areas of specialty listed above are hereby reaffirmed.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SECTION .1800. HEARING AND APPEAL RULES OF THE BOARD OF LEGAL SPECIALIZATION

### D.1801. Reconsideration of applications, failure of written examinations, and appeals.

(a) *Applications incomplete and/or applicants not in compliance with standards for certification.*
(1) *Incomplete applications.* The executive director of the North Carolina State Bar Board of Legal Specialization (the board) will review every application to determine if the application is complete. The applicant will be notified of the incompleteness of his or her application. The applicant must submit the completed application within 21 days of the date of mailing of the notice. If the

applicant fails to provide the required information for the application during the requisite time period, the executive director will refer the application to the specialty committee for review.

(2) *Applicant not in compliance.* The executive director shall refer to the specialty committee for review any application which appears complete on its face but which does not satisfactorily demonstrate compliance with the standards for certification in the specialty area for which certification is sought.

(3) *Specialty committee action.* The specialty committee shall review the incomplete applications and the applications not in compliance with the standards for certification. After reviewing the applications, the specialty committee shall recommend to the board the acceptance or rejection of the applications. The specialty committee shall notify the board of its recommendations in writing and the reason for any negative recommendation must be specified. The specialty committee must complete the above process within 14 days of receiving the applications.

(4) *Notification to applicant of the specialty committee's action.* The executive director shall promptly notify the applicant in writing of the specialty committee's recommendation of rejection of the application. The notification must specify the reason for the recommendation of rejection of the application. In addition, the notification shall inform the applicant of his or her right to petition the board for review of the application or request a hearing before the board.

(5) *Petition for review by the board.* Within 21 days of the mailing of the notice from the executive director that an application has been recommended for rejection by the specialty committee, the applicant may petition the board for review. The petition may be informal (e.g., by letter), but should include the date on which notice of the recommendation of rejection was received and the reasons for which the applicant believes the specialty committee's recommendation of rejection should not be accepted.

(6) *Review of petition by the board.* A three-member panel of the board, to be appointed by the chairperson of the board, shall review and take action by a majority of the panel upon the petition and notify the applicant of the board's decision. The notification shall inform the applicant of his or her right to appeal the decision to the North Carolina State Bar Council (the council) if the board's action is unfavorable to the applicant.

(7) *Request for hearing.* In lieu of a petition for review, an applicant may request a hearing before the board. The applicant shall notify the board through its executive director in writing of such request for a hearing within 21 days of the mailing of the notice regarding the specialty committee's recommendation of rejection of the application. The applicant shall set forth the grounds for the hearing before the board. In such a request, the applicant shall list the names of prospective witnesses and identify documentation and other evidence to be introduced at the hearing before the board. The applicant shall be notified of the board's decision, and if the board's decision is unfavorable to the applicant, the applicant will be notified of his or her right to appeal the board's decision to the council.

(8) *Hearing procedures.*

(A) *Notice: Time and place of hearing.* The chairperson of the board shall fix the time and place of the hearing as soon as practicable after the applicant's request for hearing is received. The applicant shall be notified of the hearing date. Such notice shall be given to the applicant at least 10 days prior to the time fixed for the hearing.

(B) *Quorum.* A panel of three members of the board, as appointed by the chairperson, shall be necessary to conduct the hearing with the majority of those in attendance necessary to decide upon the matter.

(C) *Representation by counsel and witnesses.* The applicant may be represented by counsel or represent himself or herself at such hearing. The applicant may offer witnesses and documents and may cross-examine any witness.

(D) *Written briefs.* The applicant is urged to submit a written brief (in quadruplicate) 10 days prior to the hearing to the executive director for distribution to the panel in support of his or her position. However, written briefs are not required.

(E) *Depositions.* Should the applicant or executive director desire to take a deposition prior to the board hearing of any voluntary witness who cannot attend the board hearing, such intention to take, and request to take, the deposition of a witness may be applied for in writing to the chairperson of the board together with a written consent signed by the potential witness that he or she will give a deposition for one party and a statement to the effect that the witness cannot attend the hearing along with the reason for such unavailability. The party seeking to take the deposition of a witness shall state in detail as to what the witness is expected to testify. If the chairperson is satisfied that such deposition from a possible witness will be relevant to the issue in question before the board, then the chairperson will authorize said taking of the deposition. The chairperson will also designate the executive director or a member of the specialty committee to be present at the deposition. The deposition may be taken orally or by video. Any refusal of the taking of the deposition by the chairperson shall be reviewed by the board at the request of the applicant. The cost connected with taking the deposition shall be borne by the party requesting the deposition.

(F) *Continuances.* Motions for continuance of the hearing should be made to the chairperson of the board and such motions will be granted or denied by the chairperson of the board.

(G) *Burden of proof: Preponderance of the evidence.* The panel of the board shall apply the preponderance of the evidence rule in determining whether or not to accept the application for certification. The burden of proof is upon the applicant.

(H) *Conduct of hearings: Rights of parties.*

(i) Hearings shall be reported by a certified court reporter. The applicant shall pay the costs associated with obtaining the court reporter's services for the hearing. The applicant shall pay the costs of the transcript and shall arrange for the preparation of the transcript with the court reporter. The applicant shall be taxed with all other costs of the hearing, but such costs shall not include any compensation to the members of the board before whom the hearing is conducted. The board in its discretion may refund to the applicant all or some portion of the necessary costs incurred as a result of the hearing.

(ii) The applicant may retain counsel at all stages of the investigation and at all meetings. The applicant and his or her counsel shall have the right to attend all hearings.

(iii) Oral evidence at hearings shall be taken only on oath or affirmation. The applicant shall have the right to testify unless he or she specifically waives such right or fails to appear at the hearing. If the applicant does not testify on his or her behalf, the applicant may be called and examined by the panel of the board, the executive director, and any member of the specialty committee. The applicant's failure to appear at the hearing ordered by the board, after receipt of written notice, shall constitute a waiver of the applicant's right to a hearing before the board.

(iv) At any hearing, the panel of the board, the executive director, any member of the appropriate specialty committee, and the applicant shall have these rights: (a) to call and examine witnesses; (b) to offer exhibits; (c) to cross-examine witnesses on any matter relevant to the issues even though that

matter was not covered in the direct examination; and (d) to impeach any witness regardless of who first called such witness to testify and to rebut any evidence.

(v) Hearings need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

(vi) Any hearing may be recessed or adjourned from time to time at the discretion of the panel.

(9) *Failure of applicant to petition the board for review or request a hearing before the board within the time allowed by these rules.* If the applicant does not petition the board for review or request a hearing before the board regarding the specialty committee's recommendation of rejection of the application within the time allowed by these rules, the board shall act on the matter at its next board meeting.

(b) *Failure of written examination.*

(1) *Review of examination.* Within 30 days of the mailing of the notice from the board's executive director that the applicant has failed the written examination, the applicant may review his or her examination at the office of the board at a time designated by the executive director. The applicant shall not remove the examination from the board's office.

(2) *Petition for grade review.* If, after reviewing the examination, the applicant feels an error or errors were made in the grading, he or she may file with the executive director a petition for grade review. The petition must be filed within 45 days of the mailing of the notice of failure and should set out in detail the area or areas which, in the opinion of the applicant, have been incorrectly graded. Supporting information may be filed to substantiate the applicant's claim. At the time of filing the petition, the applicant must either (A) request a hearing before a three-member panel of the board; or (B) waive his or her right to a hearing before the board and request that the board render a decision based upon its review of the applicant's examination, supporting documents, and the recommendations of the review committee of the specialty committee.

(3) *Review procedure.* The applicant's examination and petition shall be submitted to a panel consisting of a minimum of at least three members of the specialty committee (the review committee of the specialty committee). All information will be submitted in blind form, the staff being responsible for deleting any identifying information on the examination or the petition. The review committee of the specialty committee shall review the entire examination of the applicant. The review committee of the specialty committee shall recommend to the board that the grade of the examination remain the same or be changed.

(4) *Decision of the board.* A panel of the board shall consider the applicant's petition for grade review either by hearing or by a review only of the applicant's submitted materials.

(5) *Hearing procedures.* The rules set forth in Rule .1801(a)(8) above shall be followed when an applicant petitions for a hearing before the board for a grade review of his or her examination.

(6) *Burden of proof: Preponderance of the evidence.* The panel of the board shall apply the preponderance of the evidence rule in determining whether the applicant's grade on the examination should remain the same or be changed. The burden of proof is upon the applicant.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994, Amended Effective June 1, 1995.

### D.1802. Denial of continued certification as a specialist.

(a) *Denial of continued certification.* The board, upon its initiative or upon recommendation of the appropriate specialty committee, may deny continued certification of a specialist, if the applicant does not meet the requirements as found in Rule .1721(a) of this subchapter.

(b) *Notification of board action.* The executive director shall notify the applicant of the board's decision to grant or deny continued certification as a specialist.

(c) *Request for hearing.* Within 21 days of the mailing of notice from the executive director of the board that the applicant has been denied continued certification, the applicant may request a hearing before the board.

(d) *Hearing procedure.* The rules set forth in Rule .1801(a)(8) of this subchapter shall be followed when an applicant requests a hearing regarding the denial of continued certification.

(e) *Burden of proof: Preponderance of the evidence.* A three-member panel of the board shall apply the preponderance of the evidence rule in determining whether the applicant's certification should be continued. The burden of proof is upon the applicant.

(f) *Notification of board's decision.* The board shall notify the applicant of its decision to grant or deny continued certification as a specialist.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1803. Suspension or revocation of a specialist's certification.

(a) The board may suspend or revoke its certification of a lawyer as a specialist upon the board's initiative or upon recommendation of the appropriate specialty committee and after hearing before the board on appropriate notice, upon a finding that:

(1) the lawyer was certified as a specialist contrary to the rules and regulations of the board;

(2) the lawyer certified as a specialist made a false representation, omission or misstatement of material fact to the board or appropriate specialty committee;

(3) the lawyer certified as a specialist has failed to abide by all rules and regulations promulgated by the board;

(4) the lawyer certified as a specialist has failed to pay the fees required;

(5) the lawyer certified as a specialist no longer meets the standards established by the board for the certification of specialists; or

(6) the lawyer certified as a specialist has been disciplined, disbarred or suspended from practice in North Carolina or by the Supreme Court of any other state or federal court or agency.

(b) The executive director shall notify the specialist in writing of the board's consideration of the suspension or revocation of the specialist's certification. The specialist will also be notified of his or her right to a hearing on the issue. The specialist must request in writing a hearing within 21 days of the mailing of the notice of suspension or revocation of certification.

(c) At its next regular or specially called meeting, the board shall conduct a hearing according to the hearing procedures set forth in Rule .1801(a)(8) of this subchapter. The board shall apply the preponderance of the evidence rule in

determining whether the specialist's certification should be suspended or revoked. The burden of proof is upon the board.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1804. Appeal to the council.

(a) *Appealable decisions.* An appeal may be taken to the council from a decision of the board which denies an applicant certification (i.e., when an applicant's application has been rejected because it is incomplete and/or not in compliance with the standards for certification or when an applicant fails the written specialty examination), denies an applicant continued certification as a specialist, or suspends or revokes a specialist's certification. (Persons who appeal the board's decision are referred to herein as appellants.)

(b) *Filing the appeal.* An appeal from a decision of the board as described in Rule .1804(a) above may be taken by filing with the executive director of the North Carolina State Bar (the State Bar) a written notice of appeal not later than 21 days after the mailing of the board's decision to the applicant who is denied certification or continued certification or to a lawyer whose certification is suspended or revoked.

(c) *Time and place of hearing.* The appeal will be scheduled for hearing at a time set by the council. The executive director of the State Bar shall notify the appellant and the board of the time and place of the hearing before the council.

(d) *Record on appeal to the council.*

(1) The record on appeal to the council shall consist of all the evidence offered at the hearing before the board. The executive director of the board shall assemble the record and certify it to the executive director of the State Bar and notify the appellant of such action.

(2) The appellant shall make prompt arrangement with the court reporter to obtain and have filed with the executive director of the State Bar a complete transcript of the hearing. Failure of the appellant to make such arrangements and pay the costs shall be grounds for dismissal of the appeal.

(e) *Parties appearing before the council.* The appellant may request to appear, with or without counsel, before the council and make oral argument. The board may appear on its own behalf or by counsel.

(f) *Appeal procedure.* The council shall consider the appeal in banc. The council shall consider only the record on appeal, briefs, and oral arguments. The decision of the council shall be by a majority of those members voting. All council members present at the meeting may participate in the discussion and deliberation of the appeal. Members of the board who also serve on the council are recused from voting on the appeal.

(g) *Notice of the council's decision.* The appellant shall receive written notice of the council's decision.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1805. Judicial review.

(a) *Appeals.* The appellant or the board may appeal from an adverse ruling by the council.

(b) *Wake County Superior Court.* All appeals from the council shall lie to the Wake County Superior Court. (See *N.C. State Bar v. Du Mont,* 304 N.C. 627, 286 S.E.2d 89 (1982).)

(c) *Judicial review procedures.* Article 4 of G.S. 150-B shall be complied with by all parties relative to the procedures for judicial review of the council's decision.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1806. Additional rules pertaining to hearings and appeals.

(a) *Notices.* Every notice required by these rules shall be mailed to the applicant.

(b) *Expenses related to hearings and appeals.* In its discretion, the board may direct that the necessary expenses incurred in any investigation, processing, and hearing of any matter to the board or appeal to the council be paid by the board. However, all expenses related to travel to any hearing or appeal for the applicant, his or her attorney, and witnesses called by the applicant shall be borne by the applicant and shall not be paid by the board.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SECTION .1900. RULES CONCERNING THE ACCREDITATION OF CONTINUING LEGAL EDUCATION FOR THE PURPOSES OF THE BOARD OF LEGAL SPECIALIZATION

### D.1901. General provisions.

(a) An applicant for certification in a specialty field must make a satisfactory showing of the requisite number of hours of continuing legal education (CLE) in the specialty field for each of the last three years prior to application in accord with the standards adopted by the board in the field. In no event will the number of hours be less than an average of twelve hours per year. The average number of hours is computed by adding all hours of continuing legal education credits in the field for three years and dividing by three.

(b) An applicant for continued certification must make a satisfactory showing of the requisite number of hours of continuing legal education (CLE) in the specialty field for each of the five years of certification in accord with the standards adopted by the board in the field. In no event will the number of hours be less than an average of twelve hours per year. The average number of hours is computed by adding all hours of continuing legal education credits in the field for the five years and dividing by five.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1902. Definitions.

(1) *Applicant.* The person applying for certification or continued certification of specialization.

(2) *Board.* The North Carolina State Bar Board of Legal Specialization.

(3) *Committee.* The specialty committee appointed by the board in the applicant's specialty field.

(4) *Sponsor.* An organization offering continuing legal education courses for attendance by attorneys.

(5) *Accredited sponsor.* A sponsor which has demonstrated to the satisfaction of the board that the continuing legal education programs offered by it meet the accreditation standards on a continuing basis warranting a presumption of accreditation.

(6) *Accreditation.* A determination by the board that the continuing legal education activities further the professional competence of the applicant and a certain number of hours of continuing legal education credit should be awarded for participation in the continuing legal education activity.

(7) *Continuing Legal Education (CLE).* Attendance at lecture-type instruction meeting the standards in Rule .1903 of this subchapter or participation in alternative activities described in Rule .1905 of this subchapter.

(8) *Specialty field.* An area of the law as defined by the board in which the board certifies specialists.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## D.1903. Accreditation standards for lecture-type CLE activities.

(a) The CLE activity shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence in the applicant's specialty field.

(b) The CLE activity shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, or ethical obligations of lawyers in the applicant's specialty field.

(c) The CLE activity may be presented by either live instruction or mechanical or electronically recorded or reproduced material. If electronic transmission is used, an instructor should be present for comment or to answer questions. The board may reduce the hours of credit for electronic transmission when no instructor is present.

(d) Continuing legal education materials are to be prepared and activities conducted by an individual or group qualified by practical or academic experience in a setting suitable to the educational activity of the program.

(e) Except when not suitable or readily available because of the topic or the nature of the lecture, thorough, high quality, and carefully prepared written materials shall be provided to all attendees prior to or at the time the instruction is presented. Absence of materials should be the exception and not the rule.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## D.1904. Computation of hours of instruction.

(a) Hours of CLE will be computed by adding the number of minutes of actual instruction, dividing by 60 and rounding the results to the nearest one-tenth of an hour.

(b) Only actual instruction will be included in computing the total hours of actual instruction. The following will be excluded:

(1) introductory remarks;

(2) breaks;

(3) business meetings;

(4) keynote speeches or speeches in connection with meals;

(5) question and answer sessions in excess of fifteen minutes per hour of instruction;

(6) programs of less than 60 minutes in length.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.1905. Alternatives to lecture-type CLE course instruction.

(a) *Teaching.* Preparation and presentation of written materials at an accredited CLE course will qualify for CLE credit at the rate of six hours of credit for each hour of presentation as computed under Rule .1904 of this subchapter. In the case of joint preparation and/or presentation, each preparer and presenter will receive a proportionate share of the total credit available. Repeat presentations of substantially the same materials will not qualify for additional credit. Instruction at an academic institution will qualify for three hours of CLE credit per semester hour taught in the specialty field.

(b) *Publication.* Publication of a scholarly article in the applicant's specialty field will qualify for CLE credit in the discretion of the specialty committee, subject to board approval, based on a review of the article, its content, and its quality. No more than ten hours of credit will be given for a single article.

(c) *Self-study.* An individual may review video or audio tapes or manuscripts of lectures from qualified CLE courses, which lectures would meet the accreditation standards in Rule .1903 of this subchapter and receive credit according to the computation of hours in Rule .1904 of this subchapter provided that no more than two hours per year of self-study shall qualify to meet the CLE requirements for certification or recertification.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994, Amended March 7, 1996.

### D.1906. Accreditation of courses.

(a) All courses offered by an accredited sponsor which relate to the specialty field as defined by the board shall be accredited and credit for attendance shall be given for the hours of instruction related to the specialty field of the applicant as determined by the board.

(b) The applicant shall make a showing that any course for which the applicant desires CLE credit offered by a sponsor not on the accredited sponsor list meets the accreditation standards of Rule .1903 of this subchapter. The board will then determine the number of hours of credit based upon the standards of Rule .1904 of this subchapter.

(c) An accredited sponsor may not represent or advertise that a CLE course is approved or that the attendees will be given CLE credit by the board unless such sponsor provides a brochure or other appropriate information describing the topics, hours of instruction, and instructors for its CLE offerings in a specialty field at least thirty days in advance of the date of the course and pay a fee of $100 per course for the costs of accreditation.

(d) An unaccredited sponsor desiring advance accreditation of a course and the right to designate its accreditation for the appropriate number of CLE credits in its solicitations shall submit a brochure or other appropriate information describing the topics, hours of instruction, location, and instructors for its CLE offerings at least sixty days prior to the date of the course. A fee of $200 shall accompany all requests for accreditation of courses from a sponsor not on the accredited sponsor list.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**D.1907. Accreditation of sponsor.**

(a) The following is the list of accredited sponsors:
(1) North Carolina Bar Foundation
(2) North Carolina Academy of Trial Lawyers
(3) Wake Forest University Continuing Legal Education
(4) University of North Carolina at Chapel Hill Continuing Legal Education
(5) Duke University School of Law Continuing Legal Education
(6) Norman Adrian Wiggins School of Law Continuing Legal Education
(7) Middle District Bankruptcy Seminar
(8) UCB Estate Planning and Taxation Seminar
(9) any member of the Association of Continuing Legal Education Administrators
(10) University of Miami School of Law
(11) any of the following groups: American Bar Association, American College of Probate Counsel, American College of Trial Counsel, American Patent Law Association, Association of American Law Schools, Association of Life Insurance Counsel, Conference of Chief Justices, Council on Legal Education for Professional Responsibility, Inc., Federal Bar Association, Federal Communications Bar Association, Judge Advocates Association, Maritime Law Association of the United States, National Association of Attorneys General, National Association of Bar Executives, National Association of Bar Presidents, National Association of Bar Counsel, National Association of Women Lawyers, National Bar Association, National Conference of Bar Examiners, National Conference of Commissioners on Uniform State Laws, National Conference of Judicial Councils, National District Attorneys Association, and National Legal Aid and Defender Association.

(b) Any sponsor not listed in Rule .1907(a) above desiring to attain accredited sponsor status must submit to the board a description of the courses offered for the two years prior to application to the board for accredited sponsor status. The board may request copies of any course materials used in any of the offered courses. If, in the judgment of the board, the sponsor has met the accreditation standards of Rule .1903 of this subchapter for each of the courses offered, the board will designate the sponsor as an accredited sponsor.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**D.1908. Showing by applicants.**

Every applicant will list each type of CLE activity under each of the following categories:

(1) *Attendance at CLE instruction offered by an accredited sponsor.* The course name, sponsor, and number of hours of CLE shall be listed by the applicant;

(2) *Attendance at CLE instruction offered by a sponsor not on the accredited sponsor list or not given advanced approval by the board under Rule .1906 of this subchapter.* A fee of $5.00 per course will be charged for accrediting each course listed by the applicant offered by a sponsor not on the accredited sponsor list or not given advanced approval under Rule .1906(d) of this subchapter. The course name, sponsor, and number of hours of CLE shall be listed by the applicant;

(3) *Participation as an instructor at a CLE course.* The course name, sponsor, and number of hours of instruction or preparation shall be stated by the applicant;

(4) *Publication of a scholarly article.* A copy of the publication shall accompany the application;

(5) *Self-study.* A description of the materials used, the dates of use, the number of hours claimed, and the source from which they were obtained shall accompany the application.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SECTION .2000. RULES OF THE BOARD OF LEGAL SPECIALIZATION FOR APPROVAL OF INDEPENDENT CERTIFYING ORGANIZATIONS

### D.2001. Policy statement.

These guidelines for reviewing independent organizations which certify lawyers as specialists are designed to thoroughly evaluate the purpose and function of such certifying organizations and the procedures they use in their certification processes. These guidelines are not meant to be exclusive, but to provide a framework in which certifying organizations can be evaluated. The aim of this evaluation is to provide consumers of legal services a means of access to lawyers who are qualified in particular fields of law.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2002. General procedure.

As contemplated in Rule 2.5 of the North Carolina Rules of Professional Conduct, the North Carolina State Bar, through its Board of Legal Specialization (the board), shall, upon the filing of a completed application and the payment of any required fee, review the standards and procedures of any organization which certifies lawyers as specialists and desires the approval of the North Carolina State Bar. The board shall prepare an application form to be used by certifying organizations and shall administer the application process.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2003. Factors to be considered in reviewing certifying organizations.

(a) *Purpose of the organization.* The stated purposes for the original formation of the organization and any subsequent changes in those purposes shall be examined to determine whether the organization is dedicated to the maintenance of professional competence.

(b) *Background of the organization.* The length of time the organization has been in existence, whether the organization is a successor of another, the requirements for membership in the organization, the number of members which the organization has, the business structure under which the organization operates, and the professional qualifications of the individuals who direct the policies and operations of the organization shall be examined to determine whether the organization is a bona fide certifying organization.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**D.2004. Standards for approval of certifying organizations.**

The following standards are to be considered by the board in evaluating an application for approval of a certifying organization.

(1) *Uniform applicability of certification standards.* In general, the standards for certification in any specialty field must be understandable and easily applied to individual applicants. Certification by the organization must be available to any attorney who meets the standards, and the organization must not certify an attorney who has not demonstrably met each standard. The organization must agree to promptly inform the board of any material changes in its standards, definitions of specialty fields or certifying procedures and must further agree to respond promptly to any reasonable requests for information from the board.

(2) *Definitions of specialty fields.* Every field of law in which certification is offered must be susceptible of meaningful definition and be an area in which North Carolina lawyers regularly practice.

(3) *Decision making by recognized experts.* The persons in a certifying organization making decisions regarding applicants shall include lawyers who, in the judgment of the board, are experts in the subject areas of practice and who each have extensive practice or involvement in those areas of practice.

(4) *Certification standards.* A certifying organization's standards for certification of specialists must include, as a minimum, the standards required for certification set out in the North Carolina Plan of Legal Specialization (Section .1700 of this subchapter) and in the rules, regulations and standards adopted by the board from time to time. Such standards shall not unlawfully discriminate against any lawyer properly qualified for certification as a specialist, but shall provide a reasonable basis for a determination that an applicant possesses special competence in a particular field of law, as demonstrated by the following means:

(a) *Substantial involvement.* Substantial involvement in the area of specialty during the five-year period immediately preceding application to the certifying agency. Substantial involvement is generally measured by the amount of time spent practicing in the area of specialty. In no event may the time spent in practicing the specialty be less than 25 percent of the total practice of a lawyer engaged in a normal full-time practice;

(b) *Peer review.* Peer recommendations from attorneys or judges who are familiar with the competence of the applicant in the area of specialty, none of whom are related to, engaged in legal practice with, or involved in continuing commercial relationships with the lawyer;

(c) *Written examination.* Objective evaluation of the applicant's knowledge of the substantive and procedural law in the area of specialty as determined by written examination;

(d) *Continuing legal education.* At least 36 hours of approved continuing legal education credit in the area of specialty during the three years immediately preceding application to the certifying organization.

(5) *Applications and procedures.* Application forms used by the certifying organization must be submitted to the board for review to determine that the requirements specified above are being met by applicants. Additionally, the certifying organization must submit a description of the process it uses to review applications.

(6) *Requirements for recertification.* The standards used by a certifying organization must provide for certification for a limited period of time, which shall not exceed five years, after which time persons who have been certified must apply for recertification. Requirements for recertification must include continued substantial involvement in the area of specialty, continuing legal education, and appropriate peer review.

(7) *Revocation of certification.* The standards used by a certifying organization shall include a procedure for revocation of certification. A certification shall be revoked upon a finding that the certificate holder has been disbarred or suspended from the practice of law. The standards shall require a certificate holder to report his or her disbarment or suspension from the practice of law to the certifying organization.

(8) *Waiver.* The standards used by a certifying organization may provide for waiver of the peer review and written examination requirements set forth in Rule .2004(4)(b) and (c) above for an applicant who was responsible for formulating and grading the organization's initial written examination in his or her area of specialty.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2005. Application procedure.

(a) The organization may file an application seeking approval of the organization by the board. Applications shall be on forms available from and approved by the board. The application fee shall be $1,000.

(b) The organization which has been approved shall provide its standards, definitions and/or certifying procedures to the board in January of each year and must pay an annual administrative fee of $100 to maintain its approved status.

(c) When the board determines that an approved certifying organization has ceased to exist, has ceased to operate its certification program in the manner described in its application, or has failed to comply with the requirements of Rule .2005(b) above, its approved status shall be revoked. After such a revocation, no North Carolina lawyer may publicize a certification from the organization in question.

(d) The appeal procedures of the board shall apply to any application by an organization for approval as a certifying organization and any decision to revoke a certifying organization's approved status.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2006. Effect of approval of a certifying organization by the board of legal specialization.

When an organization is approved as a certifying organization by the board, any North Carolina lawyer certified as a specialist by that organization may publicize that certification.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SECTION .2100. CERTIFICATION STANDARDS FOR THE REAL PROPERTY LAW SPECIALTY

### D.2101. Establishment of specialty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates real property law, including the subspecialties of real property-residential transactions and real property-business, commercial, and industrial transactions as a field of law for which certification of specialists

under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2102. Definition of specialty.

The specialty of real property law is the practice of law dealing with real property transactions, including title examination, property transfers, financing, leases, and determination of property rights. Subspecialties in the field are identified and defined as follows:

(a) *Real property law-residential transactions.* The practice of law dealing with the acquisition, ownership, leasing, financing, use, transfer and disposition, of residential real property by individuals;

(b) *Real property law-business, commercial, and industrial transactions.* The practice of law dealing with the acquisition, ownership, leasing, management, financing, development, use, transfer, and disposition of residential, business, commercial, and industrial real property.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2103. Recognition as a specialist in real property law.

A lawyer may qualify as a specialist by meeting the standards set for one or both of the subspecialties. If a lawyer qualifies as a specialist in real property law by meeting the standards set for the real property law-residential transactions subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Residential Transactions." If a lawyer qualifies as a specialist in real property law by meeting the standards set for the real property law-business, commercial, and industrial transactions, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Business, Commercial, and Industrial Transactions." If a lawyer qualifies as a specialist in real property law by meeting the standards set for both the real property law-residential transactions subspecialty and the real property law-business, commercial, and industrial transactions subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Residential, Business, Commercial and Industrial Transactions."

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2104. Applicability of provisions of the North Carolina plan of legal specialization.

Certification and continued certification of specialists in real property law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**D.2105. Standards for certification as a specialist in real property law.**

Each applicant for certification as a specialist in real property law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in real property law:

(a) *Licensure and practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) *Substantial involvement.* An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of real property law.

(1) Substantial involvement shall mean during the five years preceding the application, the applicant has devoted an average of at least 500 hours a year to the practice of real property law, but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent means service as a law professor concentrating in the teaching of real property law. Teaching may be substituted for one year of experience to meet the five-year requirement.

(c) *Continuing legal education.* An applicant must have earned no less than 36 hours of accredited continuing legal education (CLE) credits in real property law during the three years preceding application with not less than 6 credits in any one year.

(d) *Peer review.* An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) *Examination.* The applicant must pass a written examination designed to test the applicant's knowledge and ability in real property law.

(1) *Terms.* The examination(s) shall be in written form and shall be given annually. The examination(s) shall be administered and graded uniformly by the specialty committee.

(2) *Subject matter.* The examination shall cover the applicant's knowledge in the following topics in real property law or in the subspecialty or subspecialties that the applicant has elected:

(A) title examinations, property transfers, financing, leases, and determination of property rights;

(B) the acquisition, ownership, leasing, financing, use, transfer, and disposition of residential real property by individuals;

(C) the acquisition, ownership, leasing, management, financing, development, use, transfer, and disposition of residential, business, commercial, and industrial real property.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2106. Standards for continued certification as a specialist.

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2106(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial involvement.* The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2105(b) of this subchapter.

(b) *Continuing legal education.* The specialist must have earned no less than 60 hours of accredited continuing legal education credits in real property law as accredited by the board with not less than 6 credits earned in any one year.

(c) *Peer review.* The specialist must comply with the requirements of Rule .2105(d) of this subchapter.

(d) *Time for application.* Application for continued certification shall be made not more than one hundred eighty (180) days nor less than ninety days prior to the expiration of the prior period of certification.

(e) *Lapse of certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2105 of this subchapter, including the examination.

(f) *Suspension or revocation of certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2105 of this subchapter.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2107. Applicability of other requirements.

The specific standards set forth herein for certification of specialists in real property law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SECTION .2200. CERTIFICATION STANDARDS FOR THE BANKRUPTCY LAW SPECIALTY

### D.2201. Establishment of specialty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates bankruptcy law, including the subspecialties of consumer bankruptcy law and business bankruptcy law, as a field of law for which certification of specialists under the Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2202. Definition of specialty.

The specialty of bankruptcy law is the practice of law dealing with all laws and procedures involving the rights, obligations, and remedies between debtors and creditors in potential or pending federal bankruptcy cases and state insolvency actions. Subspecialties in the field are identified and defined as follows:

(a) *Consumer bankruptcy law.* The practice of law dealing with consumer bankruptcy and the representation of interested parties in contested matters or adversary proceedings in individual filings of Chapter 7, Chapter 12, or Chapter 13;

(b) *Business bankruptcy law.* The practice of law dealing with business bankruptcy and the representation of interested parties in contested matters or adversary proceedings in bankruptcy cases filed on behalf of debtors who are or have been engaged in business prior to an entity filing Chapter 7, Chapter 9, Chapter 11, or Chapter 12.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2203. Recognition as a specialist in bankruptcy law.

A lawyer may qualify as a specialist by meeting the standards set for one or both of the subspecialties. If a lawyer qualifies as a specialist in bankruptcy law by meeting the standards set for the consumer bankruptcy law subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Consumer Bankruptcy Law." If a lawyer qualifies as a specialist in bankruptcy law by meeting the standards set for the business bankruptcy law subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Business Bankruptcy Law." If a lawyer qualifies as a specialist in bankruptcy law by meeting the standards set for both the consumer bankruptcy law and the business bankruptcy law subspecialties, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Business and Consumer Bankruptcy Law."

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2204. Applicability of provisions of the North Carolina plan of legal specialization.

Certification and continued certification of specialists in bankruptcy law shall be governed by the provisions of the Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2205. Standards for certification as a specialist in bankruptcy law.

Each applicant for certification as a specialist in bankruptcy law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition,

each applicant shall meet the following standards for certification as a specialist in bankruptcy law:

(a) *Licensure and practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) *Substantial involvement.* An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of bankruptcy law.

(1) Substantial involvement shall mean during the five years preceding the application, the applicant has devoted an average of at least 500 hours a year to the practice of bankruptcy law, but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent shall mean, after admission to the bar of any state, District of Columbia, or a U.S. territorial possession

(A) service as a judge of any bankruptcy court, service as a clerk of any bankruptcy court, or service as a standing trustee;

(B) corporate or government service, including military service, after admission to the bar of any state, the District of Columbia, or any U.S. territorial possession, but only if the bankruptcy work done was legal advice or representation of the corporation, governmental unit, or individuals connected therewith;

(C) service as a deputy or assistant clerk of any bankruptcy court, as a research assistant to a bankruptcy judge, or as a law professor teaching bankruptcy and/or debtor-creditor related courses may be substituted for one year of experience to meet the five-year requirement.

(c) *Continuing legal education.* An applicant must have earned no less than 36 hours of accredited continuing legal education (CLE) credits in bankruptcy law, during the three years preceding application with not less than 6 credits in any one year.

(d) *Peer review.* An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be a judge of any bankruptcy court.

(2) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(3) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) *Examination.* The applicant must pass a written examination designed to test the applicant's knowledge and ability in bankruptcy law.

(1) *Terms.* The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) *Subject matter.* The examination shall cover the applicant's knowledge and application of the law in the following topics in the subspecialty or subspecialties that the applicant has elected:

(A) all provisions of the Bankruptcy Reform Act of 1978, as amended, and legislative history related thereto, except subchapters III and IV of Chapter 7 and Chapter 9 of Title II, United States Code;

(B) the Rules of Bankruptcy Procedure effective as of August 1, 1983, as amended;

(C) bankruptcy crimes and immunity;

(D) state laws affecting debtor-creditor relations, including, but not limited to, state court insolvency proceedings; Chapter 1C of the North Carolina General Statutes; the creation, perfection, enforcement, and priorities of secured claims, claim and delivery; and attachment and garnishment;

(E) judicial interpretations of any of the above.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2206. Standards for continued certification as a specialist.

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2206(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial involvement.* The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2205(b) of this subchapter.

(b) *Continuing legal education.* Since last certified, a specialist must have earned no less than 60 hours of accredited continuing legal education credits in bankruptcy law with not less than 6 credits earned in any one year.

(c) *Peer review.* The specialist must comply with the requirements of Rule .2205(d) of this subchapter.

(d) Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) *Lapse of certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2205 of this subchapter, including the examination.

(f) *Suspension or revocation of certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2205 of this subchapter.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2207. Applicability of other requirements.

The specific standards set forth herein for certification of specialists in bankruptcy law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SECTION .2300. CERTIFICATION STANDARDS FOR THE ESTATE PLANNING AND PROBATE LAW SPECIALTY

### D.2301. Establishment of specialty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates estate planning and probate law as a field of law for which certification of specialists under the Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2302. Definition of specialty.

The specialty of estate planning and probate law is the practice of law dealing with planning for conservation and disposition of estates, including consideration of federal and state tax consequences; preparation of legal instruments to effectuate estate plans; and probate of wills and administration of estates, including federal and state tax matters.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2303. Recognition as a specialist in estate planning and probate law.

If a lawyer qualifies as a specialist in estate planning and probate law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Estate Planning and Probate Law."

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2304. Applicability of provisions of the North Carolina plan of legal specialization.

Certification and continued certification of specialists in estate planning and probate law shall be governed by the provisions of the Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2305. Standards for certification as a specialist in estate planning and probate law.

Each applicant for certification as a specialist in estate planning and probate law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in estate planning and probate law:

(a) *Licensure and practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) *Substantial involvement.* The applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of estate planning and probate law.

(1) Substantial involvement shall be measured as follows:

(A) *Time spent.* During the five years preceding the application, the applicant has devoted an average of at least 500 hours a year to the practice of estate planning and probate law, but not less than 400 hours in any one year;

(B) *Experience gained.* During the five years immediately preceding application, the applicant shall have had continuing involvement in a substantial portion of the activities described in each of the following paragraphs:

(i) counseled persons in estate planning, including giving advice with respect to gifts, life insurance, wills, trusts, business arrangements and agreements, and other estate planning matters;

(ii) prepared or supervised the preparation of (1) estate planning instruments, such as simple and complex wills (including provisions for testamentary trusts, marital deductions and elections), revocable and irrevocable inter vivos trusts (including short-term and minor's trusts), business planning agreements (including buy-sell agreements and employment contracts), powers of attorney and other estate planning instruments; and (2) federal and state gift tax returns, including representation before the Internal Revenue Service and the North Carolina Department of Revenue in connection with gift tax returns;

(iii) handled or advised with respect to the probate of wills and the administration of decedents' estates, including representation of the personal representative before the clerk of superior court, guardianship, will contest, and declaratory judgment actions;

(iv) prepared, reviewed or supervised the preparation of federal estate tax returns, North Carolina inheritance tax returns, and federal and state fiduciary income tax returns, including representation before the Internal Revenue Service and the North Carolina Department of Revenue in connection with such tax returns and related controversies.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent shall mean

(A) receipt of an LL.M. degree in taxation or estate planning and probate law (or such other related fields approved by the specialty committee and the board from an approved law school) may be substituted for one year of experience to meet the five-year requirement;

(B) service as a trust officer with a corporate fiduciary having duties primarily in the area of estate and trust administration, may be substituted for one year of experience to meet the five-year requirement;

(C) service as a law professor concentrating in the teaching of taxation or estate planning and probate law (or such other related fields approved by the specialty committee and the board). Such service may be substituted for one year of experience to meet the five-year requirement.

(c) *Continuing legal education.* An applicant must have earned no less than 72 hours of accredited continuing legal education (CLE) credits in estate planning and probate law during the three years preceding application. Of the 72 hours of CLE, at least 45 hours shall be in estate planning and probate law, and the balance may be in the related areas of taxation, business organizations, real property, and family law.

(d) *Peer review.* An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges, all of whom are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references.

Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) *Examination.* The applicant must pass a written examination designed to test the applicant's knowledge and ability in estate planning and probate law.

(1) *Terms.* The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) *Subject matter.* The examination shall cover the applicant's knowledge and application of the law in the following topics:

(A) federal and North Carolina gift taxes;

(B) federal estate tax;

(C) North Carolina inheritance tax;

(D) federal and North Carolina fiduciary income taxes;

(E) federal and North Carolina income taxes as they apply to the final returns of the decedent and his or her surviving spouse;

(F) North Carolina law of wills and trusts;

(G) North Carolina probate law, including fiduciary accounting;

(H) federal and North Carolina income and gift tax laws as they apply to revocable and irrevocable inter vivos trusts;

(I) North Carolina law of business organizations, family law, and property law as they may be applicable to estate planning transactions;

(J) federal and North Carolina tax law applicable to partnerships and corporations (including S corporations) which may be encountered in estate planning and administration.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2306. Standards for continued certification as a specialist.

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2306(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial involvement.* The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2305(b) of this subchapter.

(b) *Continuing legal education.* Since last certified, a specialist must have earned no less than 120 hours of accredited continuing legal education credits in estate planning and probate law. Of the 120 hours of CLE, at least 75 hours shall be in estate planning and probate law, and the balance may be in the related areas of taxation, business organizations, real property, and family law.

(c) *Peer review.* The specialist must comply with the requirements of Rule .2305(d) of this subchapter.

(d) *Time for application.* Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) *Lapse of certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2305 of this subchapter, including the examination.

(f) *Suspension or revocation of certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2305 of this subchapter.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2307. Applicability of other requirements.

The specific standards set forth herein for certification of specialists in estate planning and probate law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SECTION .2400. CERTIFICATION STANDARDS FOR THE FAMILY LAW SPECIALTY

### D.2401. Establishment of specialty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates family law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2402. Definition of specialty.

The specialty of family law is the practice of law relating to marriage, divorce, alimony, child custody and support, equitable distribution, enforcement of support, domestic violence, bastardy, and adoption.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2403. Recognition as a specialist in family law.

If a lawyer qualifies as a specialist in family law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Family Law."

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2404. Applicability of provisions of the North Carolina plan of legal specialization.

Certification and continued certification of specialists in family law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2405. Standards for certification as a specialist in family law.

Each applicant for certification as a specialist in family law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in family law:

(a) *Licensure and practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) *Substantial involvement.* An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of family law.

(1) Substantial involvement shall mean during the five years preceding the application, the applicant has devoted an average of at least 600 hours a year to the practice of family law, and not less than 400 hours during any one year.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent shall mean

(A) service as a law professor concentrating in the teaching of family law. Such service may be substituted for one year of experience to meet the five-year requirement.

(B) service as a district court judge in North Carolina, hearing a substantial number of family law cases. Such service may be substituted for one year of experience to meet the five-year requirement.

(c) *Continuing legal education.* An applicant must have earned no less than 45 hours of accredited continuing legal education (CLE) credits in family law, 9 of which may be in related fields, during the three years preceding application, with not less than 9 credits in any one year. Related fields shall include taxation, trial advocacy, evidence, negotiation, and juvenile law.

(d) *Peer review.* An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) *Examination.* The applicant must pass a written examination designed to test the applicant's knowledge and ability in family law.

(1) *Terms.* The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) *Subject matter.* The examination shall cover the applicant's knowledge and application of the law relating to marriage, divorce, alimony, child custody and support, equitable distribution, enforcement of support, domestic violence, bastardy, and adoption including, but not limited to, the following:

(A) contempt (Chapter 5A of the North Carolina General Statutes);
(B) adoptions (Chapter 48);
(C) bastardy (Chapter 49);
(D) divorce and alimony (Chapter 50);
(E) Uniform Child Custody Jurisdiction Act (Chapter 50A);
(F) domestic violence (Chapter 50B);
(G) marriage (Chapter 51);
(H) powers and liabilities of married persons (Chapter 52);
(I) Uniform Reciprocal Enforcement of Support Act (Chapter 52A);
(J) Uniform Premarital Agreement Act (Chapter (52B);
(K) termination of parental rights, as relating to adoption and termination for failure to provide support (Article 24B of Chapter 7A);
(L) garnishment and enforcement of child support obligations (Chapters 110-136 et seq.).

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2406. Standards for continued certification as a specialist.

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2406(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial involvement.* The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2405(b) of this subchapter.

(b) *Continuing legal education.* Since last certified, a specialist must have earned no less than 60 hours of accredited continuing legal education credits in family law or related fields. Not less than nine credits may be earned in any one year, and no more than twelve credits may be in related fields. Related fields shall include taxation, trial advocacy, evidence, negotiation, and juvenile law.

(c) *Peer review.* The specialist must comply with the requirements of Rule .2405(d) of this subchapter.

(d) *Time for application.* Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) *Lapse of certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2405 of this subchapter, including the examination.

(f) *Suspension or revocation of certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the

application shall be treated as if it were for initial certification under Rule .2405 of this subchapter.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2407. Applicability of other requirements.

The specific standards set forth herein for certification of specialists in family law are subject to any general requirement, standards, or procedure adopted by the board applicable to all applicants for certification or continued certification.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SECTION .2500. CERTIFICATION STANDARDS FOR THE CRIMINAL LAW SPECIALTY

### D.2501. Establishment of specialty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates criminal law, including the subspecialties of criminal appellate practice and state criminal law, as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2502. Definition of specialty.

The specialty of criminal law is the practice of law dealing with the defense or prosecution of those charged with misdemeanor and felony crimes in state and federal trial and appellate courts. Subspecialties in the field are identified and defined as follows:

(a) *Criminal appellate practice.* The practice of criminal law at the appellate court level.

(b) *State criminal law.* The practice of criminal law in state trial and appellate courts.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2503. Recognition as a specialist in criminal law.

A lawyer may qualify as a specialist by meeting the standards set for criminal law or the subspecialties of criminal appellate practice or state criminal law. If a lawyer qualifies as a specialist by meeting the standards set for the criminal law specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law." If a lawyer qualifies as a specialist by meeting the standards set for the subspecialty of criminal appellate practice, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Appellate Practice." If a lawyer qualifies as a specialist by meeting the standards set for the subspecialty of state criminal law, the lawyer shall be entitled to represent that he or she is a

"Board Certified Specialist in State Criminal Law." If a lawyer qualifies as a specialist by meeting the standards set for both criminal law and the subspecialty of criminal appellate practice, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law and Criminal Appellate Practice."

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2504. Applicability of provisions of the North Carolina plan of legal specialization.

Certification and continued certification of specialists in criminal law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2505. Standards for certification as a specialist.

Each applicant for certification as a specialist in criminal law, the subspecialty of state criminal law, or the subspecialty of criminal appellate practice shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition each applicant shall meet the following standards for certification:

(a) *Licensure and practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of the application. During the period of certification an applicant shall continue to be licensed and in good standing to practice law in North Carolina.

(b) *Substantial involvement.* An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of criminal law.

(1) For the specialty of criminal law and the subspecialty of state criminal law, the applicant must have been engaged in the active practice of law for at least five years prior to certification with a substantial involvement in the area of criminal law. Substantial involvement shall mean

(A) during the applicant's entire legal career, the applicant must have been participating counsel of record in criminal proceedings as follows:

(i) five felony jury trials in cases submitted to jury for decision;

(ii) ten additional jury trials, regardless of offenses, submitted to jury for decision;

(iii) fifty additional criminal matters to disposition in the state district or superior courts, or in the U.S. district court (disposition being defined as the conclusion of a criminal matter);

(iv) any one of the following:

(a) two oral appearances before an appellate court of the State of North Carolina or the United States; or

(b) three written appearances before any appellate court in which the applicant certifies that he or she had primary responsibility for the preparation of the record on appeal and brief; or

(c) 25 additional criminal trials in any jurisdiction which were submitted to the judge or jury for decision.

(B) during the five years immediately preceding application to the board, the applicant must have

(i) appeared as participating counsel for at least 25 days in the jury trial of one or more criminal cases, whether to verdict or not;

(ii) made 75 court appearances in any substantive nonjury trials or proceedings (excluding calendar calls, continuance motions, or other purely administrative matters) in a criminal court of any jurisdiction;

(iii) devoted an average of 500 hours per year in the area of criminal law but not less than 400 hours in any one year.

(C) upon recommendation by the specialty committee and approval by the board, where the profession or the geographical location of an applicant prohibits his or her completing the requirements in Rule .2505(b)(1)(A) and (B) above, and the applicant shows substantial involvement in other areas of law requiring similar skills, or has engaged in research, writing, or teaching special studies of criminal law and procedure, to include criminal appellate law, said applicant may substitute such experience for one year of the five required years of Rule .2505(b)(1)(B)(iii) above and must meet all of the requirements of Rule .2505(b)(1)(A)(iv) above and three-fifths of the remaining requirements of Rule .2505(b)(1)(B) above.

(2) For the subspecialty of criminal appellate practice, the applicant must have been engaged in the active practice of law for at least five years prior to certification with a substantial involvement in the area of criminal law. For the subspecialty of criminal appellate practice, substantial involvement shall mean

(A) the applicant must have been engaged in the active practice of law for at least five years prior to certification (unless excepted under Rule .2505(b)(2)(B)(ii) below). During the applicant's entire legal career, the applicant must have completed the requirements set forth in Rule .2505(b)(1)(A) above;

(B) during the applicant's entire legal career, the applicant must have also

(i) represented a party in at least 15 criminal appeals, 5 of which must have been within the two years preceding the application;

(ii) had substantial involvement in criminal appellate work, including brief writing, motion practice, oral arguments, and extraordinary writs. Sitting as an appellate court judge for at least one year of the three years preceding application will fulfill three years of the practice requirements.

(C) upon recommendation by the specialty committee and approval by the board, where the profession or the geographical location of an applicant prohibits his or her completion of all or a portion of the requirements of Rule .2505(b)(2)(A) above and the applicant can show substantial involvement in other areas of law requiring similar skills, or has engaged in research, writing, or teaching special studies of criminal law and procedure, to include criminal appellate law, said applicant may substitute such experience for one year of the required five years and may qualify by meeting all of the requirements of Rule .2505(b)(1)(A)(i) and (ii) above, and upon the showing of the representation of at least five criminal appellate actions within the last two years.

(c) *Continuing legal education.*

(1) In the specialty of criminal law, the state criminal law subspecialty, and the criminal appellate practice subspecialty, an applicant must have earned no less than 40 hours of accredited continuing legal education credits in criminal law during the three years preceding the application, which 40 hours must include the following:

(A) at least 34 hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, criminal trial tactics, and appellate advocacy;

(B) at least 6 hours in the area of ethics and criminal law.

(2) In order to be certified as a specialist in both criminal law and the subspecialty of criminal appellate law, an applicant must have earned no less than 46 hours of accredited continuing legal education credits in criminal law during the three years preceding application, which 46 hours must include the following:

(A) at least 40 hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, criminal trial tactics, and appellate advocacy;

(B) at least 6 hours in the area of ethics and criminal law.

(d) *Peer review.*

(1) Each applicant for certification as a specialist in criminal law, the subspecialty of state criminal law, and the subspecialty of criminal appellate practice must make a satisfactory showing of qualification through peer review.

(2) All references must be licensed and in good standing to practice in North Carolina and must be familiar with the competence and qualifications of the applicant in the specialty field. The applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualifications.

(3) Written peer reference forms will be sent by the board or the specialty committee to the references. Completed peer reference forms must be received from at least five of the references. The board or the specialty committee may contact in person or by telephone any reference listed by an applicant.

(A) Each applicant for certification as a specialist in the specialty of criminal law and in the subspecialty of state criminal law must provide for reference and independent inquiry the names and addresses of the following:

(i) four attorneys of generally recognized stature who practice in the field of criminal law;

(ii) two judges of different jurisdictions before whom the applicant has litigated a case to disposition within the previous two years;

(iii) opposing counsel, co-counsel, and judges in the last five jury trials conducted by the applicant;

(iv) opposing counsel, co-counsel, and judges in the last five nonjury trials or procedures conducted by the applicant;

(v) if the applicant has participated in appellate matters, opposing counsel, co-counsel, and judges in the last two appellate matters conducted by the applicant as well as copies of all briefs filed by the applicant in these two appellate matters;

(vi) if an applicant has not prepared any appellate briefs, then the applicant shall submit to the specialty committee two separate trial court memoranda submitted to a trial court within the last three years which were prepared and filed by the applicant.

(B) An applicant for the subspecialty of criminal appellate practice shall provide the names and addresses of the following:

(i) four attorneys of generally recognized stature to attest to the applicant's substantial involvement and competence in criminal appellate practice. Such lawyers shall be substantially involved in criminal appellate practice and familiar with the applicant's practice;

(ii) two judges before whom the applicant has appeared in criminal appellate matters within the last two years to attest to the applicant's substantial involvement and competence in criminal appellate practices;

(iii) opposing counsel, judges, and any co-counsel in the last two appellate matters the applicant has handled. The applicant shall also provide all briefs filed in these matters.

(C) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(e) *Examination.* The applicant must pass a written examination designed to test the applicant's knowledge and ability.

(1) *Terms.* The examination(s) shall be in written form and shall be given at such times as the board deems appropriate. The examination(s) shall be administered and graded uniformly by the specialty committee.

(2) *Subject matter.*

(A) The examination shall cover the applicant's knowledge in the following topics in criminal law, in the subspecialty of state criminal law, and/or in the subspecialty of criminal appellate practice, as the applicant has elected:

(i) the North Carolina and Federal Rules of Evidence;

(ii) state and federal criminal procedure and state and federal laws affecting criminal procedure;

(iii) constitutional law;

(iv) appellate procedure and tactics;

(v) trial procedure and trial tactics;

(vi) criminal substantive law;

(vii) the North Carolina Rules of Appellate Procedure.

(B) An applicant for certification in the specialty of criminal law shall take part I (covering state law) and part II (covering federal law) of the criminal law examination. An applicant for certification in the subspecialty of state criminal law shall take part I of the criminal law examination.

(3) *Requirement of criminal law examination for criminal appellate practice.* An applicant for certification in the subspecialty of criminal appellate practice must successfully pass the examination in criminal law. If an applicant for certification in criminal appellate practice is already certified as a specialist in the subspecialty of state criminal law, then the applicant must take part II (covering federal law) of the examination in criminal law as well as the criminal appellate practice examination.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## D.2506. Standards for continued certification as a specialist.

The period of certification is five years. A certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2506(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial involvement.* The specialist must demonstrate that for the five years preceding reapplication he or she has had substantial involvement in the specialty or subspecialty as defined in Rule .2505(b)(1)(B) and (C) of this subchapter for the specialty of criminal law and the subspecialty of state criminal law, and Rule .2505(b)(2) of this subchapter for the subspecialty of criminal appellate practice.

(b) *Continuing legal education.* The specialist must have earned no less than 65 hours of accredited continuing legal education credits in criminal law with not less than 6 credits earned in any one year.

(c) *Peer review.* The specialist must comply with the requirements of Rule .2505(d) of this subchapter.

(d) *Time for application.* Application for continuing certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) *Lapse of certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2505 of this subchapter, including the examination.

(f) *Suspension or revocation of certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the

application shall be treated as if it were for initial certification under Rule .2505 of this subchapter.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### D.2507. Applicability of other requirements.

The specific standards set forth herein for certification of specialists in criminal law, the subspecialty of state criminal law and the subspecialty of criminal appellate practice are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SECTION .2600. CERTIFICATION STANDARDS FOR THE IMMIGRATION LAW SPECIALTY

### D.2601. Establishment of specialty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates immigration law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

**History Note:** Adopted March 6, 1997.

### D.2602. Definition of specialty.

The specialty of immigration law is the practice of law dealing with obtaining and retaining permission to enter and remain in the United States including, but not limited to, such matters as visas, changes of status, deportation and exclusion, naturalization, appearances before courts and governmental agencies, and protection of constitutional rights.

**History Note:** Adopted March 6, 1997.

### D.2603. Recognition as a specialist in immigration law.

If a lawyer qualifies as a specialist in immigration law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Immigration Law."

**History Note:** Adopted March 6, 1997.

### D.2604. Applicability of provisions of the North Carolina Plan of Legal Specialization.

Certification and continued certification of specialists in immigration law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

**History Note:** Adopted March 6, 1997.

**D.2605. Standards for certification as a specialist in immigration law.**

Each applicant for certification as a specialist in immigration law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in immigration law:

(a) *Licensure and practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) *Substantial involvement.* An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of immigration law.

(1) An applicant shall affirm that during the five years immediately preceding the application, the applicant devoted an average of at least 700 hours a year to the practice of immigration law, but not less than 400 hours in any one year. Service as a law professor concentrating in the teaching of immigration law may be substituted for one year of experience to meet the five-year requirement.

(2) An applicant shall show substantial involvement in immigration law for the required period by providing such information as may be required by the board regarding the applicant's participation in at least five of the seven categories of activities listed below during the five years immediately preceding the date of application:

(A) *Family immigration.* Representation of clients before the U.S. Immigration and Naturalization Service and the State Department in the filing of petitions and applications.

(B) *Employment related immigration.* Representation of employers and/or aliens before at least one of the following: the N.C. Employment Security Commission, U.S. Department of Labor, U.S. Immigration and Naturalization Service, U.S. Department of State or U.S. Information Agency.

(C) *Naturalization.* Representation of clients before the U.S. Immigration and Naturalization Service and judicial courts in naturalization matters.

(D) *Administrative hearings and appeals.* Representation of clients before Immigration Judges in deportation, exclusion, bond redetermination, and other administrative matters; and the representation of clients in appeals taken before the Board of Immigration Appeals, Administrative Appeals Unit, Board of Alien Labor Certification Appeals, Regional Commissioners, Commissioner, Attorney General, Department of State Board of Appellate Review, and Office of Special Counsel for Immigration Related Unfair Employment Practices (OCAHO).

(E) *Administrative Proceedings and Review in Judicial Courts.* Representation of clients in judicial matters such as applications for habeas corpus, mandamus and declaratory judgments; criminal matters involving the immigration law; petitions for review in judicial courts; and ancillary proceedings in judicial courts.

(F) *Asylum and Refugee Status.* Representation of clients in these matters.

(G) *Employer Verification, Sanctions, Document Fraud, Bond and Custody, Rescission, Registry, and Fine Proceedings.* Representation of clients in these matters.

(c) *Continuing Legal Education.* An applicant must earn no less than 48 hours of accredited continuing legal education (CLE) credits in immigration law during the four years preceding application. At least 20 of the 48 CLE credit hours must be earned during the first and second year preceding application and at least 20 of the CLE hours must be earned during the third and fourth years preceding application. Of the 48 hours, at least 42 must be in immigration law; the balance may be in the related areas of federal adminis-

trative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.

(d) *Peer Review.* An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. At least two of the completed peer reference forms received by the board must be from lawyers or judges who have substantial practice or judicial experience in immigration law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) *Examination.* The applicant must pass a written examination designed to test the applicant's knowledge, skills, and proficiency in immigration law. The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

**History Note:** Adopted March 6, 1997.

### D.2606. Standards for Continued Certification as a Specialist.

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2606(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial Involvement.* The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2605(b) of this subchapter.

(b) *Continuing Legal Education.* The specialist must have earned no less than 60 hours of accredited continuing legal education credits in immigration law as accredited by the board. At least 30 of the 60 CLE credit hours must be earned during the first three years after certification or recertification, as applicable. Of the 60 hours, at least 52 must be in immigration law; the balance may be in the related areas of federal administrative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.

(c) *Peer Review.* The specialist must comply with the requirements of Rule .2605(d) of this subchapter.

(d) *Time for Application.* Application for continued certification shall be made not more than one hundred eighty (180) days nor less than ninety days prior to the expiration of the prior period of certification.

(e) *Lapse of Certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2605 of this subchapter, including the examination.

(f) *Suspension or Revocation of Certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2605 of this subchapter.

**History Note:** Adopted March 6, 1997.

### D.2607. Applicability of Other Requirements.

The specific standards set forth herein for certification of specialists in immigration law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

**History Note:** Adopted March 6, 1997.

## SECTION .2700. CERTIFICATION STANDARDS FOR THE WORKERS' COMPENSATION LAW SPECIALTY

### D.2701. Establishment of specilty field.

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates workers' compensation as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

**History Note:** Statutory Authority G.S. 84-23, Adopted May 4, 2000.

### D.2702. Definition of specialty.

The specialty of workers' compensation is the practice of law involving the analysis of problems or controversies arising under the North Carolina Workers' Compensation Act (Chapter 97, North Carolina General Statutes) and the litigation of those matters before the North Carolina Industrial Commission.

**History Note:** Statutory Authority G.S. 84-23, Adopted May 4, 2000.

### D.2703. Recognition as a specialist in workers' compensation law.

If a lawyer qualifies as a specialist in workers' compensation law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Workers' Compensation Law."

**History Note:** Statutory Authority G.S. 84-23, Adopted May 4, 2000.

### D.2704. Applicability of provisions of the North Carolina Plan of Legal Specialization.

Certification and continued certification of specialists in workers' compensation law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

**History Note:** Statutory Authority G.S. 84-23, Adopted May 4, 2000.

### D.2705. Standards for certification as a specialist in workers' compensation law.

Each applicant for certification as a specialist in workers' compensation law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in workers' compensation law:

(a) *Licensure and practice.* An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) *Substantial involvement.* An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of workers' compensation law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of workers' compensation law, but not less than 400 hours in any one year. "Practice" shall mean substantive legal work done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of workers' compensation law for one year or more may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2705(b)(1) above;

(B) Service as a mediator of workers' compensation cases may be included in the hours necessary to satisfy the requirement set forth in Rule .2705(b)(1) above;

(C) Service as a deputy commissioner or commissioner of the North Carolina Industrial Commission may be substituted for the substantial involvement requirements in Rule .2705(b)(1) above provided

(i) the applicant was a full time deputy commissioner or commissioner throughout the five years prior to application, or

(ii) the applicant was engaged in the private representation of clients for at least one year during the five years immediately preceding the application; and, during this year, the applicant devoted not less than 400 hours to the practice of workers's compensation law. During the remaining four years, the applicant was either engaged in the private representation of clients and devoted an average of at least 500 hours a year to the practice of workers' compensation law, but not less than 400 hours in any one year, or served as a full time deputy commissioner or commissioner of the North Carolina Industrial Commission.

(3) The board may require an applicant to show substantial involvement in workers' compensation law by providing information regarding the applicant's participation, during the five years immediately preceding the date of the application, in activities such as those listed below:

(i) representation as principal counsel of record in complex cases tried to an opinion and award of the North Carolina Industrial Commission;

(ii) representation in occupational disease cases tried to an opinion and award of the North Carolina Industrial Commission; and

(iii) representation in appeals of decisions to the North Carolina Court of Appeals or the North Carolina Supreme Court.

(c) *Continuing legal education.* An applicant must earn no less than thirty-six hours of accredited continuing legal education (CLE) credits in

workers' compensation law during the three years preceding application, with not less that six credits earned in any one year. Of the thirty-six hours of CLE, at least eighteen hours shall be in workers' compensation law, and the balance may be in the following related fields: civil trial practice and procedure; evidence; mediation; medical injuries, medicine or anatomy; labor and employment law; and Social Security disability law.

(d) *Peer review.* An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers, commissioners or deputy commissioners of the North Carolina Industrial Commission, or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina and have substantial practice or judicial experience in workers' compensation law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference by a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms mailed by the board to each reference. These forms shall be returned directly to the specialty committee.

(e) *Examination.* An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of workers' compensation law to justify the representation of special competence to the legal profession and the public. The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

**History Note:** Statutory Authority G.S. 84-23, Adopted May 4, 2000.

### D.2706. Standards for continued certification as a specialist.

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2706(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) *Substantial involvement.* The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2705(b) of this subchapter, provided, however, that a specialist who served on the Industrial Commission as a full time commissioner or deputy commissioner during the five years preceding application may substitute each year of service on the Industrial Commission for one year of practice.

(b) *Continuing legal education.* The specialist must earn no less than sixty hours of accredited continuing legal education credits in workers' compensation law during the five years preceding application. Not less than six credits may be earned in any one year. Of the sixty hours of CLE, at least thirty hours shall be in workers' compensation law, and the balance may be in the following related fields: civil trial practice and procedure; evidence; mediation; medical

injuries, medicine or anatomy; labor and employment law; and Social Security disability law.

(c) *Peer review.* The specialist must comply with the requirements of Rule .2705(d) of this subchapter.

(d) *Time for application.* Application for continued certification shall be made not more than 180 days nor less than ninety days prior to the expiration of the prior period of certification.

(e) *Lapse of certification.* Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2705 of this subchapter, including the examination.

(f) *Suspension or revocation of certification.* If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2705 of this subchapter.

**History Note:** Statutory Authority G.S. 84-23, Adopted May 4, 2000.

### D.2707. Applicability of other requirements.

The specific standards set forth herein for certification of specialist in workers' compensation law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

**History Note:** Statutory Authority G.S. 84-23, Adopted May 4, 2000.

## SUBCHAPTER 1E. REGULATIONS FOR ORGANIZATIONS PRACTICING LAW

### SECTION .0100. REGULATIONS FOR PROFESSIONAL CORPORATIONS AND PROFESSIONAL LIMITED LIABILITY COMPANIES PRACTICING LAW

### E.0101. Authority, scope, and definitions.

(a) *Authority.* Chapter 55B of the General Statutes of North Carolina, being "the Professional Corporation Act," particularly Section 55B-12, and Chapter 57C, being the "North Carolina Limited Liability Company Act," particularly Section 57C-2-01(c), authorizes the Council of the North Carolina State Bar (the council) to adopt regulations for professional corporations and professional limited liability companies practicing law. These regulations are adopted by the council pursuant to that authority.

(b) *Statutory law.* These regulations only supplement the basic statutory law governing professional corporations (Chapter 55B) and professional limited liability companies (Chapter 57C) and shall be interpreted in harmony with those statutes and with other statutes and laws governing corporations and limited liability companies generally.

(c) *Definitions.* All terms used in these regulations shall have the meanings set forth below or shall be as defined in the Professional Corporation Act or the North Carolina Limited Liability Company Act as appropriate.

(1) "Council" shall mean the Council of the North Carolina State Bar.
(2) "Licensee" shall mean any natural person who is duly licensed to practice law in North Carolina.
(3) "Professional limited liability company or companies" shall mean any professional limited liability company or companies organized for the purpose of practicing law in North Carolina.
(4) "Professional corporations" shall mean any professional corporation or corporations organized for the purpose of practicing law in North Carolina.
(5) "Secretary" shall mean the secretary of the North Carolina State Bar.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**E.0102. Name of professional corporation or professional limited liability company.**

(a) *Name of professional corporation.* The name of every professional corporation shall contain the surname of one or more of its shareholders or of one or more persons who were associated with its immediate corporate, individual, partnership, or professional limited liability company predecessor in the practice of law and shall not contain any other name, word, or character (other than punctuation marks and conjunctions) except as required or permitted by Rules .0102(a)(1), (2) and (5) below. The following additional requirements shall apply to the name of a professional corporation:
(1) *Corporate designation.* The name of a professional corporation shall end with the following words:
(A) "Professional Association" or the abbreviation "P.A."; or
(B) "Professional Corporation" or the abbreviation "P.C."
(2) *Deceased or retired shareholder.* The surname of any shareholder of a professional corporation may be retained in the corporate name after such person's death, retirement or inactivity due to age or disability, even though such person may have disposed of his or her shares of stock in the professional corporation;
(3) *Disqualified shareholder.* If a shareholder in a professional corporation whose surname appears in the corporate name becomes legally disqualified to render professional services in North Carolina or, if the shareholder is not licensed in North Carolina, in any other jurisdiction in which the shareholder is licensed, the name of the professional corporation shall be promptly changed to eliminate the name of such shareholder, and such shareholder shall promptly dispose of his or her shares of stock in the corporation;
(4) *Shareholder becomes judge or official.* If a shareholder in a professional corporation whose surname appears in the corporate name becomes a judge or other adjudicatory officer or holds any other office which disqualifies such shareholder to practice law, the name of the professional corporation shall be promptly changed to eliminate the name of such shareholder and such person shall promptly dispose of his or her shares of stock in the corporation;
(5) *Trade name allowed.* A professional corporation shall not use any name other than its corporate name, except to the extent a trade name or other name is required or permitted by statute, rule of court or the Rules of Professional Conduct.
(b) *Name of professional limited liability company.* The name of every professional limited liability company shall contain the surname of one or more of its members or one or more persons who were associated with its immediate corporate, individual, partnership, or professional limited liability company predecessor in the practice of law and shall not contain any other name, word or character (other than punctuation marks and conjunctions) except as

required or permitted by Rules .0102(b)(1), (2) and (5) below. The following requirements shall apply to the name of a professional limited liability company:

(1) *Professional limited liability company designation.* The name of a professional limited liability company shall end with the words "Professional Limited Liability Company" or the abbreviation "P.L.L.C." or "PLLC";

(2) *Deceased or retired member.* The surname of any member of a professional limited liability company may be retained in the limited liability company name after such person's death, retirement, or inactivity due to age or disability, even though such person may have disposed of his or her interest in the professional limited liability company;

(3) *Disqualified member.* If a member of a professional limited liability company whose surname appears in the name of such professional limited liability company becomes legally disqualified to render professional services in North Carolina or, if the member is not licensed in North Carolina, in any other jurisdiction in which the member is licensed, the name of the professional limited liability company shall be promptly changed to eliminate the name of such member, and such member shall promptly dispose of his or her interest in the professional limited liability company;

(4) *Member becomes judge or official.* If a member of a professional limited liability company whose surname appears in the professional limited liability company name becomes a judge or other adjudicatory official or holds any other office which disqualifies such person to practice law, the name of the professional limited liability company shall be promptly changed to eliminate the name of such member and such person shall promptly dispose of his or her interest in the professional limited liability company;

(5) *Trade name allowed.* A professional limited liability company shall not use any name other than its limited liability company name, except to the extent a trade name or other name is required or permitted by statute, rule of court, or the Rules of Professional Conduct.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective March 6, 1997.

### E.0103. Registration with the North Carolina State Bar.

(a) *Registration of professional corporation.* At least one of the incorporators of a professional corporation shall be an attorney at law duly licensed to practice in North Carolina. The incorporators shall comply with the following requirements for registration of a professional corporation with the North Carolina State Bar:

(1) *Filing with State Bar.* Prior to filing the articles of incorporation with the secretary of state, the incorporators of a professional corporation shall file the following with the secretary of the North Carolina State Bar:

(A) the original articles of incorporation;

(B) an additional executed copy of the articles of incorporation;

(C) a conformed copy of the articles of incorporation;

(D) a registration fee of fifty dollars;

(E) an application for certificate of registration for a professional corporation (Form DC-1; see Section .0106(a) of this subchapter) verified by all incorporators, setting forth (i) the name and address of each person who will be an original shareholder or an employee who will practice law for the corporation in North Carolina; (ii) the name and address of at least one person who is an incorporator; (iii) the name and address of at least one person who will be an original director; and (iv) the name and address of at least one person who will be an original officer, and stating that all such persons are duly licensed to practice law in North Carolina. The application shall also (i) set forth the

name, address, and license information of each original shareholder who is not licensed to practice law in North Carolina but who shall perform services on behalf of the corporation in another jurisdiction in which the corporation maintains an office; and (ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. The application shall include a representation that the corporation will be conducted in compliance with the Professional Corporation Act and these regulations; and

(F) a certification for professional corporation by the Council of the North Carolina State Bar (Form PC-2; see Rule .0106(b) of this subchapter), a copy of which shall be attached to the original, the executed copy, and the conformed copy of the articles of incorporation, to be executed by the secretary in accordance with Rule .0103(a)(2) below.

(2) *Certificates issued by secretary and council.* The secretary shall review the articles of incorporation for compliance with the laws relating to professional corporations and these regulations. If the secretary determines that all persons who will be original shareholders are active members in good standing with the North Carolina State Bar, or duly licensed to practice law in another jurisdiction in which the corporation shall maintain an office, and that the articles of incorporation conform with the laws relating to professional corporations and these regulations, the secretary shall take the following actions:

(A) execute the certification for professional corporation by the Council of the North Carolina State Bar (Form PC-2; see Rule .0106(b) of this subchapter) attached to the original, the executed copy, and the conformed copy of the articles of incorporation and return the original and the conformed copies of the articles of incorporation, together with the attached certificates, to the incorporators for filing with the secretary of state;

(B) retain the executed copy of the articles of incorporation together with the application (Form PC-1) and the certification of council (Form PC-2) in the office of the North Carolina State Bar as a permanent record;

(C) issue a certificate of registration for a professional corporation (Form PC-3; see Rule .0106(c) of this subchapter) to the professional corporation to become effective upon the effective date of the articles of incorporation after said articles are filed with the secretary of state.

(b) *Registration of a professional limited liability company.* At least one of the persons executing the articles of organization of a professional limited liability company shall be an attorney at law duly licensed to practice law in North Carolina. The persons executing the articles of organization shall comply with the following requirements for registration with the North Carolina State Bar:

(1) *Filing with State Bar.* Prior to filing the articles of organization with the secretary of state, the persons executing the articles of organization of a professional limited liability company shall file the following with the secretary of the North Carolina State Bar:

(A) the original articles of organization;

(B) an additional executed copy of the articles of organization;

(C) a conformed copy of the articles of organization;

(D) a registration fee of $50;

(E) an application for certificate of registration for a professional limited liability company (Form PLLC-1; see Rule .0106(f) of this subchapter) verified by all of the persons executing the articles of organization, setting forth (i) the name and address of each original member or employee who will practice law for the professional limited liability company in North Carolina; (ii) the name and address of at least one person executing the articles of organization; and (iii) the name and address of at least one person who will be an original manager, and stating that all such persons are duly licensed to practice law in North Carolina. The application shall also (i) set forth the name, address, and

license information of each original member who is not licensed to practice law in North Carolina but who shall perform services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office; and (ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. The application shall include a representation that the professional limited liability company will be conducted in compliance with the North Carolina Limited Liability Company Act and these regulations;

(F) a certification for professional limited liability company by the Council of the North Carolina State Bar, (Form PLLC-2; see Rule .0106(g) of this subchapter), a copy of which shall be attached to the original, the executed copy, and the conformed copy of the articles of organization, to be executed by the secretary in accordance with Rule .0103(b)(2) below.

(2) *Certificates issued by the secretary.* The secretary shall review the articles of organization for compliance with the laws relating to professional limited liability companies and these regulations. If the secretary determines that all of the persons who will be original members are active members in good standing with the North Carolina State Bar, or duly licensed in another jurisdiction in which the professional limited liability company shall maintain an office, and the articles of organization conform with the laws relating to professional limited liability companies and these regulations, the secretary shall take the following actions:

(A) execute the certification for professional limited liability company by the Council of the North Carolina State Bar (Form PLLC-2) attached to the original, the executed copy and the conformed copy of the articles of organization and return the original and the conformed copy of the articles of organization, together with the attached certificates, to the persons executing the articles of organization for filing with the secretary of state;

(B) retain the executed copy of the articles of organization together with the application (Form PLLC-1) and the certification (Form PLLC-2) in the office of the North Carolina State Bar as a permanent record;

(C) issue a certificate of registration for a professional limited liability company (Form PLLC-3; see Rule .0106(h) of this subchapter) to the professional limited liability company to become effective upon the effective date of the articles of organization after said articles are filed with the secretary of state.

(c) *Refund of registration fee.* If the secretary is unable to make the findings required by Rules .0103(a)(2) or .0103(b)(2) above, the secretary shall refund the $50 registration fee.

(d) *Expiration of certificate of registration.* The initial certificate of registration for either a professional corporation or a professional limited liability company shall remain effective through June 30 following the date of registration.

(e) *Renewal of certificate of registration.* The certificate of registration for either a professional corporation or a professional limited liability company shall be renewed on or before July 1 of each year upon the following conditions:

(1) *Renewal of certificate of registration for professional corporation.* A professional corporation shall submit an application for renewal of certificate of registration for a professional corporation (Form PC-4; see Rule .0106(d) of this subchapter) to the secretary listing the names and addresses of all of the shareholders and employees of the corporation who practice law for the professional corporation in North Carolina and the name and address of at least one officer and one director of the professional corporation, and certifying that all such persons are duly licensed to practice law in the state of North Carolina and representing that the corporation has complied with these regulations and the provisions of the Professional Corporation Act. Such application shall also (i) set forth the name, address, and license information

of each shareholder who is not licensed to practice law in North Carolina but who performs services on behalf of the corporation in another jurisdiction in which the corporation maintains an office; and (ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. Upon a finding by the secretary that all shareholders are active members in good standing with the North Carolina State Bar, or are duly licensed to practice law in another jurisdiction in which the corporation maintains an office, the secretary shall renew the certificate of registration by making a notation in the records of the North Carolina State Bar;

(2) *Renewal of certificate of registration for a professional limited liability company.* A professional limited liability company shall submit an application for renewal of certificate of registration for a professional limited liability company (Form PLLC-4; see Rule .0106(i) of this subchapter) to the secretary listing the names and addresses of all of the members and employees of the professional limited liability company who practice law in North Carolina, and the name and address of at least one manager, and certifying that all such persons are duly licensed to practice law in the state of North Carolina, and representing that the professional limited liability company has complied with these regulations and the provisions of the North Carolina Limited Liability Company Act. Such application shall also (i) set forth the name, address, and license information of each member who is not licensed to practice law in North Carolina but who performs services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office; and (ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. Upon a finding by the secretary that all members are active members in good standing with the North Carolina State Bar, or are duly licensed to practice law in another jurisdiction in which the professional limited liability company maintains an office, the secretary shall renew the certificate of registration by making a notation in the records of the North Carolina State Bar;

(3) *Renewal fee.* An application for renewal of a certificate of registration for either a professional corporation or a professional limited liability company shall be accompanied by a renewal fee of $25;

(4) *Refund of renewal fee.* If the secretary is unable to make the findings required by Rule .0103(e)(1) or .0103(e)(2) above, the secretary shall refund the $25 registration fee;

(5) *Failure to apply for renewal of certificate of registration.* In the event a professional corporation or a professional limited liability company shall fail to submit the appropriate application for renewal of certificate of registration, together with the renewal fee, to the North Carolina State Bar within 30 days following the expiration date of its certificate of registration, the secretary shall send a notice to show cause letter to the professional corporation or the professional limited liability company advising said professional corporation or professional limited liability company of the delinquency and requiring said professional corporation or professional limited liability company to either submit the appropriate application for renewal of certificate of registration, together with the renewal fee and a late fee of $10, to the North Carolina State Bar within 30 days or to show cause for failure to do so. Failure to submit the application and the renewal fee within said thirty days, or to show cause within said time period, shall result in the suspension of the certificate of registration for the delinquent professional corporation or professional limited liability company and the issuance of a notification to the secretary of state of the suspension of said certificate of registration;

(6) *Reinstatement of suspended certificate of registration.* Upon (A) the submission to the North Carolina State Bar of the appropriate application for renewal of certificate of registration, together with all past due renewal fees

and late fees; and (B) a finding by the secretary that the representations in the application are correct, a suspended certificate of registration of a professional corporation or professional limited liability company shall be reinstated by the secretary by making a notation in the records of the North Carolina State Bar.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective March 6, 1997.

### E.0104. Management and financial matters.

(a) *Management.* At least one director and one officer of a professional corporation and at least one manager of a professional limited liability company shall be active members in good standing with the North Carolina State Bar.

(b) *Authority over professional matters.* No person affiliated with a professional corporation or a professional limited liability company, other than a licensee, shall exercise any authority whatsoever over the rendering of professional services in North Carolina or in matters of North Carolina law.

(c) *No income to disqualified person.* The income of a professional corporation or of a professional limited liability company attributable to the practice of law during the time that a shareholder of the professional corporation or a member of a professional limited liability company is legally disqualified to render professional services in North Carolina or, if the shareholder or member is not licensed in North Carolina, in any other jurisdiction in which the shareholder or member is licensed or after a shareholder or a member becomes a judge, other adjudicatory officer, or the holder of any other office, as specified in Rule .0102(a)(4) or .0102(b)(4) of this subchapter, shall not in any manner accrue to the benefit of such shareholder, or his or her shares, or to such member.

(d) *Stock of a professional corporation.* A professional corporation may acquire and hold its own stock.

(e) *Acquisition of shares of deceased or disqualified shareholder.* Subject to the provisions of G.S. 55B-7, a professional corporation may make such agreement with its shareholders or its shareholders may make such agreement between themselves as they may deem just for the acquisition of the shares of a deceased or retiring shareholder or a shareholder who becomes disqualified to own shares under the Professional Corporation Act or under these regulations.

(f) *Stock certificate legend.* There shall be prominently displayed on the face of all certificates of stock in a professional corporation a legend that any transfer of the shares represented by such certificate is subject to the provisions of the Professional Corporation Act and these regulations.

(g) *Transfer of stock of professional corporation.* When stock of a professional corporation is transferred to a licensee, the professional corporation shall request that the secretary issue a stock transfer certificate (Form PC-5; see Rule .0106(e) of this subchapter) as required by G.S. 55B-6. The secretary is authorized to issue the certificate which shall be permanently attached to the stub of the transferee's stock certificate in the stock register of the professional corporation. The fee for such certificate shall be two dollars for each transferee listed on the stock transfer certificate.

(h) *Stock register of professional corporation.* The stock register of a professional corporation shall be kept at the principal office of the corporation and shall be subject to inspection by the secretary or his or her delegate during business hours at the principal office of the corporation.

**History Note:** Statutory Authority G.S. 84-23, Readopted effective December 8, 1994; Amended effective March 6, 1997.

## E.0105. General and administrative provisions.

(a) *Administration of regulations.* These regulations shall be administered by the secretary, subject to the review and supervision of the council. The council may from time to time appoint such standing or special committees as it may deem proper to deal with any matter affecting the administration of these regulations. It shall be the duty of the secretary to bring to the attention of the council or its appropriate committee any violation of the law or of these regulations.

(b) *Appeal to council.* If the secretary shall decline to execute any certificate required by Rule .0103(a)(2), Rule .0103(b)(2), or Rule .0104(g) of this subchapter, or to renew the same when properly requested, or shall refuse to take any other action requested in writing by a professional corporation or a professional limited liability company, the aggrieved party may request in writing that the council review such action. Upon receipt of such a request, the council shall provide a formal hearing for the aggrieved party through a committee of its members.

(c) *Articles of amendment, merger, and dissolution.* A copy of the following documents, duly certified by the secretary of state, shall be filed with the secretary within 10 days after filing with the secretary of state:

(1) all amendments to the articles of incorporation of a professional corporation or to the articles of organization of a professional limited liability company;

(2) all articles of merger to which a professional corporation or a professional limited liability company is a party;

(3) all articles of dissolution dissolving a professional corporation or a professional limited liability company;

(4) any other documents filed with the secretary of state changing the corporate structure of a professional corporation or the organizational structure of a professional limited liability company.

(d) *Filing fee.* Except as otherwise provided in these regulations, all reports or papers required by law or by these regulations to be filed with the secretary shall be accompanied by a filing fee of two dollars.

(e) *Accounting for filing fees.* All fees provided for in these regulations shall be the property of the North Carolina State Bar and shall be deposited by the secretary to its account, and such account shall be separately stated on all financial reports made by the secretary to the council and on all financial reports made by the council.

(f) *Records of State Bar.* The secretary shall keep a file for each professional corporation and each professional limited liability company which shall contain the executed articles of incorporation or organization, all amendments thereto, and all other documents relating to the affairs of the corporation or professional limited liability company.

(g) *Additional information.* A professional corporation or a professional limited liability corporation shall furnish to the secretary such information and documents relating to the administration of these regulations as the secretary or the council may reasonably request.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

**E.0106. Forms.**

**(a) Form PC-1:**

Application for Certificate of Registration for a
Professional Corporation

The undersigned, being all of the incorporators of _____, a professional corporation to be incorporated under the laws of the state of North Carolina for the purpose of practicing law, hereby certify to the Council of the North Carolina State Bar:

1. At least one person who is an incorporator, at least one person who will be an original officer, and at least one person who will be an original director, and all persons who, to the best knowledge and belief of the undersigned, will be original shareholders and employees who will practice law for said professional corporation in North Carolina are duly licensed to practice law in the state of North Carolina. The names and addresses of such persons are:

| Name and Position (incorporator, officer, director, shareholder, employee) | Address |
|---|---|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

2. Each original shareholder who is not licensed to practice law in North Carolina but who will perform services on behalf of the corporation in another jurisdiction in which the corporation maintains an office is duly licensed to practice law in that jurisdiction. The name, address, and license information of each such person are:

Name, Address, Jurisdiction of Licensure, License Number

_____

_____

_____

3. The jurisdictions other than North Carolina in which the corporation will maintain an office are:

Name of Jurisdiction and Address of Office(s)

_____

_____

_____

4. The undersigned represent that the professional corporation will be conducted in compliance with the Professional Corporations Act and with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

5. Application is hereby made for a Certificate of Registration to be effective upon the effective date of the professional corporation's articles of incorporation after said articles are filed with the secretary of state.

6. Attached hereto is the registration fee of $50.

This the _____ day of _____, _____.

_____
Incorporator

_____
Incorporator

_____
Incorporator

[Signatures of all incorporators.]

NORTH CAROLINA
_____ COUNTY

I hereby certify that _____, _____, _____, _____, and _____, being all of the incorporators of _____, a professional corporation, personally appeared before me this day and stated that they have read the foregoing Application for Certificate of Registration for a Professional Corporation and that the statements contained therein are true.

Witness my hand and notarial seal, this ____ day of _____, _____.

_____
Notary Public

My commission expires:
_____

**(b) Form PC-2:**

Certification for Professional Corporation by Council of
the North Carolina State Bar

The incorporators of _____, a professional corporation, have certified to the Council of the North Carolina State Bar the names and addresses of all persons who will be original owners of said professional corporation's shares.

Based upon that certification and my examination of the roll of attorneys licensed to practice law in the state of North Carolina, I hereby certify that the ownership of the shares of stock is in compliance with the requirements of G.S. 55B-4(2) and G.S. 55B-6.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this _____ day of _____, _____.

_____
Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-4(4) and must be attached to the original articles of incorporation when filed with the secretary of state. See Rule .0103(a)(2) of this subchapter.]

**(c) Form PC-3:**

Certificate of Registration for a Professional Corporation

It appears that _____, a professional corporation, has met all of the requirements of G.S. 55B-4, G.S. 55B-6 and the Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law of the North Carolina State Bar.

By the authority of the Council of the North Carolina State Bar, I hereby issue this Certificate of Registration for a Professional Corporation pursuant to the provisions of G.S. 55B-10 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

This registration is effective upon the effective date of the articles of incorporation of said professional corporation, after said articles are filed with the secretary of state, and expires on June 30, _____.

This the _____ day of _____, _____.

_____
Secretary of the North Carolina State Bar

**(d) Form PC-4:**

Application for Renewal of Certificate of Registration
for Professional Corporation

Application is hereby made for renewal of the Certificate of Registration for Professional Corporation of _____, a professional corporation.

In support of this application, the undersigned hereby certify to the Council of the North Carolina State Bar:

1. At least one of the officers and one of the directors, and all of the shareholders and employees of said professional corporation who practice law for said professional corporation in North Carolina are duly licensed to practice law in the state of North Carolina. The names and addresses of such persons are:

| Name and Position (officer, director, shareholder, employee) | Address |
|---|---|
| | |
| | |
| | |
| | |

2. Each shareholder who is not licensed to practice law in North Carolina but who performs services on behalf of the corporation in another jurisdiction in which the corporation maintains an office is duly licensed to practice law in that jurisdiction. The name, address, and license information of each such person are:

Name, Address, Jurisdiction of Licensure, License Number

_____

_____

3. The jurisdictions other than North Carolina in which the corporation maintains an office are:

Name of Jurisdiction and Address of Office(s)

_____

_____

_____

4. At all times since the issuance of its Certificate of Registration for Professional Corporation, said professional corporation has complied with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law and with the Professional Corporations Act.

5. Attached hereto is the renewal fee of $25.

This the ____ day of _____, _____.

_____
(Professional Corporation)

By _____
President (or Chief Executive)

NORTH CAROLINA
_____ COUNTY

I hereby certify that _____, being the _____ of _____, a professional corporation, personally appeared before me this day and stated that he/she has read the foregoing Application for Renewal of Certificate of Registration for Professional Corporation and that the statements contained therein are true.

Witness my hand and notarial seal, this ____ day of _____, ____.

_____
Notary Public

My commission expires:

_____

**(e) Form PC-5:**

North Carolina State Bar
Stock Transfer Certificate

I hereby certify that _____
(transferee)
is duly licensed to practice law in the state of North Carolina and as of this date may be a transferee of shares of stock in a professional corporation formed to practice law in the state of North Carolina.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this ____ day of _____, _____.

_____
Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-6 and must be attached to the transferee's stock certificate. See Rule .0104(g) of this subchapter.]

**(f) Form PLLC-1:**

Application for Certificate of Registration for a
Professional Limited Liability Company

The undersigned, being all of the persons executing the articles of organization of _____, a professional limited liability company to be organized under the laws of the state of North Carolina for the purpose of practicing law, hereby certify to the Council of the North Carolina State Bar:

1. At least one person executing the articles of organization, at least one person who will be an original manager, and all persons who, to the best knowledge and belief of the undersigned, will be original members and employees who will practice law for said professional limited liability company in North Carolina are duly licensed to practice law in the state of North Carolina. The names and addresses of all such persons are:

| Name and Position (signer of articles, manager, member, employee) | Address |
|---|---|
| | |
| | |
| | |

2. Each original member who is not licensed to practice law in North Carolina but who will perform services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office is duly licensed to practice law in that jurisdiction. The names, addresses, and license information of each such person are:

Name, Address, Jurisdiction Where Licensed, License Number

_____
_____
_____

3. The jurisdictions other than North Carolina in which the professional limited liability company will maintain an office are:

Name of Jurisdiction and Address of Office(s)

_____

_____

_____

4. The undersigned represent that the professional limited liability company will be conducted in compliance with the North Carolina Limited Liability Company Act and with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

5. Application is hereby made for a Certificate of Registration to be effective upon the effective date of the professional limited liability company's articles of organization after said articles are filed with the secretary of state.

6. Attached hereto is the registration fee of $50.

This the ____ day of _____, _____.

_____

_____

_____

[Signatures of all persons executing articles of organization.]

NORTH CAROLINA
_____ COUNTY

I hereby certify that _____, _____, _____, _____, and _____, being all of the persons executing the articles of organization of _____, a professional limited liability company, personally appeared before me this day and stated that they have read the foregoing Application for Certificate of Registration for a Professional Limited Liability Company and that the statements contained therein are true.

Witness my hand and notarial seal, this ____ day of _____, _____.

_____

Notary Public

My commission expires:

_____

**(g) Form PLLC-2:**

Certification for Professional Limited Liability Company
by Council of the North Carolina State Bar

All of the persons executing the articles of organization of _____, a professional limited liability company, have certified to the Council of the North Carolina State Bar the names and addresses of all persons who will be original members of said professional limited liability company.

Based upon that certification and my examination of the roll of attorneys licensed to practice law in the state of North Carolina, I hereby certify that the membership interest is in compliance with the requirements of G.S. 55C-2-01(c), and, by reference, G.S. 55B-4(2) and G.S. 55B-6.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this ____ day of _____, _____.

_____

Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-4(4) and G.S. 57C-2-01 and must be attached to the original articles of organization when filed with the secretary of state. See Rule .0103(b)(2) of this subchapter.]

**(h) Form PLLC-3:**

Certificate of Registration for a
Professional Limited Liability Company

It appears that _____, a professional limited liability company, has met all of the requirements of G.S. 57C-2-01 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

By the authority of the Council of the North Carolina State Bar, I hereby issue this Certificate of Registration for a Professional Limited Liability Company pursuant to the provisions of G.S. 55B-10, G.S. 57C-2-01 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

This registration is effective upon the effective date of the articles of organization of said professional limited liability company, after said articles are filed with the secretary of state, and expires on June 30, _____.

This the ____ day of _____, _____.

_____
Secretary of the North Carolina State Bar

**(i) Form PLLC-4:**

Application for Renewal of Certificate of Registration
for Professional Limited Liability Company

Application is hereby made for renewal of the Certificate of Registration for Professional Limited Liability Company of _____, a professional limited liability company.

In support of this application, the undersigned hereby certify to the Council of the North Carolina State Bar:

1. At least one of the managers, and all of the members and employees of said professional limited liability company who practice law for said professional limited liability company in North Carolina are duly licensed to practice law in the state of North Carolina. The names and addresses of all such persons are:

| Name and Position (manager, member, employee) | Address |
|---|---|
| | |
| | |
| | |
| | |

2. Each member who is not licensed to practice law in North Carolina but who performs services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office is duly licensed to practice law in that jurisdiction. The names, addresses, and license information of each such person are:

Name, Address, Jurisdiction Where Licensed, License Number

_____

_____

3. The jurisdictions other than North Carolina in which the professional limited liability company maintains an office are:

Name of Jurisdiction and Address of Office(s)

_____

_____

_____

4. At all times since the issuance of its Certificate of Registration for Professional Limited Liability Company, said professional limited liability company has complied with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law and with the provisions of the North Carolina Limited Liability Company Act.

5. Attached hereto is the renewal fee of $25.

This the _____ day of _____, _____.

_____

(Professional Limited Liability Company)

By _____

Manager

NORTH CAROLINA

_____ COUNTY

I hereby certify that _____, being a manager of _____, a professional limited liability company, personally appeared before me this day and stated that he/she has read the foregoing Application for Renewal of Certificate of Registration for Professional Limited Liability Company and that the statements contained therein are true.

Witness my hand and notarial seal, this ____ day of _____, ____.

_____

Notary Public

My commission expires:

_____

## SECTION .0200. REGISTRATION OF INTERSTATE AND INTERNATIONAL LAW FIRMS

### E.0201. Registration requirement.

No law firm or professional organization which maintains offices in North Carolina and one or more other jurisdictions may do business in North Carolina without first obtaining a certificate of registration from the North Carolina State Bar provided, however, that no law firm or professional organization shall be required to obtain a certificate of registration if all attorneys associated with the law firm or professional organization, or any law firm or professional organization that is in partnership with said law firm or professional organization, are licensed to practice law in North Carolina.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended March 5, 1998.

### E.0202. Conditions of registration.

The secretary of the North Carolina State Bar shall issue such a certificate of registration upon satisfaction of the following conditions:

(1) There shall be filed with the secretary of the North Carolina State Bar a registration statement disclosing:

(a) all names used to identify the filing law firm or professional organization;

(b) addresses of all offices maintained by the filing law firm or professional organization;

(c) the name and address of any law firm or professional organization with which the filing law firm or professional organization is in partnership and the name and address of such partnership;

(d) the name and address of each attorney who is a partner, shareholder, member or employee of the filing law firm or professional organization or who is a partner, shareholder, member or employee of a law firm or professional organization with which the filing law firm or professional organization is in partnership;

(e) the relationship of each attorney identified in Rule .0202(1)(d) above to the filing law firm or professional organization;

(f) the jurisdictions to which each attorney identified in Rule .0202(1)(d) above is admitted to practice law.

(2) There shall be filed with the registration statement a notarized statement of the filing law firm or professional organization executed by a responsible attorney associated with the filing law firm or professional organization who is licensed in North Carolina certifying that each attorney identified in Rule .0202(1)(d) above who is not licensed to practice law in North Carolina is a member in good standing of the bar of each jurisdiction to which the attorney has been admitted.

(3) There shall be filed with the registration statement a notarized statement of the filing law firm or professional organization executed by a responsible attorney associated with the filing law firm or professional organization who is licensed in North Carolina affirming that each attorney identified in Rule .0202(1)(d) above who is not licensed to practice law in North Carolina will govern his or her professional conduct with respect to legal matters arising from North Carolina in accordance with the Revised Rules of Professional Conduct of the North Carolina State Bar.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994; Amended March 5, 1998.

### E.0203. Registration fee.

There shall be submitted with each registration statement and supporting documentation a registration fee of $500.00 as administrative cost.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### E.0204. Certificate of registration.

A certificate of registration shall remain effective until January 1 following the date of filing and may be renewed annually by the secretary of the North Carolina State Bar upon the filing of an updated registration statement which satisfies the requirements set forth above and the submission of the registration fee.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### E.0205. Effect of registration.

This rule shall not be construed to confer the right to practice law in North Carolina upon any lawyer not licensed to practice law in North Carolina.

**History Note:** Statutory Authority G.S. 84-16; G.S. 84-23, Readopted Effective December 8, 1994.

## SECTION .0300. RULES CONCERNING PREPAID LEGAL SERVICES PLANS

### E.0301. Registration requirement.

No licensed North Carolina attorney shall participate in a prepaid legal services plan in this state unless the plan has registered with the North Carolina State Bar and has complied with the rules set forth below.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-23.1, Adopted Effective December 8, 1994.

### E.0302. Registration site.

A prepaid legal services plan must be registered in the office of the North Carolina State Bar prior to its implementation or operation in North Carolina on forms supplied by the North Carolina State Bar.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-23.1, Adopted Effective December 8, 1994.

### E.0303. Requirement to file amendments.

Amendments to prepaid legal services plans and to other documents required to be filed upon registration of such plans shall be filed in the office of the North Carolina State Bar no later than 30 days after the adoption of such amendments.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-23.1, Adopted Effective December 8, 1994.

### E.0304. Advertising of State Bar approval prohibited.

Prepaid legal services plans approved by the North Carolina State Bar shall register with the North Carolina State Bar on or before January 31, 1992. Effective January 31, 1992, the approval of these existing plans is revoked and the plans shall not advertise, communicate, or represent in any way that the North Carolina State Bar approved the plan.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-23.1, Adopted Effective December 8, 1994.

### E.0305. Annual registration.

Subsequent to initial registration, all prepaid legal services plans shall be registered annually on or before January 31 on forms supplied by the State Bar.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-23.1, Adopted Effective December 8, 1994.

### E.0306. Registration fee.

The initial and annual registration fees for each prepaid legal services plan shall be $100.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-23.1, Adopted Effective December 8, 1994.

### E.0307. Index of registered plans.

The North Carolina State Bar shall maintain an index of the prepaid legal services plans registered pursuant to these rules. All documents filed in compliance with this rule are considered public documents and shall be available for public inspection during normal business hours.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-23.1, Adopted Effective December 8, 1994.

### E.0308. State Bar may not approve or disapprove plans.

The North Carolina State Bar shall not approve or disapprove any prepaid legal services plan or render any legal opinion regarding any plan. The registration of any plan under this rule shall not be construed to indicate approval or disapproval of the plan.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-23.1, Adopted Effective December 8, 1994.

### E.0309. State Bar jurisdiction.

The North Carolina State Bar retains jurisdiction of North Carolina licensed attorneys who participate in prepaid legal services plans and North Carolina licensed attorneys are subject to the rules and regulations governing the practice of law.

**History Note:** Statutory Authority G.S. 84-23; G.S. 84-23.1, Adopted Effective December 8, 1994.

## SECTION .0400. RULES FOR ARBITRATION OF INTERNAL LAW FIRM DISPUTES

### E.0401. Purpose.

Subject to these rules, the North Carolina State Bar will administer a

voluntary binding arbitration program for resolution of disputed issues between lawyers arising out of the dissolution of law firms or disputes within law firms. The purpose of this arbitration procedure is to provide a mechanism for resolving economic disputes between lawyers arising out of the operation or dissolution of law firms.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### E.0402. Submission to arbitration.

The program is voluntary. The procedure shall be instituted by a written submission to arbitration agreement, executed by all the parties to the dispute, in a form and manner as provided by the executive director of the North Carolina State Bar.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### E.0403. Jurisdiction.

The procedure may be used for the resolution of any dispute if all of the following conditions are met:

(a) the disputed issues submitted to arbitration hereunder shall be solely between or among lawyers who are members of the same law firm;

(b) the dispute arises out of an economic relationship between or among lawyers concerning the operation, dissolution, or proposed dissolution of the law firm of which they are members;

(c) at least one of the parties to such dispute resides or maintains an office for the practice of law in the state of North Carolina and is a member of the North Carolina State Bar;

(d) all parties agree in a written submission to arbitration agreement to submit the issues in dispute to binding arbitration under these rules and procedures.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### E.0404. Administration.

The North Carolina State Bar is the administrator of the arbitration program, through its executive director and his designees, to carry out all administrative functions, including those specified in Rules .0406 through .0410 of this subchapter.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### E.0405. Uniform Arbitration Act.

Except as modified herein, all arbitration procedures will be governed by Article 45A of Chapter 1 of the General Statutes of North Carolina (Uniform Arbitration Act). Said Uniform Arbitration Act and any amendments thereto are hereby incorporated by reference and constitute a part of these rules.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### E.0406. List of arbitrators.

The North Carolina State Bar shall establish a list of arbitrators, consisting of attorneys or retired judges, who have been members of the North Carolina State Bar for at least ten years and who have indicated a willingness to serve. The parties shall, in their submission to arbitration agreement, elect to have one or three arbitrators. The administrator shall thereafter provide each party with the list of arbitrators.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### E.0407. Selection of arbitrators.

If three arbitrators are to be selected, then

(a) each party to the dispute shall, within ten days after receipt of notice from the administrator, select one arbitrator on the approved list who shall be contacted by the administrator concerning his or her ability to serve and dates of availability. The two arbitrators so chosen shall execute an oath and appointment of arbitrator certificate provided by the administrator. Within fifteen days after certification, the two arbitrators shall choose a third from the administrator's approved list, who shall also execute an oath and appointment certificate. Failure of the two arbitrators to choose a third within the allotted time shall constitute a consent to have the third arbitrator chosen by the administrator;

(b) if the opposing parties cannot, because of the number of parties involved, settle upon two arbitrators who are to choose the third as set forth above, then the administrator shall notify the parties and appoint all three arbitrators from the approved list.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### E.0408. Fees and expenses.

All expenses and the arbitrator(s') fees shall be paid by the parties. Arbitrator(s') compensation shall be at the same rate paid to retired judges who are assigned to temporary active service as provided in G.S. 7A-52 or any successor statutory provision. The administrator may require from each party an escrow deposit covering anticipated fees and expenses.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### E.0409. Confidentiality.

It is the policy of the North Carolina State Bar to protect the confidentiality of all arbitration proceedings. The parties, the arbitrators, and the North Carolina State Bar shall keep all proceedings confidential, except that any final award shall be enforceable under Chapter 1, Article 45A.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

### E.0410. Authority to adopt amendments and regulations.

The North Carolina State Bar may, from time to time, adopt and amend procedures and regulations consistent with these rules and amend or supplement these rules or otherwise regulate the arbitration procedure.

**History Note:** Statutory Authority G.S. 84-23, Readopted Effective December 8, 1994.

## SUBCHAPTER 1F. FOREIGN LEGAL CONSULTANTS

### SECTION .0100. FOREIGN LEGAL CONSULTANTS

### F.0101. Applications.

All applicants for certification as a foreign legal consultant must be made on forms supplied by the North Carolina State Bar and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by writing or by telephoning the Bar's offices.

**History Note:** Adopted March 7, 1996.

### F.0102. Application form.

(a) The application for certification as a foreign legal consultant form requires an applicant to supply full and complete information under oath relating to the applicant's background, including family history, past and current residences, education, military service, past and present employment, citizenship, credit status, involvement in disciplinary, civil, or criminal proceedings, substance abuse, mental treatment and bar admission and discipline history.

(b) Every applicant must submit as part of the application:

(1) A certificate from the authority that has final jurisdiction regarding matters of professional discipline in the foreign country or jurisdiction in which the applicant is admitted to practice law, or the equivalent thereof. This certificate must be signed by a responsible official or one of the members of the executive body of the authority, imprinted with the official seal of the authority, if any, and must certify:

(A) The authority's jurisdiction in such matters;

(B) The applicant's admission to practice law, or the equivalent thereof, in the foreign country, the date of admission and the applicant's standing as an attorney or the equivalent thereof; and

(C) Whether any charge or complaint has ever been filed with the authority against the applicant and if so, the substance of and adjudication or resolution of each charge or complaint.

(2) A letter of recommendation from one of the members of the executive body of this authority or from one of the judges of the highest law court or court of general original jurisdiction of the foreign country, certifying the applicant's professional qualifications, and a certificate from the clerk of this authority or the clerk of the highest law court or court of general original jurisdiction, attesting to the genuineness of the applicant's signature;

(3) A letter of recommendation from at least two attorneys, or the equivalent thereof, admitted in and practicing law in the foreign country, stating the length of time, when, and under what circumstances they have known the applicant and their appraisal of the applicant's moral character;

(4) Two sets of clear fingerprints;

(5) Two executed informational Authorization and Release forms;
(6) A birth certificate;
(7) Copies of all applications to take a bar examination or an attorney's examination or for admission to the practice of law that the applicant has filed in any state or territory of the U.S., or the District of Columbia or in any foreign country;
(8) Certified copies of any legal proceedings in which the applicant has been a party;
(9) Two recent 2-inch by 3-inch photographs of the applicant showing a front view of the applicant's head and shoulders; and
(10) Any other relevant documents or information as may be required by the North Carolina State Bar.
(c) The application must be filed in duplicate. The duplicate may be a photocopy of the original.
(d) The application and all required attachments shall be in English or accompanied by duly authenticated English translations.

**History Note:** Adopted March 7, 1996.

### F.0103. Requirements for applicants.

As a prerequisite to being certified as a foreign legal consultant, an applicant shall:
(a) Possess the qualifications of character and general fitness requisite for an attorney and counselor at law and be of good moral character and entitled to the high regard and confidence of the public and have satisfied the requirements of Section .0104 of this Chapter at the time the certificate is issued;
(b) Have been admitted to practice as an attorney, or the equivalent thereof, in a foreign country for at least five years as of the date of application for a certificate of registration;
(c) Certify in writing that he or she intends to practice in the State as a foreign legal consultant and intends to maintain an office in the State for this practice;
(d) Be at least 21 years of age;
(e) Have been actively and substantially engaged in the practice of law or a profession or occupation that requires admission to the practice of law, or the equivalent thereof, in the foreign country in which the applicant holds a license for at least five of the seven years immediately preceding the date of application for a certificate of registration and is in good standing as an attorney, or the equivalent thereof, in that country;
(f) Have filed an application as prescribed in section .0102 above;
(g) Be at all times in good professional standing and entitled to practice in every state or territory of the U.S. or in the District of Columbia, in which the applicant has been licensed to practice law, and in every foreign country in which the applicant is admitted to the practice of law or the equivalent thereof and is not under any pending charges of misconduct. The applicant may be inactive and in good standing in any foreign country or in any state or territory of the U.S. or in the District of Columbia; and
(h) Satisfy the Bar that the foreign country in which the applicant is licensed will admit North Carolina attorneys to practice as foreign legal consultants or the equivalent thereof.

**History Note:** Adopted March 7, 1996.

### F.0104. Burden of proving moral character and general fitness.

Every applicant shall have the burden of proving that the applicant possesses the qualifications of character and general fitness requisite for an attorney and counselor-at-law and is possessed of good moral character and is entitled to the high regard and confidence of the public.

**History Note:** Adopted March 7, 1996.

### F.0105. Failure to disclose.

No one shall be issued a certificate of registration as a foreign legal consultant in this state:

(a) Who fails to disclose fully to the Bar, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to the applicant's professional conduct, whether same have terminated or not, in this or any other state, or any federal court or other jurisdiction or foreign country, or

(b) Who fails to disclose fully to the Bar, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant, whether the same have been terminated or not in this or any other state, or any federal court or other jurisdiction or foreign country.

**History Note:** Adopted March 7, 1996.

### F.0106. Investigation by counsel.

The counsel will conduct any necessary investigation regarding the application and will advise the Administrative Committee of the North Carolina State Bar (the committee) of the findings of any such investigation.

**History Note:** Adopted March 7, 1996;
Amended effective February 3, 2000.

### F.0107. Recommendation of Administrative Committee.

(a) Upon receipt of all completed application forms, attachments, filing fees and information required by the Bar, and completion of the Bar's investigation, the committee shall make a written recommendation to the council respecting whether an applicant for certification as a foreign legal consultant has met the requirements of G.S. § 84A-1 and these rules. Prior to making a written recommendation, the Committee may request further information from the applicant or other sources and may require the applicant to appear before it upon reasonable notice. The Committee's written recommendation shall include a statement of the reason(s) for the Committee's decision.

(b) A copy of the Committee's recommendation shall be served upon the applicant by pursuant to Rule 4 of the N.C. Rules of Civil Procedure.

**History Note:** Adopted March 7, 1996;
Amended effective February 3, 2000.

### F.0108. Appeal from committee decision.

(a) The applicant will have 30 days from the date of service of the committee's recommendation in which to serve a written request for a hearing upon the secretary pursuant to Rule 4 of the N.C. Rules of Civil Procedure.

(b) If the applicant does not request a hearing in a timely fashion, the committee will forward its recommendation to the council. The council will consider the application and the recommendation of the committee and will make a final written recommendation to the N.C. Supreme Court, as set out in section .0110(f) below.

**History Note:** Adopted March 7, 1996;
Amended effective February 3, 2000.

### F.0109. Hearing procedure.

(a) *Notice, time & place of hearing.*

(1) The chair of the committee shall fix the time and place of hearing within 30 days after the applicant's request for a hearing is served upon the Secretary. The hearing shall be held as soon as practicable after the request is filed.

(2) The notice of the hearing shall include the date, time and place of the hearing and shall be served upon the applicant at least 10 days before the hearing date.

(b) *Hearing panel.*

(1) The chair of the committee shall appoint a hearing panel composed of three members of the committee to consider the application and make a written recommendation to the counsel.

(2) The chair shall appoint one of the three members of the panel to serve as the presiding member. The presiding member shall rule on any question of procedure which arises during the hearing; preside at the deliberations of the panel, sign the written determinations of the panel and report the panel's determination to the council.

(c) *Proceedings before the hearing panel.*

(1) A majority of the panel members is necessary to decide the application.

(2) Following the hearing on the contested application, the panel will make a written recommendation to the council on behalf of the committee regarding whether the application should be granted. The recommendation shall include appropriate findings of fact and conclusions of law.

(3) The applicant will have the burden of proving that he or she has met all the requirements of sections .0102-.0104 above.

(4) At the hearing, the applicant and State Bar counsel will have the right

(A) to appear personally and be heard

(B) to call and examine witnesses

(C) to offer exhibits

(D) to cross-examine witnesses

(5) In addition the applicant will have the right to be represented by counsel.

(6) The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as practicable and by the Rules of Evidence applicable in superior court, unless otherwise provided by this subchapter or the parties agree otherwise.

(7) The hearing shall be reported by a certified court reporter. The applicant will pay the costs associated with obtaining the court reporter's services for the hearing. The applicant shall pay the costs of the transcript and shall arrange for the preparation of the transcript with the court reporter. The applicant may also be taxed with all other costs of the hearing, but the costs shall not include any compensation to the members of the hearing panel.

(8) The written recommendation of the hearing panel shall be served upon the member and the counsel within 14 days of the date of the hearing.

**History Note:** Adopted March 7, 1996;
Amended effective February 3, 2000.

### F.0110. Review and order of council.

(a) *Review by council.*
The applicant shall compile a record of the proceedings before the hearing panel, including a legible copy of the complete transcript, all exhibits introduced into evidence at the hearing, all pleadings and all motions and orders, unless the applicant and counsel agree in writing to shorten the record. Any agreement regarding the record shall be included in the record transmitted to the council.
(b) *Transmission of record to council.*
The applicant shall provide a copy of the record to the council not later than 90 days after the hearing unless an extension is granted by the president of the N.C. State Bar for good cause shown. The applicant shall transmit a copy of the record to each member of the council, at the applicant's expense, no later than 30 days before the council meeting at which the application is to be considered.
(c) *Costs.*
The applicant shall bear all of the costs of transcribing, copying, and transmitting the record to the members of the council.
(d) *Dismissal for failure to apply.*
If the applicant fails to comply fully with any provisions of this rule, the counsel may file a motion with the secretary to dismiss the application.
(e) *Appearance before the council.*
In his or her discretion, the president of the State Bar may permit the counsel for the State Bar and the applicant to present oral or written argument but the council will not consider additional evidence not in the record transmitted from the hearing panel absent a showing that the ends of justice so require or that undue hardship will result if the additional evidence is not presented.
(f) *Order by council.*
The council will review the recommendation of the hearing panel and the record and will determine whether the applicant has met all of the requirements of sections .0102-.0104 above. The council will make a written recommendation to the N.C. Supreme Court regarding whether the application should be granted. The council's recommendation will contain a statement of the reasons for the recommendation and shall attach to it the application.
(g) *Costs.*
The council may tax the costs attributable to the proceeding against the applicant.

**History Note:** Adopted March 7, 1996.

### F.0111. Application fees; Refunds; Returns checks.

(a) Every application and every reapplication for certification as a foreign legal consultant shall be accompanied by a fee of $200 paid in U.S. currency.
(b) No part of the fee will be refunded.
(c) Failure to pay the application fees required by the these rules shall cause the application to be deemed not filed. If the check payable for the application fee is not honored upon presentment for any reason other than error of the bank, the application will be deemed not filed. All checks presented to the Bar for any fees which are not honored upon presentment will be returned to the applicant, who shall pay the Bar in cash, cashier's check, certified check or money order any fees payable to the Bar, along with a $20 additional fee for processing the dishonored check.

**History Note:** Adopted March 7, 1996.

### F.0112. Permanent record.

All information furnished to the Bar by an applicant shall be deemed material, and all such information shall be and become a permanent record of the Bar. Records, papers and other documents containing information collected or compiled by the North Carolina State Bar and its members or employees as a result of any investigation, application, inquiry or interview conducted in connection with an application for certificate of registration are not public records within the meaning of Chapter 132 of the General Statutes.

**History Note:** Adopted March 7, 1996.

### F.0113. Denial; Re-application.

No new application or petition for reconsideration of a previous application from an applicant who has been denied a certificate of registration as a foreign legal consultant shall be considered by the Bar within a period of three years (3) next after the date of such denial unless, for good cause shown, permission for reapplication or petition for a reconsideration is granted by the Bar.

**History Note:** Adopted March 7, 1996.

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# THE REVISED RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

As amended through October 17, 2001.

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A complete set of all referenced ethics opinions may be obtained from the North Carolina State Bar. Contact Jennifer Eichenberger, Director of Communications, P.O. Box 25908, Raleigh, N.C. 27611.


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**Editor's note.** — On July 24, 1997, the North Carolina Supreme Court entered an order approving the Revised Rules of Professional Conduct of the North Carolina State Bar. The Revised Rules represent the first comprehensive revision of North Carolina's ethical code for lawyers since 1985. The court's order also repealed the Rules of Professional Conduct which were originally enacted on October 7, 1985. The (1985) Rules of Professional Conduct governed the professional conduct of North Carolina lawyers from January 1, 1986 until July 24, 1997. From January 1, 1974 until the adoption of the 1985 rules, lawyers were regulated under the North Carolina Code of Professional Responsibility (adopted on April 30, 1973). The complete text of the Revised Rules and all of the comments thereto, as approved by the North Carolina Supreme Court, follows this note. Correlation tables appear after the Revised Rules. These tables cross-reference the Revised Rules with the comparable provisions of the superseded (1985) Rules of Professional Conduct and (1973) Code of Professional Conduct.

Each revised rule is followed by annotations of cases, decisions of the Disciplinary Hearing Commission of the North Carolina State Bar, and ethics opinions of the State Bar which apply or interpret the rule. In the annotations, the terms "CPR" and "RPC" designate formal ethics opinions adopted under the superseded (1973) Code of Professional Responsibility and (1985) Rules of Professional Conduct respectively. These opinions still provide guidance on issues of professional conduct except to the extent that a particular opinion is overruled by a subsequent opinion or by a provision of the Revised Rules of Professional Conduct. Ethics opinions rendered invalid by subsequent opinion or the Revised Rules are generally not included in the annotations. An ethics opinion promulgated under the Revised Rules is designated as a "Formal Ethics Opinion."

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**Editor's note.** — For North Carolina court system website, see www.aoc.state.nc.us. For the North Carolina State Bar website, see www.ncbar.com.

## Rule 0.1. Preamble: A lawyer's responsibilities.

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers

and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.

A lawyer should render public interest legal service and provide civic leadership. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, society, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Traditionally, the legal profession has been a group of people united in a learned calling for the public good. At their best, lawyers have assured the availability of legal services to all, regardless of ability to pay, and as leaders of their communities, states, and nation have utilized their education and experience to improve society. It is acknowledged that it is the basic responsibility of each lawyer engaged in the practice of law to provide community service, community leadership, and public interest legal services without fee, or at a substantially reduced fee, in such areas as poverty law, civil rights, public rights law, charitable organization representation, and the administration of justice.

The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, voluntary efforts by the profession to provide legal assistance in coping with the web of statutes, rules, and regulations are imperative for communities and persons of modest and limited means.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. Personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and the government. Every lawyer should support all proper efforts to meet this need for legal services.

As important as the provision of pro bono legal services is, participation of lawyers in civic leadership is equally important. In the long run, because of their values, education and experience, lawyers who render unpaid service in nonlegal settings to help provide new jobs, improve educational opportunities, and meet the spiritual needs of a community, can enhance the quality of life of all citizens.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an

opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and, at the same time, assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves that public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private. In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for the abuse of legal authority is more readily challenged by a self-regulated profession.

The legal profession's relative autonomy carries with it a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**CASE NOTES**

**Respect for Other Lawyers.** — Where a law firm represented a client for a number of years pursuant to a contingency fee arrangement, the firm should have been notified of its discharge when it became clear that a new attorney was taking over representation of the client. Robinson, Bradshaw & Hinson v. Smith, 129 N.C. App. 305, 498 S.E.2d 841 (1998), review dismissed, 348 N.C. 695, 511 S.E.2d 650 (1998).

**Cited** in SuperGuide Corp. v. DirecTV Enters., Inc., 141 F. Supp. 2d 616 (W.D.N.C. 2001).

## Rule 0.2. Scope.

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas

under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act, or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary, and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be

a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances to clients that communications will be protected against disclosure.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative. Research notes were prepared to compare counterparts in the original Rules of Professional Conduct (adopted 1985, as amended) and to provide selected references to other authorities. The notes have not been adopted, do not constitute part of the Revised Rules, and are not intended to affect the application or interpretation of the Rules and Comments.

**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Legal Periodicals.** — For article, 'Attorney-Client Relationships in Cyberspace: The Peril and the Promise,' see 1999 Duke L.J. 147.

## CASE NOTES

**Violation Not Civil Liability Per Se.** — Although a violation of a Rule of Professional Conduct does not constitute civil liability per se, the rules are some evidence of an attorney's duty to his client. Booher v. Frue, 98 N.C. App. 570, 394 S.E.2d 816, cert. denied, 327 N.C. 426, 395 S.E.2d 674 (1990).

**Creation of Attorney-Client Relationship.** — An express verbal agreement is not necessary to establish an attorney-client relationship, but such may be implied from the conduct of the parties, even in the absence of the payment of fees or the lack of a formal contract. Broyhill v. Aycock & Spence, 102 N.C. App. 382, 402 S.E.2d 167, aff'd, 330 N.C. 438, 410 S.E.2d 392 (1991).

**Question of Attorney-Client Relationship.** — A genuine issue of material fact was presented as to whether there was an attorney-client relationship where defendant introduced a deposition in which he denied that he had ever represented plaintiff in any transaction and stated that, at one point, plaintiff claimed to defendant that he represented himself, and where plaintiff, on the other hand, presented his affidavit stating that defendant did represent plaintiff in the transaction at issue. Broyhill v. Aycock & Spence, 102 N.C. App. 382, 402 S.E.2d 167, aff'd, 330 N.C. 438, 410 S.E.2d 392 (1991).

**An attorney may be held liable for negligence by a non-client third party** in the absence of privity of contract. Broyhill v. Aycock & Spence, 102 N.C. App. 382, 402 S.E.2d 167, aff'd, 330 N.C. 438, 410 S.E.2d 392 (1991).

Insurance attorney had authority to move

against default judgment although there was no contact with the individual defendant-insured. Johnson v. Amethyst Corp., 120 N.C. App. 529, 463 S.E.2d 397 (1995), cert. granted, — N.C. —, 467 S.E.2d 713 (1996).

**Quoted** in Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637, 535 S.E.2d 55 (2000).

### Rule 0.3. Terminology.

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confidential information" denotes information described in Rule 1.6(a) and (b).

(c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(d) "Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.

(e) "Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a partner in a partnership or limited liability partnership, a shareholder in a professional corporation, and a member of a professional limited liability company.

(h) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Substantial," when used in reference to degree or extent, denotes a material matter of clear and weighty importance.

(l) "Tribunal" denotes a court or a government body exercising adjudicative or quasi-adjudicative authority.

**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

## CLIENT-LAWYER RELATIONSHIP

### Rule 1.1. Competence.

(a) A lawyer shall not handle a legal matter which the lawyer knows or should know he or she is not competent to handle, without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter without preparation adequate under the circumstances.

COMMENT

**Legal Knowledge and Skill**

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that which is reasonably necessary under the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

**Thoroughness and Preparation**

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

**Maintaining Competence**

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

**Distinguishing Professional Negligence**

An error by a lawyer may constitute professional malpractice under the applicable standard of care and subject the lawyer to civil liability. However, conduct that constitutes a breach of the civil standard of care owed to a client giving rise to liability for professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client competently. A lawyer who makes a good faith effort to be prepared and to be thorough will not generally be subject to professional discipline, although he or she may be subject to a claim for malpractice. For example, a single error or omission made in good faith, absent aggravating circumstances, such as an error while performing a public records search, is not usually indicative of a violation of the duty to represent a client competently.

Repeated failure to perform legal services competently is a violation of this Rule. A pattern of incompetent behavior demonstrates that a lawyer cannot or will not acquire the knowledge and skills necessary for minimally competent practice. For example, a lawyer who repeatedly provides legal services that are inadequate or who repeatedly provides legal services that are unnecessary is not fulfilling his or her duty to be competent. This pattern of behavior does not have to be the result of a dishonest or sinister motive nor does it have to result in damages to a client giving rise to a civil claim for malpractice in order to cast doubt on the lawyer's ability to fulfill his or her professional responsibilities.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Legal Periodicals.** — For article, 'Attorney-Client Relationships in Cyberspace: The Peril and the Promise,' see 1999 Duke L.J. 147.

CASE NOTES

**Cited** in State v. Rogers, 352 N.C. 119, 529 S.E.2d 671 (2000).

ETHICS OPINION NOTES

**99 Formal Ethics Opinion 12** — Opinion rules that when a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

**RPC 198.** Opinion explores the ethical responsibilities of stand-by defense counsel who are instructed to take over the defense in a capital murder case without an opportunity to prepare.

**RPC 199.** Opinion addresses the ethical responsibilities of a lawyer appointed to represent a criminal defendant in a capital case who, in good faith, believes he lacks the experience and ability to represent the defendant competently.

**RPC 216.** A lawyer may use the services of a nonlawyer independent contractor to search a title provided the nonlawyer is properly supervised by the lawyer.

## Rule 1.2. Scope of representation.

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued.

(1) A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(2) A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, or by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(3) In the representation of a client, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

COMMENT

**Scope of Representation**

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means

sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Lawyers are encouraged to treat opposing counsel with courtesy and to cooperate with opposing counsel when it will not prevent or unduly hinder the pursuit of the objective of the representation. To this end, a lawyer may waive a right or fail to assert a position of a client without first obtaining the client's consent. For example, a lawyer may consent to an extension of time for the opposing party to file pleadings or discovery without obtaining the client's consent.

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

**Independence from Client's Views or Activities**

Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

**Services Limited in Objectives or Means**

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

**Criminal, Fraudulent and Prohibited Transactions**

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. There is also a distinction between giving a client legitimate advice about asset protection and assisting in the illegal or fraudulent conveyance of assets.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 1.2 is substantially similar to Model Rule 1.2. Rule 1.2 is also similar to Rule 7.1 of the superseded (1985) Rules of Professional Conduct, although Rule 1.2(b) has no counterpart in the superseded (1985) Rules.

CASE NOTES

**Law Firm as Interested Party.** — Law firm which had no contact with defendant/phony psychiatric resident accused of sexual misconduct with client and which had not been authorized by him to undertake his representation lacked the authority under subsection (a) of this rule to represent him on a limited basis, but could intervene under § 1A-1, Rule 24(a)(2) as an interested party to protect its interests. Dunkley v. Shoemate, 350 N.C. 573, 515 S.E.2d 442 (1999).

ETHICS OPINION NOTES

**99 Formal Ethics Opinion 12** — Opinion rules that when a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

**CPR 110.** An attorney may not advise client to seek a Dominican divorce knowing that the client will return immediately to North Carolina and continue residence.

**CPR 267.** An attorney may prepare a contractual agreement regarding property for a man and woman who contemplate living together without marriage so long as sexual intercourse is not part of the consideration supporting the agreement.

**CPR 285.** An attorney may advise his client in custody litigation of the legal consequences and practical effects of her decision to move into an apartment leased by her boyfriend.

**RPC 44.** A closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

**RPC 103.** A lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent.

**RPC 118.** An attorney should not waive the statute of limitations without the client's consent.

**RPC 129.** Prosecutors and defense attorneys may negotiate plea agreements in which appellate and post-conviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.

**RPC 145.** A lawyer may not include language in an employment agreement that divests the client of her exclusive authority to settle a civil case.

**RPC 172.** A lawyer retained by an insurer to defend its insured is not required to represent the insured on a compulsory counterclaim provided the lawyer apprises the insured of the counterclaim in sufficient time to retain separate counsel.

**RPC 208.** A lawyer should avoid offensive trial tactics and treat others with courtesy by attempting to ascertain the reason for the opposing party's failure to respond to a notice of hearing where there has been no prior lack of diligence or responsiveness on the part of opposing counsel.

**RPC 212.** A lawyer may contact an opposing lawyer who failed to file an answer on time to remind the other lawyer of the error and to give the other lawyer a last opportunity to file the pleading.

**RPC 220.** A lawyer should seek the court's permission to listen to a tape recording of a telephone conversation of his or her client made by a third party if listening to the tape recording would otherwise be a violation of the law.

**RPC 223.** When a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

**RPC 240.** A lawyer may decline to represent a client on a property damage claim while agreeing to represent the client on a personal injury claim arising out of a motor vehicle accident provided the limited representation will not adversely affect the client's representation on the personal injury claim and the client consents after full disclosure.

**RPC 252.** A lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.

**98 Formal Ethics Opinion 2.** Opinion rules that a lawyer may explain the effect of service of process to a client but may not advise a client to evade service of process.

## Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

## COMMENT

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

**Distinguishing Professional Negligence**

Conduct that may constitute professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client diligently. Generally speaking, a single instance of unaggravated negligence does not warrant discipline. For example, missing a statute of limitations may form the basis for a claim of professional malpractice. However, where the failure to file the complaint in a timely manner is due to inadvertence or a simple mistake such as mislaying the papers or miscalculating the date upon which the statute of limitations will run, absent some other aggravating factor, such an incident will not generally constitute a violation of this Rule.

Conduct sufficient to warrant the imposition of professional discipline is typically characterized by the element of intent or scienter manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of delay, procrastination, carelessness and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome case load or inadequate office procedures.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 1.3 is identical to Model Rule 1.3 and Rule 6(b)(3) of the superseded (1985) Rules of Professional Conduct.

## CASE NOTES

**Failure to Seek Appellate Review.** — Appointed counsel who failed to seek appellate review in four criminal cases held in violation of the disciplinary rule. In re Robinson, 39 N.C. App. 345, 250 S.E.2d 79 (1979).

**Failure to Perfect Appeal.** — The failure of the respondent attorney to perfect an appeal in a criminal case in which the sentence of death had been imposed was a violation of the disciplinary rule. In re Dale, 39 N.C. App. 370, 250 S.E.2d 82, appeal dismissed, 296 N.C. 584, 254 S.E.2d 30 (1979).

DISCIPLINARY HEARING NOTES

The attorney failed to perfect an appeal or seek an extension. He did not inform his client of his neglect or return his client's money. Public Censure. **77 DHC 13.**

The attorney failed to complete representation of a client in a property transaction by failing to have a final title insurance policy issued. Public Censure. **80 DHC 11.**

The attorney was employed to represent a client's corporation in a civil action. When an action was subsequently filed against his client, the attorney failed to file an answer, causing default judgment to be entered. Although the attorney managed to have the default judgment set aside, his client was barred from asserting its claim due to the attorney's neglect. The attorney was also employed by another client to defend a civil action and prosecute a counterclaim. The attorney failed to file an answer or a counterclaim. Default judgment was entered which the attorney succeeded in having set aside. The attorney admitted neglect in these matters due to alcoholism. Two Year Suspension. **80 DHC 13, 14.**

The attorney agreed to undertake the task of obtaining access to his client's landlocked real property. Although the attorney failed to initiate any legal action on behalf of his client, he delivered to the client a document purporting to be an order of the superior court dismissing a petition for a cartway across adjoining land. The document was purportedly signed by a judge, and bore the seal and signature of an assistant clerk, but the document was never actually signed by the named individuals nor was it filed. One Year Suspension. **81 DHC 1.**

The attorney neglected a client's traffic ticket case by failing to appear in court for the hearing on the ticket. The attorney also failed to respond to the client's request for information about the case and failed to respond to the State Bar's inquiries and a subpoena regarding the matter. Three Year Suspension. **88 DHC 4.**

The attorney neglected his client's case by failing to appear at any of ten depositions scheduled in the matter. The attorney also failed to inform his client of a settlement offer made by the opposing party in the client's case. Public Reprimand. **89 DHC 27.**

The attorney failed to prosecute civil actions on behalf of three different clients within the applicable statutes of limitation. Two Year Suspension, one year stayed, on condition the attorney pay two malpractice judgments obtained by the injured clients. **90 DHC 9.**

Attorney took $1500 from the proceeds of the sale of decedent's house as fee and costs for handling the estate. Attorney failed to deposit $1500 in trust account, failed to administer the estate, and failed to communicate with decedent's daughter who retained him. Five Year Suspension, stayed for one year upon certain conditions. **93 DHC 7.**

Among other things, attorney neglected several clients' matters, failed to communicate with clients, and neglected three appeals. Five Year Suspension, one year stayed upon certain conditions. **93 DHC 22 and 94 DHC 2.**

ETHICS OPINION NOTES

**99 Formal Ethics Opinion 5** — Opinion rules that whether the lawyer for a residential real estate closing must obtain the cancellation of record of a prior deed of trust depends upon the agreement of the parties.

**RPC 48.** Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

## Rule 1.4. Communication.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

COMMENT

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with

the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

**Withholding Information**

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 1.4 is identical to Model Rule 1.4 and Rule 6(b)(1) and (2) of the superseded (1985) Rules of Professional Conduct.

## CASE NOTES

**Failure to Notify Client of Dates.** — The attorney violated the Code of Professional Responsibility by failing to notify the client of court dates. North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648, appeal dismissed, 308 N.C. 677, 303 S.E.2d 546 (1983).

**A lawyer is ethically bound to advise his client of a plea bargain offer.** State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

## DISCIPLINARY HEARING NOTES

The attorney failed to perfect an appeal or seek an extension. He did not inform his client of his neglect or return his client's money. Public Censure. **77 DHC 13.**

The attorney neglected a client's traffic ticket case by failing to appear in court for the hearing on the ticket. The attorney also failed to respond to the client's request for information about the case and failed to respond to the State Bar's inquiries and a subpoena regarding the matter. Three Year Suspension. **88 DHC 4.**

The attorney neglected his client's case by failing to appear at any of ten depositions scheduled in the matter. The attorney also failed to inform his client of a settlement offer made by the opposing party in the client's case. Public Reprimand. **89 DHC 27.**

The attorney handled a real estate closing in which the sellers provided additional financing to the buyer. The attorney failed to provide the lender with sufficient information about the secondary financing to permit the lender to make an informed decision regarding whether to proceed with the closing. Public Reprimand. **90 DHC 17.**

Attorney took $1500 from the proceeds of the sale of decedent's house as fee and costs for handling the estate. Attorney failed to deposit

$1500 in trust account, failed to administer the estate, and failed to communicate with decedent's daughter who retained him. Five Year Suspension, stayed for one year upon certain conditions. **93 DHC 7.**

Among other things, attorney neglected several clients' matters, failed to communicate with clients, and neglected three appeals. Five Year Suspension, one year stayed upon certain conditions. **93 DHC 22 and 94 DHC 2.**

**ETHICS OPINION NOTES**

**99 Formal Ethics Opinion 12** — Opinion rules that when a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

**CPR 24.** Withdrawing partners and remaining partners should send clients a common announcement of the firm's dissolution so that the client may elect whom he wishes to handle his legal business.

**RPC 48.** Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution

**RPC 91.** An attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits but must inform insurer of insured's wishes.

**RPC 92.** An attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.

**RPC 99.** A lawyer may tack onto an existing title insurance policy if such is disclosed to the client prior to undertaking the representation.

**RPC 111.** An attorney retained by a liability insurer to defend its insured may not advise insured or insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim but must communicate the proposal to both clients.

**RPC 112.** An attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability but must communicate the proposed to both clients.

**RPC 129.** Prosecution and defense attorneys may negotiate plea agreements in which appellate and post-conviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct. Defense attorney must explain the consequences to the client.

**RPC 156.** An attorney who has been retained by an insurance company to represent an insured must inform and advise the insured to the degree necessary for the insured to make informed decisions about future representation when the insurance company pays its entire coverage and is released from further liability or obligation to participate in the defense under the provisions of N.C.G.S. 20-279.21(b)(4).

**RPC 172.** A lawyer retained by an insurer to defend its insured is not required to represent the insured on a compulsory counterclaim provided the lawyer apprises the insured of the counterclaim in sufficient time to retain separate counsel.

## Rule 1.5. Fees.

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence experienced in the area of law involved would be left with a definite and firm conviction that the fee is clearly excessive. Factors to be considered in determining whether a fee is clearly excessive include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) a contingent fee for representing a defendant in a criminal case, however, a lawyer may charge and collect a contingent fee for representation in a criminal or civil asset forfeiture proceeding if not otherwise prohibited by law; or

(2) a contingent fee in a civil case in which such a fee is prohibited by law.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

(1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bar's program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee; and

(2) participate in good faith in the fee dispute resolution process if the client submits a proper request.

**COMMENT**

**Basis or Rate of Fee**

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

**Terms of Payment**

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). This does not apply when the advance payment is a true retainer to reserve services rather than an advance to secure the payment of fees yet to be earned. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, provided this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

Once a fee agreement has been reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent the client's best interests regardless of whether the lawyer has struck an unfavorable bargain. An attorney may seek to renegotiate the fee agreement in light of changed circumstances or for other good cause, but the attorney may not abandon or threaten to abandon the client to cut the attorney's losses or to coerce an additional or higher fee. Any fee contract made or remade during the existence of the attorney-client relationship must be reasonable and freely and fairly made by the client having full knowledge of all material circumstances incident to the agreement. If a dispute later arises concerning the fee, the burden of proving reasonableness and fairness will be upon the lawyer. Fees, including contingent fees, should not be excessive as to percentage or amount.

An agreement may not be made whose terms

might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

**Division of Fee**

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

**Disputes over Fees and Expenses**

Participation in the fee dispute resolution program of the North Carolina State Bar is mandatory when a client requests resolution of a disputed fee. Before filing an action to collect a disputed fee, the client must be advised of the fee dispute resolution program. Notification must occur not only when there is a specific issue in dispute, but also when the client simply fails to pay. However, when the client expressly acknowledges liability for the specific amount of the bill and states that he or she cannot presently pay the bill, the fee is not disputed and notification of the client is not required. In making reasonable efforts to advise the client of the existence of the fee dispute resolution program, it is preferable to address a written communication to the client at the client's last known address. If the address of the client is unknown, the lawyer should use reasonable efforts to acquire the current address of the client. Notification is not required in those instances where the State Bar does not have jurisdiction over the fee dispute as set forth in 27 N.C.A.C. 1D, .0702.

If fee dispute resolution is requested by a client, the lawyer must participate in the resolution process in good faith. The State Bar program of fee dispute resolution uses mediation to resolve fee disputes as an alternative to litigation. The lawyer must cooperate with the person who is charged with investigating the dispute and with the person(s) appointed to mediate the dispute. Further information on the fee dispute resolution program can be found at 27 N.C.A.C. 1D, .0700, et. seq. The lawyer should fully set forth his or her position and support that position by appropriate documentation.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended effective May 4, 2000.

**Editor's note.** — Rule 1.5 corresponds to Model Rule 1.5. The Model Rule prohibits the collection of an unreasonable fee while Rule 1.5 prohibits a clearly excessive fee. Both Rule 1.5(d) and Model Rule 1.5(d) prohibit contingent fees in criminal cases. In civil cases, the Model Rule specifically prohibits such fees only in domestic matters while Rule 1.5(d) condemns contingent fee contracts whenever they are prohibited by law. Rule 1.5(e) and Model Rule 1.5(e) are identical. Rule 1.5(f) has no corresponding provision in the Model Rules.

Rule 1.5 is similar to Rule 2.6 of the superseded (1985) Rules of Professional Conduct, except that the superseded rule does not require that the basis or rate of the fee be communicated at the onset of representation.

**Legal Periodicals.** — For comment on contingent fees in domestic relations actions, see 62 N.C.L. Rev. 381 (1984).

For note, "The Contingent Fee Contract in Domestic Relations Cases," see 7 Campbell L. Rev. 427 (1985).

For article, "Nonrefundable Retainers Revisited," see 72 N.C.L. Rev. 1 (1993).

For comment, "Creating the Legal Monster: The Expansion and Effect of Legal Malpractice Liability in North Carolina", see 18 Campbell L. Rev. 121 (1996).

## CASE NOTES

**Entitlement to Reasonable Value of Services.** — An attorney discharged by his client is entitled to recover the reasonable value of the services he has already rendered. The reasonable value of such services is determined by the totality of the circumstances of each case. O'Brien v. Plumides, 79 N.C. App. 159, 339 S.E.2d 54, cert. improvidently allowed, 318 N.C. 409, 348 S.E.2d 805 (1986).

Plaintiff attorney brought an action to recover a contingent fee in a personal injury case where the client had discharged the attorney after he had begun working on the client's case. The Court held that the attorney was entitled to the reasonable value of the services rendered before his discharge by the client. Covington v. Rhodes, 38 N.C. App. 61, 247 S.E.2d 305 (1978), cert. denied, 296 N.C. 410, 251 S.E.2d 468 (1979).

**Determination of Reasonable Fees.** — Reasonable counsel fees may be determined in part by the amount of the verdict obtained in a condemnation proceeding in light of proposals made to the property owner prior to his employment of an attorney. The results obtained by an attorney are a legitimate consideration in determining the amount of his fee. Redevelopment Comm'n v. Hyder, 20 N.C. App. 241, 201 S.E.2d 236 (1973).

**The court refused to issue a temporary restraining order** where lawyer in fee dispute with client failed to follow the procedures of this section and there was a state court action pending. Parker v. United States, 948 F. Supp. 24 (E.D.N.C. 1996).

**Contingent Fee Contracts in Domestic Cases.** — A contingent fee contract for legal services in a divorce, alimony or child support proceeding is void. Thompson v. Thompson, 70 N.C. App. 147, 319 S.E.2d 315 (1984), rev'd on other grounds, 313 N.C. 313, 328 S.E.2d 288 (1985).

**Contingent Fee Contracts in Obtaining Equitable Distribution.** — A contingent fee contract for an attorney's services in obtaining an equitable distribution is valid if the contract does not compensate the attorney for securing a divorce for the same client. In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986).

**Contingent Contract Held Void.** — Fee contract which provided that the attorney would receive 20% of the total amount recovered in an action for alimony and child support was void as against public policy. Townsend v. Harris, 102 N.C. App. 131, 401 S.E.2d 132, appeal dismissed, 328 N.C. 734, 404 S.E.2d 877, cert. denied, 502 U.S. 919, 112 S. Ct. 329 116 L.Ed.2d 270 (1991).

**Quoted** in Robinson, Bradshaw & Hinson, P.A. v. Smith, 139 N.C. App. 1, 532 S.E.2d 815 (2000).

**Cited** in West ex rel. Farris v. Tilley, 120 N.C. App. 145, 461 S.E.2d 1 (1995).

## DISCIPLINARY HEARING NOTES

Attorney who was administrator of estate authorized payment of a fee from estate account to attorney's partners for legal services rendered to the estate without first obtaining a court order or approval of all of the heirs of the estate. Public Censure. **89 DHC 21.**

The attorney filed pleadings which were not well grounded in fact or law and falsely certified to the court that he had served the pleadings on opposing counsel. The client later discharged the attorney, who refused to withdraw, refused to return the client's file, and insisted on charging a contingent fee, rather than the reasonable value of his services. Two Year Suspension, with reinstatement conditioned on the attorney passing the bar examination. **90 DHC 22.**

Attorney assisted former in-house counsel to Firestone Tire & Rubber Company to engage in conflict of interest by accepting assistance of the former in-house counsel in preparing complex products liability action against Firestone. Attorney also improperly divided settlement proceeds with the former in-house counsel. Disbarred. **96 DHC 16.**

Attorney told client that attorney could get murder charge pending against client dismissed on payment of $10,000 fee, concealing fact that District Attorney had already decided to dismiss charge for lack of evidence. After client discovered deception and demanded return of fee, attorney threatened to reveal confidential communications of client. Attorney engaged in criminal and fraudulent conduct, implied ability to influence government official and collected excessive fee. Disbarred. **97 DHC 12.**

## ETHICS OPINION NOTES

**99 Formal Ethics Opinion 1** — Opinion rules that a lawyer may not accept a referral fee or solicitor's fee for referring a client to an investment advisor.

**CPR 11.** An attorney may accept an interest in land as a fee for title examination and representation in an action to clear title.

**CPR 37.** An attorney may charge interest on delinquent accounts.

**CPR 47.** A Legal Aid Society may receive fees awarded by the court.

**CPR 54.** An attorney may submit a fee schedule to a savings and loan association.

**CPR 79.** An attorney serving as a trustee in bankruptcy or as a fiduciary in state proceedings may receive legal fees for acting as his own attorney.

**CPR 129.** An attorney may accept payment of legal fees by credit card.

**CPR 217.** An attorney appointed to represent an indigent may not receive compensation from any source other than the court.

**CPR 250.** An attorney charging a flat fee may have his client sign a confession of judgment and file it with the clerk of court.

**CPR 312.** Contingent fees may be charged in equitable distribution cases.

**CPR 375.** An attorney may agree for his fee to be the interest earned on an amount escrowed at a loan closing to guarantee completion of repairs.

**RPC 2.** Contingent fees may be charged to collect liquidated amounts of past due child support.

**RPC 7.** An attorney may employ a collection agency to collect a past due fee so long as the fee agreement out of which the account arose was permitted by law and by the Rules of Professional Conduct; the lawyer, at the time underlying the fee agreement was made, did not believe, and had no reason to believe, that he was undertaking to represent a client who was unable to afford his services; the legal services giving rise to the fee out of which the account arose have been completed so that the lawyer has no further responsibilities as the client's attorney; there is no genuine dispute between the lawyer and the client about the existence, amount, or delinquent status of the indebtedness; and the lawyer does not believe, and has no reason to believe, that the agency which he employs will use any illegal means to collect the account.

**RPC 35.** An attorney may not charge an elevated contingent fee to collect "med-pay" or any other claim with respect to which liability is clear and there is no real dispute as to the amount due.

**RPC 50.** A lawyer may charge nonrefundable retainers that are reasonable in amount.

**RPC 52.** Opinion describes circumstances under which a lawyer who has been appointed to represent an indigent person may accept payment directly from the client.

**RPC 106.** Opinion discusses circumstances under which a refund of a prepaid fee is required.

**RPC 107.** A lawyer and her client may agree to employ alternative dispute resolution procedures to resolve disputes between themselves about legal fees.

**RPC 141.** An attorney's contingent fee in a case resolved by a structured settlement should, if paid in a lump sum, be calculated in terms of the settlement's present value.

**RPC 148.** A lawyer may not split a fee with another lawyer who does not practice in her law firm unless the division is based upon the work done by each lawyer or the client consents in writing, the fee is reasonable, and responsibility is joint.

**RPC 155.** An attorney may charge a contingent fee to collect delinquent child support.

**RPC 158 (Third Revision).** A sum of money paid to a lawyer in advance to secure payment of a fee which is yet to be earned and to which the lawyer is not entitled must be deposited in the lawyer's trust account.

**RPC 166.** A lawyer may seek to renegotiate a fee agreement with a client provided he does not abandon or threaten to abandon his client to cut his losses or to coerce a higher fee.

**RPC 174.** A legal fee for the collection of "med-pay" which is based upon the amount collected is unreasonable.

**RPC 190.** A lawyer who agreed to bill a client on the basis of hours expended may not bill the client on the same basis for reused work product.

**RPC 196.** A law firm may not charge a clearly excessive fee for legal representation even if the legal fee may be recovered from an opposing party.

**RPC 205.** A lawyer may receive a fee for referring a case to another lawyer provided that, by written agreement with the client, both lawyers assume responsibility for the representation and the total fee is reasonable.

**RPC 222.** Prior to the completion of legal services for a client, a lawyer may not obtain a confession of judgment from a client to secure a fee.

**RPC 231.** A lawyer may not collect a contingent fee on the reimbursement paid to the client's medical insurance provider in addition to a contingent fee on the gross recovery if the total fee received by the lawyer is clearly excessive.

**RPC 235.** A lawyer may charge a client an hourly rate, or a flat rate, for his or her services plus a contingent fee on the client's recovery provided the ultimate fee paid by the client is not clearly excessive and the client is given an honest assessment of the potential for recovery.

**97 Formal Ethics Opinion 4.** Opinion provides that flat fees may be collected at the beginning of a representation, treated as presently owed to the lawyer, and deposited into the lawyer's general operating account or paid to the lawyer but that if a collected fee is clearly

excessive under the circumstances of the representation a refund to the client of some or all of the fee is required.

**98 Formal Ethics Opinion 3.** Opinion rules that, subject to the requirements of law, a lawyer may add a finance charge to a client's account if the client fails to pay the balance when due as agreed with the client.

**98 Formal Ethics Opinion 9.** Opinion rules that a lawyer may charge a client the actual cost of retrieving a closed client file from storage, subject to certain conditions, provided the lawyer does not withhold the file to extract payment.

**98 Formal Ethics Opinion 14.** Opinion rules that a lawyer may participate in the solicitation of funds from third parties to pay the legal fees of a client provided there is disclosure to contributors and the funds are administered honestly.

## Rule 1.6. Confidentiality of information.

(a) "Confidential information" refers to information protected by the attorney-client privilege under applicable law, and other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. For the purposes of this rule, "client" refers to present and former clients.

(b) "Confidential information" also refers to information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

(c) Except when permitted under paragraph (d), a lawyer shall not knowingly:

(1) reveal confidential information of a client;

(2) use confidential information of a client to the disadvantage of the client; or

(3) use confidential information of a client for the advantage of the lawyer or a third person, unless the client consents after consultation.

(d) A lawyer may reveal:

(1) confidential information, the disclosure of which is impliedly authorized by the client as necessary to carry out the goals of the representation;

(2) confidential information with the consent of the client or clients affected, but only after consultation with them;

(3) confidential information when permitted under the Rules of Professional Conduct or required by law or court order;

(4) confidential information concerning the intention of a client to commit a crime, and the information necessary to prevent the crime;

(5) confidential information to the extent the lawyer reasonably believes necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;

(6) confidential information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client; and

(7) confidential information to the extent permitted by the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

## COMMENT

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional conduct or other law. See also 0.2 Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

**Lawyer's Assistance Program**

Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek help through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance, which may then result in harm to their professional careers and injury to their clients and the public. The rule therefore requires that any information received by a lawyer on behalf of an approved lawyers' or judges' assistance program be regarded as confidential and protected from disclosure to the same extent as information received by a lawyer in any conventional attorney-client relationship.

**Authorized Disclosure**

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

**Disclosure Adverse to Client**

The confidentiality rule is subject to limited exceptions. For instance, in becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's confidences even though the client's purpose is wrongful. However, to the extent a lawyer is required or permitted to disclose a client's purpose, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. A rule governing disclosure of threatened criminal activity thus involves balancing the interests of one group of potential victims against those of another.

Generally speaking, information relating to the representation must be kept confidential, as stated in paragraph (c). However, where the client is or has been engaged in criminal or fraudulent conduct or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may have to yield, depending on the lawyer's knowledge about and relationship to the conduct in question, and the seriousness of that conduct. Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence.

This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (d)(4), the lawyer has the professional discretion to reveal information in order to prevent such consequences. It is very difficult for a lawyer to "know" when such a purpose will actually be carried out, for the client may have a change of mind.

Third, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information relating to the representation. Paragraph (d)(5) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct is question.When practical, the lawyer should first seek to persuade the client to take suitable action making it unnecessary for the lawyer to make any disclosure. In any case, a disclosure adverse to the client's interests should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to make the disclosure permitted by paragraphs (d)(4) and (d)(5) does not violate this rule.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Paragraph (b)(5) does not apply where a lawyer is employed after a crime or fraud has been committed to represent the client in matters ensuing therefrom.

**Dispute Concerning a Lawyer's Conduct**

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (d)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil,criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (d)(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

**Disclosures Otherwise Required or Authorized**

If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (c) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to

disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

**Former Client**

The duty of confidentiality continues after the client lawyer relationship has terminated.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 1.6 is similar to Model Rule 1.6 and Rule 4 of the superseded (1985) Rules of Professional Conduct. However, there are some important differences between the revised rule and the Model Rule. The Model Rule permits disclosure of confidential information to prevent a crime likely to result in imminent death or substantial bodily harm, whereas Rule 1.6 permits disclosure of information necessary to prevent any crime. Rule 1.6 also permits disclosure to the extent the lawyer reasonably believes necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used. Neither the Model Rule nor Rule 4 of the superseded (1985) Rules of Professional Conduct contains this provision. Finally, the Model Rules do not expressly prohibit a lawyer from using confidential information for his or her own advantage or for the advantage of a third person as does Rule 1.6(c)(3). The Model Rules only condemn use of such information to the disadvantage of the client or former client. See Model Rules 1.8(b) and 1.9(c).

**Legal Periodicals.** — For article, "Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds," see 64 N.C.L. Rev. 443 (1986).

For article, "Incriminating Physical Evidence: The Defense Attorney's Dilemma and the Need for Rules," see 64 N.C.L. Rev. 897 (1986).

For comment, "Grand Jury Subpoenas to Defense Attorneys Representing Targets: An Ethical/Legal Tug of War," see 9 Campbell L. Rev. 347 (1987).

For a comment on ethical and legislative considerations of multidisciplinary practices, see 36 Wake Forest L. Rev. 193 (2001).

## CASE NOTES

**Statement to Insurance Adjuster.** — The attorney-client privilege does not cover a statement made to an insurance adjuster, not in the presence or at the request of counsel, and even before an attorney-client relationship exists. Phillips v. Dallas Carriers Corp., 133 F.R.D. 475 (M.D.N.C. 1990).

**Law firm was disqualified** from representing plaintiff computer company in copyright case against another company which hired three of plaintiff's engineers where the law firm had previously represented one of the engineers. Robert Woodhead, Inc. v. Datawatch Corp., 934 F. Supp. 181 (E.D.N.C. 1995).

**Applied** in SuperGuide Corp. v. DirecTV Enters., Inc., 141 F. Supp. 2d 616 (W.D.N.C. 2001).

**Quoted** in Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

**Stated** in Furbush v. Otsego Mach. Shop, Inc., 914 F. Supp. 1275 (E.D.N.C. 1996).

## DISCIPLINARY HEARING NOTES

The attorney revealed confidential information of a client by disclosing to a creditor of the client that the attorney's law firm was holding funds belonging to the client. Public censure. **89 DHC 4.**

## ETHICS OPINION NOTES

**99 Formal Ethics Opinion 11** — Opinion rules that an insurance defense lawyer may not submit billing information to an independent audit company at the insurance carrier's request unless the insured's consent to the disclosure, obtained by the insurance carrier, was informed.

**CPR 284.** An attorney who in the course of representing one spouse obtains confidential information bearing upon the criminal conduct

of the other spouse must not disclose such information.

**CPR 299.** An attorney, with the consent of the client, may utilize the services of a letter writing service in collection matters.

**CPR 300.** An attorney, after being discharged, cannot discuss the client's case with the client's new attorney without the client's consent.

**CPR 313.** An attorney may not voluntarily disclose confidential information concerning a client's criminal record.

**CPR 362.** An attorney may not disclose the perjury of his partner's client.

**CPR 374.** Information concerning apparent tax fraud obtained by an attorney employed by a fire insurer to depose insureds concerning claims is confidential and may not be disclosed without the insurer's consent.

**RPC 12.** An attorney may reveal confidential information to correct a mistake if disclosure is impliedly authorized by the client.

**RPC 21.** An attorney may send a demand letter to an adverse party without identifying the client by name.

**RPC 23.** An attorney does not need the consent of the client to file Form 1099 including confidential information with the IRS incident to a real estate transaction since such is required by law.

**RPC 33.** An attorney may not disclose confidential information concerning the client's identity and criminal record without the client's consent nor may an attorney misrepresent such information to the court. In response to a direct question from the court concerning such matters, an attorney may not misrepresent the defendant's criminal record but is under no ethical obligation to respond. If the client misrepresents his identity or record under oath, the attorney must ask the client to correct the misstatements. If the client refuses, the attorney must seek to withdraw.

**RPC 62.** An attorney may disclose client confidences necessary to protect her reputation where a claim alleging malpractice is brought by a former client against the insurance company which employed the attorney to represent the former client.

**RPC 77.** A lawyer may disclose confidential information to his or her liability insurer to defend against a claim but not for the sole purpose of assuring coverage.

**RPC 113.** A lawyer may disclose information concerning advice given to a client at a closing in regard to the significance of the client's lien affidavit.

**RPC 117.** An attorney may not reveal confidential information concerning a client's contagious disease without the client's consent.

**RPC 120.** An attorney may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement.

**RPC 133.** A law firm may make its waste paper available for recycling.

**RPC 157.** A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent but in so doing the lawyer may disclose only her belief that there exists a good faith basis for the relief requested and may not disclose confidential information which led her to conclude the client is incompetent.

**RPC 175.** A lawyer may ethically exercise his or her discretion to decide whether to reveal confidential information concerning child abuse or neglect pursuant to a statutory requirement.

**RPC 179.** A lawyer must comply with the client's request that the information regarding a settlement be kept confidential if the client enters into a settlement agreement conditioned upon maintaining the confidentiality of the terms of the settlement.

**RPC 195.** The attorney who represented an estate and the personal representative in her official capacity may divulge confidential information relating to the representation of the estate and the personal representative to the substitute personal representative of the estate.

**RPC 206.** A lawyer may disclose the confidential information of a deceased client to the personal representative of the client's estate but not to the heirs of the estate.

**RPC 209.** Opinion provides guidelines for the disposal of closed client files.

**RPC 215.** When using a cellular or cordless telephone or any other unsecure method of communication, a lawyer must take steps to minimize the risk that confidential information may be disclosed.

**RPC 230.** A lawyer representing a client on a good faith claim for social security disability benefits may withhold evidence of an adverse medical report in a hearing before an administrative law judge if not required by law or court order to produce such evidence. (But see Rule 3.3(d).)

**RPC 244.** Although a lawyer asks a prospective client to sign a form stating that no client-lawyer relationship will be created by reason of a free consultation with the lawyer, the lawyer may not subsequently disclaim the creation of a client-lawyer relationship and represent the opposing party.

**RPC 246.** Under certain circumstances, a lawyer may not represent a party whose interests are opposed to the interests of a prospective client if confidential information of the prospective client must be used in the representation.

**RPC 252.** A lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confiden-

tial, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.

**98 Formal Ethics Opinion 5.** Opinion rules that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court, and further provided, that on application for a limited driving privilege, there is no misrepresentation to the court about the client's prior driving record.

**98 Formal Ethics Opinion 10.** Opinion rules that an insurance defense lawyer may not disclose confidential information about an insured's representation in bills submitted to an independent audit company at the insurance carrier's request unless the insured consents.

**98 Formal Ethics Opinion 18.** Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

**98 Formal Ethics Opinion 20.** Opinion rules that, subject to a statute prohibiting the withholding of such information, a lawyer's duty to disclose confidential client information to a bankruptcy court ends when the case is closed although the debtor's duty to report new property continues for 180 days.

## Rule 1.7. Conflict of interest: General rule.

(a) A lawyer shall not represent a client if the representation of that client will be or is likely to be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the interest of the other client; and

(2) each client consents after consultation which shall include explanation of the implications of the common representation and the advantages and risks involved.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation which shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) A lawyer shall have a continuing obligation to evaluate all situations involving potentially conflicting interests, and shall withdraw from the representation of any party the lawyer cannot adequately represent without using the confidential information of another client or a former client except as Rule 1.6 allows.

### COMMENT

**Loyalty to a Client**

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and 0.2 Scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not re-

quire consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

**Consultation and Consent**

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

**Lawyer's Interests**

The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

**Conflicts in Litigation**

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

**Interest of Person Paying for a Lawyer's Service**

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in

which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

**Other Conflict Situations**

Conflicts of interest in contexts other than litigation sometimes maybe difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the clients are the estate as an entity and the personal representative in his or her official capacity. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

**Conflict Charged by an Opposing Party**

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants.Where the conflict clearly calls into question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 1.7 is similar to Model Rule 1.7 and Rule 5.1(a), (b), and (c) of the superseded (1985) Rules of Professional Conduct. In addition to prohibiting the representation of interests that are directly adverse to those of another client as does the Model Rule, Rule 1.7 also condemns a representation that "is likely to be" directly adverse. Rule 1.7(c) expands upon Model Rule 1.9(c) to state clearly the lawyer's continuing obligation to a former client to avoid the use of confidential information.

## CASE NOTES

**Conflict of Interest Not Shown.** — A law firm which represented an insurance company in securing information to bring the insurance company back into compliance with North Carolina law and in rehabilitation proceedings was not prohibited from representing minority shareholders of the company in a derivative action against the company's directors. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), appeal dismissed, 296 N.C. 740, 254 S.E.2d 181 (1979).

**Conflict of Interest Shown.** — The attorneys for the plaintiffs could not represent the receivers of a group of corporations who were appointed to preserve assets of all the corporations when the plaintiffs were seeking to have assets transferred from some corporations in the group to other corporations. Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230, aff'd in part, rev'd in part, 309 N.C. 695, 309 S.E.2d 193 (1983).

In a suit against the United States to recover losses resulting from an airplane crash, representation by the Department of Justice of both the United States and individual air traffic controllers would create a conflict of interest and would prevent adequate representation of the individual controllers. Aetna Cas. & Sur. Co. v. United States, 438 F. Supp. 886 (W.D.N.C. 1977), rev'd, 570 F.2d 1187 (4th Cir.),

cert. denied, 439 U.S. 821, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978).

**Underinsured Motorist Carrier Could Appear as Unnamed Defendant Without Conflict of Interest.** — On a motion by an underinsured motorist carrier to be allowed to appear in the liability phase of an action against its insured as an unnamed defendant, the court rejected the contention that an impermissible conflict of interest would arise if the carrier's attorney were to represent to the jury that he represented the interests of the tortfeasor. Church v. Allstate Ins. Co., — N.C. App. —, 547 S.E.2d 458, 2001 N.C. App. LEXIS 315 (2001).

**Consent Procured Without Advice of Disinterested Counsel.** — The consent of an individual litigant to representation by counsel with a potential conflict of interest cannot be presumed to be fully informed when it is procured without the advice of a lawyer who has no conflict of interest. Aetna Cas. & Sur. Co. v. United States, 438 F. Supp. 886 (W.D.N.C. 1977), rev'd, 570 F.2d 1187 (4th Cir.), cert. denied, 439 U.S. 821, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978).

**Potential Conflict Not Sufficient to Interfere with Right of Counsel.** — A potential conflict of interest, as distinguished from an actual conflict of interest, is not sufficient to warrant the State's interference with the constitutionally guaranteed right of a criminal defendant to retain and be represented by counsel of his choice. State v. Yelton, 87 N.C. App. 554, 361 S.E.2d 753 (1987).

Although defendant claimed that the joint representation of two accomplices created a conflict of interest between their attorney and the public's interest in the fair administration of justice due to what he labeled as the artificial conformity of the testimony of the accomplices, defendant's interests were not sufficient to overcome the accomplices' rights to representation by counsel of their choice where defendant failed to show that the potential conflict of interest prejudiced his rights. State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989).

**Hearing on Conflict of Interest.** — Once a motion by the State or the defense, or the court on its own motion, raises a possible conflict of interest in a dual representation situation, the trial court must conduct a hearing. State v. Yelton, 87 N.C. App. 554, 361 S.E.2d 753 (1987).

**Applied** in Chappell v. Roth, 141 N.C. App. 502, 539 S.E.2d 666 (2000).

**Quoted** in Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992); State v. Reid, 334 N.C. 551, 434 S.E.2d 193 (1993).

**Stated** in Furbush v. Otsego Mach. Shop, Inc., 914 F. Supp. 1275 (E.D.N.C. 1996).

**Cited** in Hieb v. Lowery, 121 N.C. App. 33, 464 S.E.2d 308 (1995).

## DISCIPLINARY HEARING NOTES

The attorney accepted employment to represent individuals against a company in which he owned an interest without disclosing his interest to his client. Private Reprimand. **79 DHC 26.**

The attorney provided legal services to two clients regarding the purchase and development of real property owned by the attorney and the clients, despite the fact that the attorney's judgment was likely to be impaired by his own personal, financial and business interests respecting the property. One Year Suspension. **89 DHC 14.**

Among other things, the attorney hired his girlfriend to do work for a client and permitted his girlfriend to charge the client excessively. One Year Suspension, stayed on certain conditions. **92 DHC 5.**

The attorney represented the seller in commercial real estate transaction while he was also general partner of the buyer. The attorney also improperly directed a $165,000 credit to the buyer and a corresponding debit to the seller at the closing of the transaction without the seller's consent and paid himself $150,000 in attorneys' fees from funds held in escrow, in violation of the escrow agreement. Three-Year Suspension. **92 DHC 16.**

Attorney, who obtained a judgment on a debt, purchased property at the execution sale on the judgment through a corporation controlled by attorney without the informed consent of the attorney's client. Six Month Suspension, stayed on certain conditions. **93 DHC 15.**

Attorney made unwanted sexual advances to several female clients and thereby engaged in conflicts of interest and conduct prejudicial to the administration of justice. Disbarred. **95 DHC 13.**

## ETHICS OPINION NOTES

### I. GENERAL CONFLICTS.

**99 Formal Ethics Opinion 14** — Opinion rules that when an insured fails to cooperate with the defense, as required by the insurance contract, the insurance defense lawyer may

follow the instructions of the insurance carrier unless the insured's lack of cooperation interferes with the defense or presenting an effective defense is harmful to the interests of the insured.

**2000 Formal Ethics Opinion 2** — Opinion rules a lawyer who represented a husband and wife on a joint Chapter 13 bankruptcy petition may not continue to represent only one of the spouses after the other spouse disappears or becomes unresponsive.

**CPR 9.** An attorney may not give a title opinion to an individual and then represent another person in a boundary dispute against that individual.

**CPR 15.** A lawyer/guardian may not give a title opinion to the purchaser of his ward's property.

**CPR 46.** Once it is determined that attorneys from same firm have undertaken to represent adverse parties, one must withdraw and the other may continue only with the consent of all involved.

**CPR 55.** An attorney appointed as examiner of title is not prohibited from representing petitioners or respondents in actions unrelated to the Torrens proceeding.

**CPR 147.** An attorney cannot defend an action brought by a former client when confidential information obtained during the prior representation would be relevant to the defense of the current action.

**CPR 171.** A part-time county attorney may not serve as guardian ad litem if official duties include advising Department of Social Services.

**CPR 179.** An attorney may not represent a municipality and a distributee of an estate suing the municipality.

**CPR 216.** An attorney may not serve as receiver and as attorney for a judgment creditor.

**CPR 249.** An attorney who owns an insurance agency may not represent claimants against persons insured by companies his agency represents.

**CPR 255.** An attorney who is employed by an insurer to defend its insureds on a regular basis represents the insurer and the insureds and, if a conflict develops between the insurer and an insured, the attorney has a duty to advise the insured to seek independent counsel. The attorney may represent a plaintiff against the insurer, but he or she should notify the insurer and have the informed consent of plaintiff.

**CPR 281.** An attorney may sue another attorney for malpractice on behalf of a client even though the attorney for the plaintiff owns stock in the defendant's liability insurance company.

**CPR 286.** An attorney may participate in a mediation service with marriage counselors but should not later represent either party in domestic litigation.

**CPR 317.** An attorney appointed to represent a state official or agency may not represent other clients in a suit against the same official or agency, another official or agency under the jurisdiction of that same official or agency or another official or agency with authority over the official or agency. Nor should an attorney represent one official or agency while representing other clients against another official or agency if both of the officials or agencies are under the jurisdiction of the same official or agency.

**CPR 323.** An attorney may not act as a friend and attempt to mediate a domestic problem and later represent the wife in domestic litigation.

**CPR 344.** An attorney for a school board is not automatically disqualified from representing criminal defendants despite the school board's interest in fines and forfeitures.

**RPC 18.** An attorney may not simultaneously represent shareholders in a derivative action and the corporation's landlord on a claim for back rent.

**RPC 22.** An attorney may not represent the administratrix officially and personally where her interests in the two roles are in conflict without the consent of the heirs.

**RPC 24.** An attorney may not purchase his client's property at an execution sale on his own account.

**RPC 28.** An attorney may represent the estate of pilot and the estate of passenger in a wrongful death case against the airplane manufacturer if attorney is convinced that there was no pilot negligence and if the representatives of both estates consent.

**RPC 53.** A lawyer may sue a municipality his partner serves as a member of its governing body. (But see RPC 160.)

**RPC 54.** A lawyer who represents a criminal defendant from whose possession property was seized may not without consent seek the property as a fine or forfeiture on behalf of the local school board.

**RPC 55.** A member of the Attorney General's staff may prosecute appeals of adverse Medicaid decisions against the Department of Human Resources, which is represented by another member of the Attorney General's staff.

**RPC 56.** A lawyer may represent a plaintiff against an insurance company's insured while defending other persons insured by the company in unrelated matters.

**RPC 59.** A lawyer may represent an insurer and its insured as co-plaintiffs in a declaratory judgment action.

**RPC 60.** Subject to general conflict of interest rules, a lawyer may represent police officers who are referred by a professional organization of which they are members on a case-by-case basis and also represent criminal defendants.

**RPC 65.** The public defender's office should be considered as a single law firm and staff attorneys may not represent codefendants with conflicting interests unless both consent and can be adequately represented.

**RPC 72.** An attorney hired by the Bureau of Indian Affairs to prosecute criminal charges before a tribal court may represent defendants in state or federal court despite the fact that the defendants have been arrested by members of the tribal police force.

**RPC 73.** Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants where a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

**RPC 74.** A firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked if the paralegal is screened from participation in the case.

**RPC 91.** An attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits.

**RPC 92.** An attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.

**RPC 95.** An assistant district attorney may prosecute cases while serving on the school board.

**RPC 100.** An attorney serving on a hospital ethics committee is not automatically disqualified from representing interests adverse to the hospital or its staff physicians.

**RPC 102.** A lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.

**RPC 103.** A lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent.

**RPC 105.** A public defender may represent criminal defendants while serving on the school board.

**RPC 109.** An attorney may not represent parents as guardians ad litem for their injured child and as individuals concerning their related tort claims after having received a joint settlement offer which is insufficient to fully satisfy all claims.

**RPC 110.** An attorney employed by an insurer to defend in the name of the defendant pursuant to underinsured motorist coverage may not communicate with that individual without the consent of another attorney employed to represent that individual by her liability insurer, and the attorney employed by the liability insurer may not take a position on behalf of the insurer which is adverse to the insured.

**RPC 111.** An attorney retained by a liability insurer to defend its insured may not advise insured or insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim.

**RPC 112.** An attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability.

**RPC 123.** An attorney may represent parents and an independent guardian ad litem for their child concerning related tort claims under certain circumstances.

**RPC 131.** An attorney employed to represent a county in appellate matters may also sue the county's department of social services if the county and the plaintiffs consent.

**RPC 140.** There is no disqualifying conflict of interest where an attorney is retained by an insurer to represent an insured during the pendency of a declaratory judgment action relating to coverage in which the attorney is a nonparticipant.

**RPC 151.** Where an insurance company and its policyholder are both parties to an action, a lawyer who is a full-time employee of the insurance company may not represent both the insurance company and the policyholder because of the "diluted responsibility" to the policyholder created by the employment relationship between the lawyer and the insurance company.

**RPC 154.** An attorney may not represent the insured, her liability insurer and the same insurer relative to underinsured motorist coverage carried by the plaintiff.

**RPC 160 (Second Revision).** A lawyer whose associate is a member of a hospital's

board of trustees may not sue the hospital on behalf of a client.

**RPC 168.** A lawyer may ask her client for a waiver of objection to a possible future representation presenting a conflict of interest if certain conditions are met.

**RPC 170.** A lawyer may jointly represent a personal injury victim and the medical insurance carrier that holds a subrogation agreement with the victim provided the victim consents and the lawyer withdraws upon the development of an actual conflict of interest.

**RPC 177.** A lawyer may represent the insured, his liability insurer, and the same insurer relative to underinsured motorist coverage carried by the plaintiff if the insurer waives its subrogation rights against the insured and the plaintiff executes a covenant not to enforce judgment.

**RPC 207 (Second Revision).** A lawyer may represent an insured in a bad faith action against his insurer for failure to pay a liability claim brought by a claimant who is represented by the same lawyer.

**RPC 228.** A lawyer for a personal injury victim may not execute an agreement to indemnify the tortfeasor's liability insurance carrier against the unpaid liens of medical providers.

**RPC 229.** A lawyer who jointly represented a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will affect adversely the interests of the other spouse or each spouse agreed not to change the estate plan without informing the other spouse.

**RPC 251.** A lawyer may represent multiple claimants in a personal injury case, even though the available insurance proceeds are insufficient to compensate all claimants fully, provided each claimant, or his or her legal representative, gives informed consent to the representation and the lawyer does not advocate against the interest of any client in the division of the insurance proceeds.

### II. REAL PROPERTY CONFLICTS.

**99 Formal Ethics Opinion 1** Opinion rules that a lawyer may not accept a referral fee or solicitor's fee for referring a client to an investment advisor.

**99 Formal Ethics Opinion 8** — Opinion rules that a lawyer may represent all parties in a residential real estate closing and subsequently represent only one party in an escrow dispute provided the lawyer insures that the conditions for waiver of an objection to a possible future conflict of interest set forth in RPC 168 are satisfied.

**CPR 100. (See also RPC 210 and 97 Formal Ethics Opinion 8.)** In the usual residential loan transaction:

(a) A lawyer may ethically represent both the borrower and the lender.

(b) If the lawyer intends not to represent both the borrower and the lender, he must give timely notice to the one he intends not to represent of this fact, so that the one not represented may secure separate and timely representation.

(c) If the lawyer does not give such notice, he shall be deemed to represent both the borrower and the lender.

(d) If the lawyer represents only the borrower, he may nevertheless ethically provide the title and lien priority assurances required by the lender as a condition of the loan.

(e) The lawyer shall clearly state to his client(s), whether the borrower or the lender, or both, whom he represents and the general scope of his representation.

(f) If the lawyer does not represent both principals, and the one he does not represent retains another lawyer to represent him, both lawyers should fully cooperate with each other in serving the interests of their respective clients and in closing the loan promptly.

(g) If the lawyer represents both the borrower and the lender, he may be ethically barred from representing either one (without the consent of the other) if a controversy arises between the borrower and the lender before, during or after the closing.

It is not unethical for a lawyer representing the borrower and the lender (or either) in the usual residential loan transaction to prepare a deed from the seller to the buyer, collect the purchase price for the seller, or draft other documents (such as a second deed of trust and not secured thereby) as may be necessary to complete the transaction between the seller and the buyer in accordance with their agreement, and charge the seller therefor.

It is not unethical for the lawyer representing the borrower, the lender and the seller (or one or more of them) to provide the title insurer with an opinion on title sufficient to issue a mortgagee's title insurance policy, the premium for which is normally paid by the borrower.

**CPR 107.** An attorney/trustee in a foreclosure proceeding which is not contested by the owner-borrower may represent the lender in resisting a tenant's suit to restrain foreclosure. (But see RPC 82.)

**CPR 137.** An attorney/trustee in a foreclosure proceeding may not represent the lender when the foreclosure is contested by the borrower. (But see RPC 82.)

**CPR 166.** An attorney/trustee cannot ethically represent either the lender or the borrower in a role of advocacy at any state of the foreclosure proceeding. In the absence of controversy the trustee may present, on behalf of

the lender, the evidence necessary to support the clerk's findings essential to a foreclosure order. Even if the proceeding is adversary, he may ethically perform for himself such legal services as are necessary to the performance of his fiduciary duties. (See also RPC 82.)

**CPR 201.** When an attorney/trustee learns that a foreclosure will be contested, he may resign as trustee and represent the lender. (See also RPC 82.)

**CPR 220.** An attorney's secretary may not be trustee if the attorney wishes to represent the lender at a contested foreclosure.

**CPR 264.** After initiating foreclosure, an attorney/trustee may not represent the lender in defense of the borrower's suit for injunctive relief. (See also RPC 82.)

**CPR 275.** An attorney who is part owner of a mortgage brokerage firm may certify title to real property with respect to which the mortgage broker has arranged financing.

**CPR 297.** An attorney/trustee cannot represent a husband-debtor in a partition action against his wife-debtor, but he may resign as trustee and then represent the husband. (See also RPC 82.)

**CPR 305.** An attorney/trustee cannot represent the lender in bankruptcy court in seeking relief from an automatic stay in order to commence foreclosure. (See also RPC 82.)

**RPC 3.** An attorney/trustee is not prohibited from continuing to serve as trustee in a contested foreclosure if he represented the seller at the closing. (See also RPC 82.)

**RPC 40.** For the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and the lender may prepare the closing documents. (See also RPC 41.)

**RPC 44.** A closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

**RPC 46.** An attorney acting as trustee in a foreclosure proceeding may not, while serving in that capacity, file a motion to have an automatic stay lifted in the debtor's bankruptcy proceeding. (See also RPC 82.)

**RPC 49.** Attorneys who own stock in a real estate company may refer clients to the company if such would be in the clients' best interest and there is full disclosure, and such attorneys may not close transactions brokered by the real estate firm.

**RPC 64.** A lawyer who served as a trustee may after foreclosure sue the former debtor on behalf of the purchaser. (See also RPC 82.)

**RPC 78.** A closing attorney cannot make conditional delivery of trustee account checks to real estate agent before depositing loan proceeds against which checks are to be drawn.

**RPC 82.** This opinion comprehensively revises the ethical responsibilities of the attorney-trustee.

**RPC 83.** The significance of an attorney's personal interest in property determines whether he or she has a conflict of interest sufficient to disqualify him or her from rendering a title opinion concerning that property.

**RPC 86.** Opinion discusses disbursement against uncollected funds, accounting for earnest money paid outside closing and representation of the seller. (See also RPC 191.)

**RPC 88.** A lawyer may close a real estate transaction brokered by a real estate firm which employs the attorney's secretary as a part-time real estate broker.

**RPC 90.** A lawyer who as a trustee initiated a foreclosure proceeding may resign as trustee after the foreclosure is contested and act as lender's counsel. (See also RPC 82.)

**RPC 121.** A borrower's lawyer may render a legal opinion to the lender.

**RPC 185.** A lawyer who owns any stock in a title insurance agency may not give title opinions to the title insurance company for which the title insurance agency issues policies.

**RPC 188.** A lawyer may close a real estate transaction brokered by the lawyer's spouse with the consent of the parties to the transaction.

**RPC 201.** Opinion explores the circumstances under which a lawyer who is also a real estate salesperson may close real estate transactions brokered by the real estate company with which he is affiliated.

**RPC 210.** Opinion examines the circumstances in which it is acceptable for a lawyer to represent the buyer, seller, and the lender in the closing of a residential real estate transaction.

**RPC 248.** A lawyer who owns stock in a mortgage brokerage corporation may not act as the settlement agent for a loan brokered by the corporation nor may the other lawyers in the firm certify title or act as settlement agent for the closing.

**97 Formal Ethics Opinion 8.** Opinion examines the circumstances in which it is acceptable for the lawyer who regularly represents a real estate developer to represent the buyer and the developer in the closing of a residential real estate transaction.

**98 Formal Ethics Opinion 10.** Opinion rules that an insurance defense lawyer may not disclose confidential information about an insured's representation in bills submitted to an independent audit company at the insurance carrier's request unless the insured consents.

**98 Formal Ethics Opinion 11.** Opinion rules that the fiduciary relationship that arises when a lawyer serves as an escrow agent demands that the lawyer be impartial to both the obligor and the obligee and, therefore, the lawyer may not act as advocate for either party against the other. Once the fiduciary duties of the escrow agent terminate, the lawyer may

take a position adverse to the obligor or the obligee provided the lawyer is not otherwise disqualified.

**Rule 1.8. Conflict of interest: Prohibited transactions and other specific applications.**

(a) A lawyer shall not enter into a business transaction with a client under any circumstances unless it is fair to the client. A lawyer shall not enter into a business transaction with a client in which the lawyer and the client have differing interests and wherein the client expects the lawyer to exercise his or her independent professional judgment for the protection of the client, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing.

(b) During or subsequent to legal representation of a client, a lawyer shall not enter into a business transaction with a client for which a fee or commission will be charged in lieu of, or in addition to, a legal fee, if the business transaction is related to the subject matter of the legal representation, any financial proceeds from the representation, or any information, confidential or otherwise, acquired by the lawyer during the course of the representation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer publication, literary, or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation except that a lawyer may advance court costs and expenses of litigation including expenses of investigation and medical examinations and cost of obtaining and presenting evidence, provided the client remains ultimately liable for such costs and expenses.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of the client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case, an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship. This provision shall not be construed to disqualify other lawyers in the affected lawyer's firm.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien to secure the lawyer's fee or expenses, provided the requirements of Rule 1.8(a) are satisfied; and

(2) contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

**COMMENT**

**Transactions Between Client and Lawyer**

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions, a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utility services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

Because of the actual and potential conflicts of interests, paragraph (b) prohibits the sale of business services to a client or former client if the proposed transaction relates to the subject matter or the proceeds of representation. For example, a lawyer who is also a securities broker or insurance agent should not endeavor to sell securities or insurance to a client when the lawyer knows by virtue of the representation that such client has received funds suitable for investment.

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

**Literary Rights**

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

**Person Paying for a Lawyer's Services**

A lawyer may be paid from a source other than the client. Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. For instance, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees if the clients consent after consultation and the arrangement ensures the lawyer's professional independence. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

**Limiting Liability**

Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

**Family Relationships Between Lawyers**

Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

**Acquisition of Interest in Litigation**

Paragraph (j) states the general rule that

lawyers are prohibited from acquiring a proprietary interest in litigation. The rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e). The rule also permits a lawyer to acquire a lien to secure the lawyer's fee or expenses provided the requirements of Rule 1.7(b) are satisfied. Specifically, the lawyer must reasonably believe that the representation will not be adversely affected after taking into account the possibility that the acquisition of a proprietary interest in the client's cause of action or any res involved therein may cloud the lawyer's judgment and impair the lawyer's ability to function as an advocate. The lawyer must also disclose the risks involved prior to obtaining the client's consent. Prior to initiating a foreclosure on property subject to a lien securing a legal fee, the lawyer must notify the client of the right to require the lawyer to participate in the mandatory fee dispute arbitration program. See Rule 1.6(f).

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 1.8 is similar to Model Rule 1.8 except that Rule 1.8(b) has no counterpart in the Model Rules. Rule 1.8(a) is similar to Rule 5.4(a) of the superseded (1985) Rules of Professional Conduct. The provisions of Rule 1.8(b) through (j) correspond to Rules 5.4(c), 5.5, 5.4(b), 5.3(b), 5.6, 5.7, 5.8, 5.9 and 5.3(a) of the superseded (1985) Rules of Professional Conduct, respectively.

**Legal Periodicals.** — For article, "Malpractice and Ethical Considerations," see 19 N.C. Cent. L.J. 165 (1991).

## CASE NOTES

**A fee arrangement whereby a law firm would receive a one-third interest in the shares it was representing** in a derivative action by minority shareholders of a corporation against the directors of the corporation did not constitute an acquisition by the law firm of an improper interest in the subject matter of the litigation. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), appeal dismissed, 296 N.C. 740, 254 S.E.2d 181 (1979).

**Release Exonerating Attorney.** — The attorney violated the Code of Professional Responsibility by having his client sign a release in an attempt to exonerate himself from malpractice. North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648, appeal dismissed, 308 N.C. 677, 303 S.E.2d 546 (1983).

**Obligation to Pay Expert.** — When a lawyer hiring an expert to help on a case says or does nothing to indicate that the obligation to pay is not his, the expert can reasonably assume that the lawyer is the contracting party, rather than the client. Gualtieri v. Burleson, 84 N.C. App. 650, 353 S.E.2d 652, disc. rev. denied, 320 N.C. 168, 358 S.E.2d 50 (1987).

**Lending Money to Clients.** — The State Bar's hearing committee's finding adequately supported its conclusion that the defendant violated Rules of Professional Responsibility 5.3(B) and 1.2(A) where the undisputed facts were that: (1) the defendant kept $ 20,000.00 in his trust account for several years which came from his brother's company, and (2) he loaned this money to three clients to pay for one client's surgery; another client's rent and payments on a car note; and a third client's surgical, medical and travel expenses. North Carolina State Bar v. Harris, 137 N.C. App. 207, 527 S.E.2d 728 (2000).

**Liability for Costs of Class Action.** — Where class representative plaintiffs agreed with their counsel that counsel — rather than the class members or class representatives — would bear ultimate liability for the costs and expenses of litigation the arrangement was ethical and in no way impacted upon the adequacy of counsel under Federal Rules of Civil Procedure Rule 23(a)(4). In re Southeast Hotel Properties Ltd. Partnership Investor Litig., 151 F.R.D. 597 (W.D.N.C. 1993).

## DISCIPLINARY HEARING NOTES

The attorney accepted compensation from someone other than his client without the knowledge or consent of his client. Private Reprimand. **79 DHC 26.**

Among other things, the attorney invested the proceeds from a wrongful death action in a corporation in which the attorney owned a 90% interest, without the knowledge or consent of his client. Attorney also attempted to exonerate himself or limit his liability for malpractice by

presenting his client with a document entitled "Release" and procuring his client's signature. Eighteen Month Suspension. **80 DHC 16.**

In addition to other misconduct, the attorney required the client to sign a release form exonerating the attorney from liability for malpractice before turning over the client's files. One Year Suspension. **81 DHC 4.**

The attorney certified title to 77 acres of his client's land. A dispute ensured over 47 acres. The attorney advised the client that it would cost $5,000 to settle the dispute. The client could not afford this amount so the attorney offered to purchase all the property for $2800. The client sold the property to the attorney for $3550. The attorney did not pay fair market value for the property and later sold the property for $30,000. Eighteen Month Suspension. **85 DHC 7.**

The attorney entered into a contract with a client to purchase property of the client which proved ultimately to be unfair to the client. Six Month Suspension, stayed three years upon certain conditions. **89 DHC 41.**

The attorney had a client sign an agreement prospectively limiting the attorney's malpractice liability to the client, at a time when the client was not represented by independent counsel and without advising her to obtain such counsel. One Year Suspension, stayed for three years upon conditions. **90 DHC 23.**

Attorney purchased house from 81-year-old client for less than fair market value without fully disclosing risks of transaction and without advising client to seek independent counsel. One Year Suspension, stayed for three years and order to reconvey property to client. **92 DHC 8.**

Among other things, attorney borrowed money from client funds on deposit in his trust account without evidencing these transactions by promissory notes or other documentation. One Year Suspension, stayed for three years upon certain conditions. **93 DHC 20.**

Attorney borrowed $10,000 of insurance proceeds from a disabled widow without securing the loan, without providing for the payment of interest and without advising the widow to consult independent counsel. Two Year Suspension, one year stayed upon certain condition. **93 DHC 35.**

## ETHICS OPINION NOTES

**98 Formal Ethics Opinion 17** Opinion rules that a lawyer may not comply with an insurance carrier's billing requirements and guidelines if they interfere with the lawyer's ability to exercise his or her independent professional judgment in the representation of the insured.

**CPR 11.** An attorney may contract to receive an interest in real property as a contingent fee for legal representation in an action to clear title to the subject property.

## ETHICS OPINION NOTES

**CPR 121.** It is permissible for the defendant in an uncontested divorce to pay the plaintiff's attorney.

**CPR 135.** It is not improper for a legal aid society to request clients to donate unused trust funds to the society.

**CPR 157.** An attorney handling a personal injury case may advance the cost of the client's medical examination if such is actually an expense of litigation for which the client remains ultimately liable.

**CPR 241.** An attorney may practice law and sell insurance but must keep the law practice and the insurance business separate in all respects. The attorney should not sell insurance to clients for whom he has provided legal services involving estate planning.

**CPR 291.** An attorney who has procured a judgment for a client that has not been collected by the ninth year may purchase the judgment if the client does wish to renew it, but this practice is not encouraged.

**CPR 295.** An attorney who refers a client-creditor to a collection agency may accept payment only from the client for legal services rendered to the client.

**CPR 346.** An attorney may represent a defendant employee of a city and accept payment of his fee from the city even though the employee may cross-claim against city.

**CPR 364.** An attorney may not purchase a judgment even though the client needs money immediately.

**RPC 11.** Full disclosure and clients' consent are necessary only when both spouses personally participate as counsel.

**RPC 24.** An attorney may not purchase his client's property at an execution sale on his own account.

**RPC 76.** A lawyer may advance his client's fine.

**RPC 80.** A lawyer may not lend money to a client who is represented in pending or contemplated litigation except to finance costs of litigation.

**RPC 124.** An attorney may not agree to bear

the costs of federal class action litigation.

**RPC 134.** An attorney may not accept an assignment of her client's judgment while representing the client on appeal of the judgment.

**RPC 167.** A lawyer may accept compensation from a potentially adverse insurance carrier for representing a minor in the court approval of a personal injury settlement provided the lawyer is able to represent the minor's interests without regard to who is actually paying for his services.

**RPC 173.** A lawyer who represents a client on a criminal charge may not lend the client the money necessary to post bond.

**RPC 186.** A lawyer who represents a client in a pending domestic action may take a promissory note secured by a deed of trust as payment for the lawyer's fee even though the deed of trust is on real property that is or may be the subject of the domestic action.

**RPC 187.** A lawyer may not ask a client for authorization to instruct the clerk of court to forward the client's support payments to the lawyer in order to satisfy the client's legal fees.

**RPC 238.** A lawyer is subject to the Rules of Professional Conduct with respect to the provision of a law related service, such as financial planning, if the law related service is provided in circumstances that are not distinct from the lawyer's provision of legal services to clients.

**98 Formal Ethics Opinion 14.** Opinion rules that a lawyer may participate in the solicitation of funds from third parties to pay the legal fees of a client provided there is disclosure to contributors and the funds are administered honestly.

## Rule 1.9. Conflict of interest: Former client.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter, or whose present or former firm has formerly represented a client in a matter, shall not thereafter:

(1) use confidential information protected from disclosure by Rule 1.6 to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known; or

(2) reveal confidential information protected from disclosure by Rule 1.6 except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

**History Note:** Amended July 23, 1999.

### COMMENT

The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military juris-

diction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

**Lawyers Moving Between Firms**

When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with disqualification is the appearance of impropriety. This rubric has a two fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

**Confidentiality**

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraph (b) depends on a situation's particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer, while with one firm, acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

**Adverse Positions**

The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from

continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met.

Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Whether information is "generally known" depends in part upon how the information was obtained and in part upon the former client's reasonable expectations. The mere fact that information is accessible through the public record or has become known to some other persons, does not necessarily deprive the information of its confidential nature. If the information is known or readily available to a relevant sector of the public, such as the parties involved in the matter, then the information is probably considered "generally known." See Restatement (Third of The Law Governing Lawyers, §111 cmt. d (Proposed Final Draft No. 1, 1996).

Disqualification from subsequent representation is for the protection of former clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role on behalf of the new client.

With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 1.9 is substantially similar to Model Rule 1.9. Rule 1.9(a) is essentially the same as Rule 5.1(d) of the superseded (1985) Rules of Professional Conduct. Rule 1.9(b) corresponds to Rule 5.11(b) of the superseded (1985) Rules of Professional Conduct and Rule 1.9(c) has no counterpart in the superseded Rules.

## CASE NOTES

**Conflict of Interest Shown.** — The defendant's motion to disqualify the plaintiff's lead attorney and his law firm from representing the plaintiff, under this rule, was granted where although attorney claimed never to have provided legal advice on the scope of defendant's license agreement during the five years that he was their lead counsel, and although the litigation in which he was involved concerned infringement of defendant's patents for cable use, not the direct-to-home or satellite field of use at issue, he had crucial knowledge of the parties' course of conduct under the license agreement, which he could reference in cross-examination of witnesses, and he could even be called as a potential witness. SuperGuide Corp. v. DirecTV Enters., Inc., 141 F. Supp. 2d 616 (W.D.N.C. 2001).

**Conflict of Interest Not Shown.** — There was no conflict of interest involved where the attorney for the plaintiff in an action to impress a trust had represented a defendant in a divorce action against her former husband, her co-defendant in this action. In this case the former client had consented to the attorney's representation of the current client, her foster mother, who knew of the prior representation. Saintsing v. Taylor, 57 N.C. App. 467, 291 S.E.2d 880, cert. denied, 306 N.C. 558, 294 S.E.2d 224 (1982).

**Refusal to Disqualify Counsel.** — In a derivative action in which the defendant waited 22 months before moving to disqualify the plaintiffs' counsel on the ground of prior representation of the defendant by the attorney who referred the derivative action to the plaintiffs' counsel, the trial court did not abuse its discretion in refusing to disqualify counsel. Lowder v. All Star Mills Inc., 60 N.C. App. 275, 300 S.E.2d 230, aff'd in part, rev'd in part, 309 N.C. 695, 309 S.E.2d 193 (1983).

**Law firm was disqualified** from representing plaintiff computer company in copyright case against another company which hired three of plaintiff's engineers where the law firm had previously represented one of the engineers. Robert Woodhead, Inc. v. Datawatch Corp., 934 F. Supp. 181 (E.D.N.C. 1995).

## DISCIPLINARY HEARING NOTES

Attorney assisted former in-house counsel to Firestone Tire & Rubber Company to engage in conflict of interest by accepting assistance of the former in-house counsel in preparing complex products liability action against Firestone. Attorney also improperly divided settlement

proceeds with the former in-house counsel. Disbarred. **96 DHC 16.**

**ETHICS OPINION NOTES**

**CPR 93.** A law firm may not continue to represent a husband charged with his wife's murder after the public defender who had represented a codefendant who had agreed to testify against the husband in the same case joins the firm.

**CPR 119.** It is improper for a judgement creditor's attorney or his partner or his lay employee to serve as a referee in supplemental proceedings.

**CPR 140.** It is improper for an attorney who formerly represented a creditor to later represent the debtor in the same action.

**CPR 147.** An attorney cannot defend an action brought by a former client when confidential information obtained during the prior representation would be relevant to the defense of the current action.

**CPR 159.** It is proper for an attorney to prepare a will for a woman and later represent her husband in a domestic action so long as the prior representation is not substantially related to the present action.

**CPR 169.** An attorney may represent the defendant in a lawsuit after having been first approached by the plaintiff if no attorney-client relationship was formed.

**CPR 195.** An attorney may not act as a private prosecutor against a former client who sought his advice concerning the domestic problems which culminated in the subject homicide.

**CPR 243.** An attorney may certify title to the State for purposes of condemnation and later represent the landowner against the State in a suit for damages if all consent.

**CPR 273.** An attorney may not represent a neighborhood group in opposition to another group he previously represented concerning the same or substantially related subject matter.

**RPC 32.** An attorney who represented a husband and wife in certain matters may not later represent the husband in an action for alimony and equitable distribution.

**RPC 45.** An attorney whose partner represented the adverse party prior to joining the firm is not disqualified unless the partner acquired confidential information material to the current dispute.

**RPC 53.** A lawyer may sue a municipality although his partner serves as a member of its governing body. (But see RPC 160.)

**RPC 137.** An attorney who formerly represented an estate may not subsequently defend the former personal representative against a claim brought by the estate.

**RPC 144.** A lawyer having undertaken to represent two clients in the same matter may not thereafter represent one against the other in the event their interests become adverse without the consent of the other.

**RPC 168.** A lawyer may ask her client for a waiver of objection to a possible future representation presenting a conflict of interest if certain conditions are met.

**RPC 229.** A lawyer who jointly represented a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will affect adversely the interests of the other spouse or each spouse agreed not to change the estate plan without informing the other spouse.

**RPC 244.** Although a lawyer asks a prospective client to sign a form stating that no client-lawyer relationship will be created by reason of a free consultation with the lawyer, the lawyer may not subsequently disclaim the creation of a client-lawyer relationship and represent the opposing party.

**RPC 246.** Under certain circumstances, a lawyer may not represent a party whose interests are opposed to the interests of a prospective client if confidential information of the prospective client must be used in the representation.

## Rule 1.10. Imputed disqualification: General rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

COMMENT

**Definition of "Firm"**

For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public as a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11 (a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences and, therefore, to the protections provided in Rules 1.6, 1.9 and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations and, thus, has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

**Principles of Imputed Disqualification**

The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

The duty of loyalty to a client obliges a lawyer to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obliga-

tion requires abstention from adverse representation by the individual lawyer involved, but does not necessarily entail abstention of other lawyers through imputed disqualification. If a lawyer has left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 1.9(b) and Rule 1.10(b) concerning confidentiality have been met.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 1.10 is identical to Model Rule 1.10 and substantially similar to Rule 5.11(a), (c), and (d) of the superseded (1985) Rules of Professional Conduct.

### CASE NOTES

**Cited** in Smith v. Beaufort County Hosp. Ass'n, 141 N.C. App. 203, 540 S.E.2d 775 (2000), cert denied, 353 N.C. 381, 547 S.E.2d 435 (2001).

### ETHICS OPINION NOTES

**CPR 93.** A law firm may not continue to represent a husband charged with his wife's murder after the public defender who had represented a codefendant who had agreed to testify against the husband in the same case joins the firm.

**99 Formal Ethics Opinion 3** Opinion rules that lawyers in different field offices of Legal Services of North Carolina may represent clients with materially adverse interests provided confidential client information is not shared by the lawyers with the different field offices.

**CPR 96.** When different attorneys in the same firm are employed to represent conflicting interests in related cases (estate in wrongful death case and criminal defendant in homicide case), both must withdraw.

**CPR 158.** An attorney whose partner represented the wife in domestic litigation which resulted in parties holding real property as co-tenants cannot subsequently represent the husband in a partition proceeding.

**CPR 274.** Attorneys who merely share office space are not automatically disqualified.

**RPC 45.** An attorney whose partner represented the adverse party prior to joining the firm is not disqualified unless the partner acquired confidential information material to the current dispute.

**RPC 49.** Attorneys who own stock in a real estate company may refer clients to the company if such would be in the clients' best interest and there is full disclosure, but the attorneys and other members of their law firm may not close transactions brokered by the real estate firm.

**RPC 55.** A member of the Attorney General's staff may prosecute appeals of adverse Medicaid decisions against the Department of Human Resources, which is represented by another member of the Attorney General's staff.

**RPC 65.** The public defender's office should be considered as a single law firm and staff attorneys may not represent co-defendants with conflicting interests unless both consent and can be adequately represented.

**RPC 73.** Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants if a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

**RPC 248.** A lawyer who owns stock in a mortgage brokerage corporation may not act as the settlement agent for a loan brokered by the corporation nor may the other lawyers in the firm certify title or act as settlement agent for the closing.

## Rule 1.11. Successive government and private employment.

(a) Except as law may otherwise expressly permit, a lawyer shall not

represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

**COMMENT**

This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another. A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government

information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement.They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 1.11 is identical to Model Rule 1.11. Rule 1.11 also closely follows Rule 9.1 of the superseded (1985) Rules of Professional Conduct. However, Rule 1.11 permits members of a law firm which employs a former government lawyer to represent a party adverse to the lawyer's former employer, without the consent of the government agency, provided the former government lawyer is "screened" from any involvement with the case and does not receive any fee therefrom. Under superseded Rule 9.1, no member of a disqualified lawyer's firm may participate unless the adverse government party consents.

## CASE NOTES

**No Per Se Disqualification.** — Government employment as a district attorney by an attorney formerly in private practice does not create a per se disqualification of all the other government attorneys on his staff from prosecuting or appearing at any time against his former clients of the attorney who left private practice. State v. Reid, 104 N.C. App. 334, 410 S.E.2d 67 (1991), cert. granted, 331 N.C. 121, 414 S.E.2d 765 (1992), rev'd on other grounds, 334 N.C. 551, 434 S.E.2d 193 (1993).

**Stated** in State v. Reid, 334 N.C. 551, 434 S.E.2d 193 (1993).

## ETHICS OPINION NOTES

**CPR 208.** A former U.S. attorney may represent criminal defendants and civil plaintiffs against the United States so long as he did not participate in substantially related matters while with the government.

**CPR 245.** A former assistant district attorney may not act as private prosecutor in a case he was handling before he left the district attorney's office.

**CPR 306.** A former district attorney who prepared bills of indictment and requests for extradition in a criminal case may not privately prosecute that case.

**CPR 341.** Members of a former assistant district attorney's current law firm may not represent a criminal defendant with respect to whom the former assistant district attorney sought indictment, unless the district attorney consents.

## Rule 1.12. Former judge or arbitrator.

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after consultation.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

### COMMENT

This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court and thereafter left judicial office to practice law is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 1.12 is identical to Model Rule 1.12 and Rule 9.2 of the superseded (1985) Rules of Professional Conduct.

### ETHICS OPINION NOTES

**CPR 113.** An attorney may not represent either party in a domestic case after having signed a consent judgment in the matter as a judge.

**RPC 138.** A partner of a lawyer who represents a party to an arbitration should not act as an arbitrator.

## Rule 1.13. Organization as client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refused to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably

might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or withdraw in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

## COMMENT

**The Entity as the Client**

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Rule apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter

reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point, it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that, under certain conditions, highest authority reposes elsewhere; for example, in the independent directors of a corporation.

**Relation to Other Rules**

The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

**Government Agency**

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole maybe the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See 0.2 Scope.

**Clarifying the Lawyer's Role**

There are times when the organization's interest may be or may become adverse to those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

**Dual Representation**

Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

**Derivative Actions**

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 1.13 is identical to Model Rule 1.13. Rule 1.13 generally corresponds to Rule 5.10 of the superseded (1985) Rules of Professional Conduct. Unlike the superseded rule, Rule 1.13 contains additional guidance for a lawyer who learns of improper conduct by a constituent of the organization that is inconsistent with the best interests of the organization.

### ETHICS OPINION NOTES

**CPR 154.** Because the town attorney owes allegiance to the town and not to particular employees of the town, he must disclose to any inquiring member of the town's board of commissioners the subject of a town business meeting involving town officials and other interested persons despite contrary instructions from the mayor.

**CPR 185.** A staff attorney for a member-owned corporation may provide legal advice to members and nonmembers as long as their interests are not in conflict with those of the corporation.

**CPR 227.** The retained attorney for a religious organization cannot represent citizens who want wills leaving property to the organization.

**CPR 228.** A retained attorney for a religious organization cannot represent employees of the organization in drawing wills.

**CPR 235.** An attorney may not offer to draw wills free for church members who agree to contribute a certain amount to the church.

**CPR 271.** An attorney who drafted a partnership agreement cannot later represent some of the partners against the partnership.

**RPC 97.** Counsel for a condominium association may represent the association against a unit owner.

**97 Formal Ethics Opinion 7.** After a corporation files a Chapter 7 bankruptcy petition and at the request of the bankruptcy trustee, a lawyer who previously represented the corporation may continue to represent the corporation's bankruptcy estate and the bankruptcy trustee in a civil action provided the lawyer understands that the trustee is responsible for making decisions about the representation and the representation is not adverse to a former client of the lawyer.

## Rule 1.14. Client under a disability.

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

### COMMENT

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent, the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a legal representative has already been appointed for the client, the lawyer should

ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

**Disclosure of the Client's Condition**

Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 1.14 is identical to Model Rule 1.14. There is no corresponding rule in the superseded (1985) Rules of Professional Conduct.

**ETHICS OPINION NOTES**

**CPR 314.** An attorney who believes his or her client is not competent to make a will may not prepare or preside over the execution of a will for that client.

**RPC 157.** A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection if reasonably necessary to protect the client's interest.

**RPC 163.** A lawyer may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

**98 Formal Ethics Opinion 16.** Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

**98 Formal Ethics Opinion 18.** Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

## Rule 1.15-1. Definitions.

For purposes of this Rule 1.15, the following definitions apply:

(a) "Bank" denotes a bank, savings and loan association, or credit union chartered under North Carolina or federal law.

(b) "Client" denotes a person, firm, or other entity for whom a lawyer performs, or is engaged to perform, any legal services.

(c) "Dedicated trust account" denotes a trust account that is maintained for the sole benefit of a single client or with respect to a single transaction or series of integrated transactions.

(d) "Entrusted property" denotes trust funds, fiduciary funds and other property belonging to someone other than the lawyer which is in the lawyer's possession or control in connection with the performance of legal services or professional fiduciary services.

(e) "Fiduciary account" denotes an account, designated as such, maintained by a lawyer solely for the deposit of fiduciary funds or other entrusted property of a particular person or entity.

(f) "Fiduciary funds" denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of professional fiduciary services.

(g) "Funds" denotes any form of money, including cash, payment instruments such as checks, money orders, or sales drafts, and receipts from electronic fund transfers.

(h) "General trust account" denotes any trust account other than a dedicated trust account.

(i) "Instrument" denotes an instrument under the Uniform Commercial Code, a payment item or advice accepted for credit by a bank, or a requisition or order for the electronic transfer of funds.

(j) "Legal services" denotes services rendered by a lawyer in a client-lawyer relationship.

(k) "Professional fiduciary services" denotes compensated services (other than legal services) rendered by a lawyer as a trustee, guardian, personal representative of an estate, attorney-in-fact, or escrow agent, or in any other fiduciary role customary to the practice of law.

(*l*) "Trust account" denotes an account, designated as such, maintained by a lawyer for the deposit of trust funds.

(m) "Trust funds" denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of legal services.

**History Note:** Statutory Authority G.S. 84-23, Amended May 4, 2000.

## Rule 1.15-2. General rules.

(a) *Entrusted property.* All entrusted property shall be identified, held, and maintained separate from the property of the lawyer, and shall be deposited, disbursed, and distributed only in accordance with this Rule 1.15.

(b) *Deposit of trust funds.* All trust funds received by or placed under the control of a lawyer shall be promptly deposited in either a general trust account or a dedicated trust account of the lawyer.

(c) *Deposit of fiduciary funds.* All fiduciary funds received by or placed under the control of a lawyer shall be promptly deposited in a fiduciary account or a general trust account of the lawyer.

(d) *Safekeeping of other entrusted property.* A lawyer may also hold entrusted property other than fiduciary funds (such as securities) in a fiduciary account. All entrusted property received by a lawyer that is not deposited in a trust account or fiduciary account (such as a stock certificate) shall be promptly identified, labeled as property of the person or entity for whom it is to be held, and placed in a safe deposit box or other suitable place of safekeeping. The lawyer shall disclose the location of the property to the client or other person for whom it is held. Any safe deposit box or other place of safekeeping shall be located in this state, unless the lawyer has been otherwise authorized in writing by the client or other person for whom it is held.

(e) *Location of accounts.* All trust accounts shall be maintained at a bank in North Carolina except that, with the written consent of the client, a dedicated trust account may be maintained at a bank outside of North Carolina or in a financial institution other than a bank in or outside of North Carolina. A lawyer may maintain a fiduciary account at any bank or other financial institution in or outside of North Carolina selected by the lawyer in the exercise of the lawyer's fiduciary responsibility.

(f) *Segregation of lawyer's funds.* No funds belonging to a lawyer shall be deposited in a trust account or fiduciary account of the lawyer except:

(1) funds sufficient to open or maintain an account, pay any bank service charges, or pay any tax levied on the account; or

(2) funds belonging in part to a client or other third party and in currently or conditionally to the lawyer.

(g) *Mixed funds deposited intact.* When funds belonging to the lawyer are received in combination with funds belonging to the client or other persons, all of the funds shall be deposited intact. The amounts currently or conditionally belonging to the lawyer shall be identified on the deposit slip or other record. After the deposit has been finally credited to the account, the lawyer may withdraw the amounts to which the lawyer is or becomes entitled. If the lawyer's entitlement is disputed, the disputed amounts shall remain in the trust account or fiduciary account until the dispute is resolved.

(h) *Instruments payable to lawyer.* An instrument drawn on a trust account or fiduciary account for the payment of the lawyer's fees or expenses shall be made payable to the lawyer and shall indicate the client balance on which instrument is drawn.

(i) *No bearer instruments.* No instrument shall be drawn on a trust account or fiduciary account made payable to cash or bearer.

(j) *No personal benefit.* A lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for the lawyer or any person other than the legal or beneficial owner of that property.

(k) *Bank directive.* Every lawyer maintaining a trust account or fiduciary account at a bank shall file with the bank a written directive requiring the bank to report to the executive director of the North Carolina State Bar when an instrument drawn on the account is presented for payment against insufficient funds. No trust account or fiduciary account shall be maintained in a bank that does not agree to make such reports.

(*l*) *Notification of receipt.* A lawyer shall promptly notify his or her client of the receipt of any entrusted property belonging in whole or in part to the client.

(m) *Delivery of client property.* A lawyer shall promptly pay or deliver to the client, or to third persons as directed by the client, any entrusted property belonging to the client and to which the client is currently entitled.

(n) *Property received as security.* Any entrusted property or document of title delivered to a lawyer as security for the payment of a fee or other obligation to the lawyer shall be held in trust in accordance with this Rule 1.15 and shall be clearly identified as property held as security and not as a completed transfer of beneficial ownership to the lawyer. This provision does not apply to property received by a lawyer on account of fees or other amounts owed to the lawyer at the time of receipt; however, such transfers are subject ot the rules governing legal fees or business transactions between a lawyer and client.

(o) *Duty to report misappropriation.* A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the North Carolina State Bar.

(p) *Interest on deposited funds.* Except as authorized by Rule 1.15-4, any interest earned on a trust account or fiduciary account, less any amounts deducted for bank service charges and taxes, shall belong to the client or other person or entity entitled to the corresponding principal amount. Under no circumstances shall the lawyer be entitled to any interest earned on funds deposited in a trust account or fiduciary account.

(q) *Abandoned property.* If entrusted property is unclaimed, the lawyer shall make due inquiry of his or her personnel, records and other sources of information in an effort to determine the identity and location of the owner of the property. If that effort is successful, the entrusted property shall be promptly transferred to the person or entity to whom it belongs. If the effort is unsuccessful and the provisions of G.S. 116B-18 are satisfied, the property shall be deemed abandoned, and the lawyer shall comply with the require-

ments of Chapter 116B of the General Statutes concerning the escheat of abandoned property.

**History Note:** Statutory Authority G.S. 84-23, Amended May 4, 2000.

### Rule 1.15-3. Records and accountings.

(a) *Minimum records for accounts at banks.* The minimum records required for general trust accounts, dedicated trust accounts and fiduciary accounts maintained at a bank shall consist of the following:

(1) all bank receipts or deposit slips listing the source and date of receipt of all funds deposited in the account, and, in the case of a general trust account, also the name of the client or other person to whom the funds belong;

(2) all canceled checks or other instruments drawn on the account, or printed digital images thereof furnished by the bank, showing the amount, date, and recipient of the disbursement, and, in the case of a general trust account, the client balance against which each instrument is drawn, provided, that:

(i) digital images must be legible reproductions of the front and back of the original instruments with no more than six instruments per page and no images smaller than 1-3⁄16 x 3 inches; and

(ii) the bank must maintain, for at least six years, the capacity to reproduce electronically additional or enlarged images of the original instruments upon request within a reasonable time;

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the trust account;

(4) all bank statements and other documents received from the bank with respect to the trust account, including, but not limited to notices of return or dishonor of any instrument drawn on the account against insufficient funds;

(5) in the case of a general trust account, a ledger containing a record of receipts and disbursements for each person or entity from whom and for whom funds are received and showing the current balance of funds held in the trust account for each such person or entity; and

(6) any other records required by law to be maintained for the trust account.

(b) *Minimum records for accounts at other financial institutions.* The minimum records required for dedicated trust accounts and fiduciary accounts at financial institutions other than a bank shall consist of the following:

(1) all depository receipts or deposit slips listing the source and date of receipt of all property deposited in the account;

(2) a copy of all checks or other instruments drawn on the account, or printed digital images thereof furnished by the depository, showing the amount, date, and recipient of the disbursement, provided, that the images satisfy the requirements set forth in Rule 1.15-3(b)(2);

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the account;

(4) all statements and other documents received from the depository with respect to the account, including, but not limited to notices of return or dishonor of any instrument drawn on the account for insufficient funds; and

(5) any other records required by law to be maintained for the account.

(c) *Quarterly reconciliations of general trust accounts.* At least quarterly, the individual client balances shown on the ledger of a general trust account must be totaled and reconciled with the current bank balance for the trust account as a whole.

(d) *Accountings for trust funds.* The lawyer shall render to the client a written accounting of the receipts and disbursements of all trust funds (i) upon

the complete disbursement of the trust funds, (ii) at such other times as may be reasonably requested by the client, and (iii) at least annually if the funds are retained for a period of more than one year.

(e) *Accountings for fiduciary property.* Inventories and accountings of fiduciary funds and other entrusted property received in connection with professional fiduciary services shall be rendered to judicial officials or other persons as required by law. If an annual or more frequent accounting is not required by law, a written accounting of all transactions concerning the fiduciary funds and other entrusted property shall be rendered to the beneficial owners, or their representatives, at least annually and upon the termination of the lawyer's professional fiduciary services.

(f) *Minimum record keeping period.* A lawyer shall maintain, in accordance with this Rule 1.15, complete and accurate records of all entrusted property received by the lawyer, which records shall be maintained for a period of at least six (6) years from the last transaction to which the records pertain.

(g) *Audit by state bar.* The financial records required by this Rule 1.15 shall be subject to audit for cause and to random audit by the North Carolina State Bar; and such records shall be produced for inspection and copying upon request by the State Bar.

**COMMENT**

The purpose of a lawyer's trust account or fiduciary account is to segregate the funds belonging to others from those belonging to the lawyer. Money received by a lawyer while providing legal services or otherwise serving as a fiduciary should never be used for personal purposes. Failure to place the funds of others in a trust or fiduciary account can subject the funds to claims of the lawyer's creditors or place the funds in the lawyer's estate in the event of the lawyer's death or disability.

**Property Subject to These Rules**

Any property belonging to a client or other person or entity that is received by or placed under the control of a lawyer in connection with the lawyer's furnishing of legal services or professional fiduciary services must be handled and maintained in accordance with this Rule 1.15. The minimum records to be maintained for accounts in banks differ from the minimum records to be maintained for accounts in other financial institutions (where permitted), to accommodate brokerage accounts and other accounts with differing reporting practices.

**Client Property**

Every lawyer who receives funds belonging to a client must maintain a trust account. The general rule is that every receipt of money from a client or for a client, which will be used or delivered on the client's behalf, is held in trust and should be placed in the trust account. All client money received by a lawyer, except that to which the lawyer is immediately entitled, must be deposited in a trust account, including funds for payment of future fees and expenses. Funds delivered to the lawyer by the client for payment of future fees or expenses should never be used by the lawyer for personal purposes or subjected to the potential claims of the lawyer's creditors.

This rule does not prohibit a lawyer who receives an instrument belonging wholly to a client or a third party from delivering the instrument to the appropriate recipient without first depositing the instrument in the lawyer's trust account.

**Property from Professional Fiduciary Service**

The phrase "professional fiduciary service," as used in this rule, is service by a lawyer in any one of the various fiduciary roles undertaken by a lawyer that is not, of itself, the practice of law, but is frequently undertaken in conjunction with the practice of law. This includes service as a trustee, guardian, personal representative of an estate, attorney-in-fact, and escrow agent, as well as service in other fiduciary roles "customary to the practice of law."

Property held by a lawyer performing a professional fiduciary service must also be segregated from the lawyer's personal property, properly labeled, and maintained in accordance with the applicable provisions of this rule.

When property is entrusted to a lawyer in connection with a lawyer's representation of a client, this rule applies whether or not the lawyer is compensated for the representation. However, the rule does not apply to property received in connection with a lawyer's uncompensated service as a fiduciary such as a trustee or personal representative of an estate. (Of course, the lawyer's conduct may be governed by the law applicable to fiduciary obligations in general, including a fiduciary's obliga-

tion to keep the principal's funds or property separate from the fiduciary's personal funds or property, to avoid self-dealing, and to account for the funds or property accurately and promptly).

Compensation distinguishes professional fiduciary service from a fiduciary role that a lawyer undertakes as a family responsibility, as a courtesy to friends, or for charitable, religious or civic purposes. As used in this rule, "compensated services" means services for which the lawyer obtains or expects to obtain money or any other valuable consideration. The term does not refer to or include reimbursement for actual out-of-pocket expenses.

**Property Excluded from Coverage of Rules**

This rule also does not apply when a lawyer is handling money for a business or for a religious, civic, or charitable organization as an officer, employee, or other official regardless of whether the lawyer is compensated for this service. Handling funds while serving in one of these roles does not constitute "professional fiduciary service," and such service is not "customary to the practice of law."

**Burden of Proof**

When a lawyer is entrusted with property belonging to others and does not comply with these rules, the burden of proof is on the lawyer to establish the capacity in which the lawyer holds the funds and to demonstrate why these rules should not apply.

**Prepaid Legal Fees**

Whether a fee that is prepaid by the client should be placed in the trust account depends upon the fee arrangement with the client. A retainer fee in its truest sense is a payment by the client for the reservation of the exclusive services of the lawyer, which is not used to pay for the legal services provided by the lawyer and, by agreement of the parties, is nonrefundable upon discharge of the lawyer. It is a payment to which the lawyer is immediately entitled and, therefore, should not be placed in the trust account. A "retainer," which is actually a deposit by the client of an advance payment of a fee to be billed on an hourly or some other basis, is not a payment to which the lawyer is immediately entitled. This is really a security deposit and should be place in the trust account. As the lawyer earns the fee or bills against the deposit, the funds should be withdrawn from the account. Rule 1.16(d) requires the refund to the client of any part of a fee that is not earned by the lawyer at the time that the representation is terminated.

**Abandoned Property**

Should a lawyer need technical assistance concerning the escheat of property to the State of North Carolina, the lawyer should contact the escheat officer at the Office of the North Carolina State Treasurer in Raleigh, North Carolina.

**Responsibility for Records and Accountings**

It is the lawyer's responsibility to assure that complete and accurate records of the receipt and disbursement of entrusted property are maintained in accordance with this rule.

The lawyer is responsible for keeping a client, or any other person to whom the lawyer is accountable, advised of the status of entrusted property held by the lawyer. Therefore, it is essential that the lawyer regularly reconcile a general trust account. This means that, at least once a quarter, the lawyer must reconcile the balance shown for the account in the lawyer's records with the current bank balance. The current bank balance is the balance obtained when subtracting outstanding checks and other withdrawals from the bank statement balance and adding outstanding deposits to the bank statement balance. With regard to trust funds held in any trust account, there is also an affirmative duty to produce a written accounting for the client and to deliver it to the client, either at the conclusion of the transaction or periodically if funds are held for an appreciable period. Such accountings must be made at least annually or at more frequent intervals if reasonably requested by the client.

**Bank Notice of Overdrafts**

A properly maintained trust account should not have any instruments presented against insufficient funds. However, even the best-maintained accounts are subject to inadvertent errors by the bank or the lawyer, which may be easily explained. The reporting requirement should not be burdensome and may help avoid a more serious problem.

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**History Note:** Statutory Authority G.S. 84-23; Adopted May 4, 2000.

## Rule 1.15-4. Interest on lawyers' trust accounts.

(a) Pursuant to a plan promulgated by the North Carolina State Bar and approved by the North Carolina Supreme Court, a lawyer may elect to create

or maintain an interest bearing general trust account for those funds of clients which, in the lawyer's good faith judgment, are nominal in amount or are expected to be held for a short period of time. Funds deposited in a permitted interest bearing general trust account under the plan must be available for withdrawal upon request and without delay. The account shall be maintained in a bank. The North Carolina State Bar shall furnish to each lawyer or firm that elects to participate in the Interest on Lawyers' Trust Account (IOLTA) plan, a suitable plaque or scroll indicating participation in the program, which plaque or scroll shall be exhibited in the office of the participating lawyer or firm.

(b) Lawyers or law firms electing to deposit client funds in a general trust account under the plan shall direct the depository institution:

(1) to remit interest or dividends, as the case may be (less any deduction for bank service charges, fees of the depository institution, and taxes collected with respect to the deposited funds) at least quarterly to the North Carolina State Bar;

(2) to transmit with each remittance to the North Carolina State Bar a statement showing the name of the lawyer or law firm maintaining the account with respect to which the remittance is sent and the rate of interest applied in computing the remittance; and

(3) to transmit to the depository lawyer or law firm at the same time a report showing the amount remitted to the North Carolina State Bar and the rate of interest applied in computing the remittance.

(c) The North Carolina State Bar shall periodically deliver to each nonparticipating lawyer a form whereby the lawyer may elect, not to participate in the IOLTA plan. If a lawyer does not so elect within the time provided, the lawyer shall be deemed to have opted to participate in the plan and shall provide to the North Carolina State Bar such information as is required to participate in IOLTA.

(d) A lawyer or law firm participating in the IOLTA plan may terminate participation at any time by notifying the North Carolina State Bar or the IOLTA Board of Trustees. Participation will be terminated as soon as practicable after receipt of written notification from a participating lawyer or firm.

**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997; Redesignated from former Rule 1.15-3, May 4, 2000; Amended effective August 24, 2000.

**DISCIPLINARY HEARING NOTES**

Attorney failed to pay to his clients or the IOLTA program of the State Bar the interest earned on client funds on deposit in his trust account for a period of ten years. Reprimand. **93 DHC 14.**

**ETHICS OPINION NOTES**

**RPC 150.** An attorney cannot permit a bank to link her trust and business accounts for the purpose of determining interest earned or charges assessed if such an arrangement causes the attorney to use client funds from the trust account to offset service charges assessed on the business account.

## Rule 1.16. Declining or terminating representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of law or the Rules of Professional Conduct;

(2) in representing a client before a tribunal, the lawyer reasonably believes that the client is bringing the legal action, conducting the defensive or asserting a position for the purpose of harassing or maliciously injuring any person;

(3) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(4) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client knowingly and freely assents to the termination of the representation;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client insists upon pursuing an objective that the lawyer considers repugnant, imprudent or contrary to the advice and judgment of the lawyer;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation has been rendered unreasonably difficult by the client;

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or

(7) other good cause for withdrawal exists.

(c) When permission for withdrawal from representation of a client is required by the rules of a tribunal, a lawyer shall not withdraw from the representation of a client in a proceeding before that tribunal without the permission of the tribunal.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.

**COMMENT**

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

**Mandatory Withdrawal**

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

**Discharge**

A client has the right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explana-

tion of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

**Optional Withdrawal**

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Forfeiture by the client of a substantial financial investment in the representation may have such effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

**Assisting the Client upon Withdrawal**

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

The lawyer may never retain papers to secure a fee. Generally, anything in the file which would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

A lawyer who represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the State for use in preparing the appeal, must turn over the transcript to the former client upon request, the transcript being property to which the former client is entitled.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 1.16 is similar to Model Rule 1.16, except the Model Rule permits a lawyer to retain client papers to the extent permitted by law. By contrast, Rule 1.16 requires the lawyer to deliver all papers to the client upon termination of the representation. Rule 1.16 is similar to Rule 2.8 of the superseded (1985) Rules of Professional Conduct. Rule 1.16, however, explicitly permits a lawyer to withdraw from the representation of a client, without cause and without the consent of the client, subject to the authority of the court to require continued representation, provided the withdrawal can be accomplished without material prejudice to the client. The superseded rule permits withdrawal only for cause.

## CASE NOTES

**Inadequate Notice of Withdrawal.** — An attorney did not withdraw from representation when he sent his client a letter stating that he believed he could not handle the client's case and that the client should visit the office for further discussion. North Carolina State Bar v. Sheffield, 73 N.C. App. 349, 326 S.E.2d 320, cert. denied, 474 U.S. 981, 106 S. Ct. 385, 88 L.Ed.2d 338 (1985).

**Duty of Attorney to Withdraw.** — Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court, he must withdraw from representation of the client, seeking leave of the court, if necessary. The right of a client to effective counsel in any case (civil or criminal) does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

## DISCIPLINARY HEARING NOTES

The attorney was employed and paid in advance by an incarcerated client to pursue post-conviction relief. When the attorney failed to act on the client's behalf, the client discharged the attorney and demanded a refund. The attorney refused to refund the client any portion of the fee and refused to answer the State Bar's request for explanation. Two Year Suspension. **82 DHC 10, 11.**

Attorney refused to withdraw from case or return client's file when directed to do so by client. Attorney failed to respond to discovery requests and did not appear at disciplinary hearing. One Year Suspension. **88 DHC 7.**

The attorney filed pleadings which were not well grounded in fact or law and falsely certified to the court that he had served the pleadings on opposing counsel. The client later discharged the attorney, who refused to withdraw, refused to return the client's file, and insisted on charging a contingent fee, rather than the reasonable value of his services. Two Year Suspension, with reinstatement conditioned on the attorney passing the bar examination. **90 DHC 22.**

Attorney required client to sign a release before turning over the client's file to her. Suspended One Year, stayed three years upon certain conditions. **90 DHC 23.**

Among other things, the attorney failed to refund unearned fees in two cases. Six Month Suspension and an order of restitution. **91 DHC 24.**

## ETHICS OPINION NOTES

**CPR 3.** A client is entitled to his file upon withdrawal of his attorney.

**CPR 24.** Withdrawing partners and remaining partners should send clients a common announcement of the firm's dissolution so that the client may elect whom he wishes to handle his legal business.

**CPR 61.** It is improper for a senior member of a law firm who is employed to represent a client to refer a case to a junior partner or associate without the client's consent.

**CPR 186.** It is permissible for an attorney to withdraw after giving notice of appeal when the client agrees that an appeal would be fruitless and the client assumes responsibility for retaining another attorney. The Rules of Court determine whether the tribunal's permission is required.

**CPR 269.** An attorney whose motion to withdraw from representation of a corporation is denied must continue to represent the corporation.

**CPR 315.** An attorney must give an indigent client the transcript provided by the State after disposition of the appeal.

**CPR 322.** After completion of custody litigation, an attorney must release a "home study" report to a client unless such is precluded by statute or court order.

**RPC 8.** An attorney employed by an insurer to represent an uninsured motorist may not withdraw after settlement between insurer and the claimant until the court gives permission and the attorney takes steps to minimize prejudice to his client.

**RPC 48.** Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

**RPC 58.** Another member of a lawyer's firm may substitute for the lawyer in defending a criminal case if there is no prejudice to the client and the client and the court consent.

**RPC 79.** A lawyer who advances the cost of obtaining medical records before deciding whether to accept a case may not condition the release of the records to the client upon reimbursement of the cost.

**RPC 106.** Opinion discusses circumstances under which a refund of a prepaid fee is required.

**RPC 153.** In cases of multiple representation, a lawyer who has been discharged by one client must deliver to that client, as part of that client's file, information entrusted to the lawyer by the other client.

**RPC 157.** A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection if reasonably necessary to protect the client's interest.

**RPC 158 (Third Revision).** Any portion of a sum of money paid by a client in advance to secure payment of a fee that is unearned at the time the lawyer is discharged must be refunded to the client.

**RPC 169.** A lawyer is not required to provide a former client with copies of title notes and may charge a former client for copies of documents from the client's file under certain circumstances.

**RPC 178.** Opinion examines the obligation to deliver the file to the client upon the termination of the representation when a lawyer represents multiple clients in a single matter.

**RPC 227.** A former residential real estate client is not entitled to the lawyer's title notes or abstracts regardless of whether such information is stored in the client's file. However, a lawyer formerly associated with a firm may be entitled to examine the title notes made by the

lawyer to provide further representation to the same client.

**RPC 233.** When a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

**RPC 234.** An inactive client file may be stored in an electronic format provided original documents with legal significance are preserved and the documents in the electronic file can be reproduced on paper.

**RPC 245.** A lawyer in possession of the legal file relating to the prior representation of co-parties in an action must provide the co-party the lawyer does not represent with access to the file and a reasonable opportunity to copy the contents of the file.

**98 Formal Ethics Opinion 9.** Opinion rules that a lawyer may charge a client the actual cost of retrieving a closed client file from storage, subject to certain conditions, provided the lawyer does not withhold the file to extract payment.

## Rule 1.17. Sale of a law practice.

A lawyer or a law firm may sell or purchase a law practice, including goodwill, if the following conditions are satisfied:

(a) Upon transferring the law practice to the purchaser, the seller ceases to engage in the private practice of law in North Carolina;

(b) The practice is sold as an entirety to a single purchaser, which is another lawyer or law firm licensed to practice law in North Carolina. Without violating this provision, the seller may agree to transfer matters in one legal field to one purchaser, while transferring matters in another legal field to another purchaser, provided that such purchasers concentrate in those legal fields;

(c) Written notice is sent to each of the seller's clients regarding:

(1) the proposed sale, including the identity of the purchaser;

(2) the terms of any proposed change in the fee arrangement authorized by paragraph (f);

(3) the client's right to retain other counsel and to take possession of the client's files prior to the sale or at any time thereafter; and

(4) the fact that the client's consent to the transfer of the client's files and legal representation to the purchaser will be presumed if the client does not take any action or does not otherwise object within thirty (30) days of receipt of the notice.

(d) If the seller or purchaser identifies a conflict of interest that prohibits the purchaser from representing the client, the seller's notice to the client shall advise the client to retain substitute counsel to assume the client's representation and to arrange to have the substitute counsel contact the seller.

(e) If a client cannot be given notice, the files and the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary for the court to decide whether to issue the order. In the event the court fails to grant a substitution of counsel in a matter, that matter shall not be included in the sale and the sale otherwise shall be unaffected.

(f) The fees charged clients shall not be increased by reason of the sale. The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations; and

(g) The seller and purchaser may agree that the purchaser does not have to pay the entire sales price for the seller's law practice in one lump sum. The seller and purchaser may enter into reasonable arrangements to finance the purchaser's acquisition of the seller's law practice without violating Rules 1.5(e) and 5.4(a). The seller, however, shall have no say regarding the purchaser's conduct of the law practice.

**COMMENT**

The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

**Termination of Practice by the Seller**

The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchaser. The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere, therefore, does not result in a violation. Neither does a return to private practice as a result of an unanticipated change in circumstances result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office.

The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity which provides legal services to the poor, or as in-house counsel to a business.

The Rule permits a sale attendant upon retirement from the private practice of law in North Carolina. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

**Single Purchaser**

The Rule requires a single purchaser unless all matters in particular legal fields are transferred to purchasers who concentrate in those fields.The prohibition against piecemeal sale of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchaser is required to undertake all client matters in the practice, subject to client consent. If, however, the purchaser is unable to undertake all client matters because of a conflict of interest in a specific matter respecting which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, the requirement that there be a single purchaser is nevertheless satisfied.

**Client Confidences, Consent and Notice**

Written notice of the proposed sale must be sent to all clients who are currently represented by the seller and to all former clients whose files will be transferred to the purchaser. Although it is not required by this rule, the placement of a notice of the proposed sale in a local newspaper of general circulation would supplement the effort to provide notice to clients as required by subpart (c) of the rule.

A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation.Preservation of client confidences requires that the petition for a court order be considered in camera.

Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser, the client must be sent written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or make other arrangements must be made within 30 days. If nothing is heard from the client within that time, consent to the sale is presumed.

All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice. The notice to clients must advise clients that they have a right to retain a lawyer other than the purchaser. In addition, the notice must inform clients that their right to counsel of their choice continues after the sale even though they consent to the transfer of the representation to the purchaser.

**Fee Arrangements Between Client and Purchaser**

The sale may not be financed by increases in

fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser, unless the client consents after consultation. The purchaser may, however, advise the client that the purchaser will not undertake the representation unless the client consents to pay the higher fees the purchaser usually charges. To prevent client financing of the sale, the higher fee the purchaser may charge must not exceed the fees charged by the purchaser for substantially similar service rendered prior to the initiation of the purchase negotiations.

The purchaser may not intentionally fragment the practice which is the subject of the sale by charging significantly different fees in substantially similar matters. Doing so would make it possible for the purchaser to avoid the obligation to take over the entire practice by charging arbitrarily higher fees for less lucrative matters, thereby increasing the likelihood that those clients would not consent to the new representation.

**Other Applicable Ethical Standards**

Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure client consent after consultation for those conflicts which can be agreed to (see Rule 1.7); and the obligation to protect information relating to the representation (see Rules1.6 and 1.9).

If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

**Applicability of the Rule**

This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by the Rule.

This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 1.17 is similar to Model Rule 1.17. Model Rule 1.17, however, provides that consent to the transfer of the client's matter to the purchaser of the law practice will be presumed 90 days after receipt of notice whereas Rule 1.17 requires only 30 days notice. Rule 1.17 also permits the transfer of matters in different practice areas to different purchasers and requires notice to the client of any conflict of interest. There is no counterpart to Rule 1.17 in the superseded (1985) Rules of Professional Conduct.

**ETHICS OPINION NOTES**

**98 Formal Ethics Opinion 6.** Opinion rules that the requirements set forth in Rule 1.17 relative to the sale of a law practice to a lawyer who is a stranger to the firm do not apply to the sale of a law practice to lawyers who are current employees of the firm.

## Rule 1.18. Sexual relations with clients prohibited.

(a) A lawyer shall not have sexual relations with a current client of the lawyer.

(b) Paragraph (a) shall not apply if a consensual sexual relationship existed between the lawyer and the client before the legal representation commenced.

(c) A lawyer shall not require or demand sexual relations with a client incident to or as a condition of any professional representation.

(d) For purposes of this rule, "sexual relations" means:

(1) Sexual intercourse; or

(2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.

(e) For purposes of this rule, "lawyer" means any lawyer who assists in the representation of the client but does not include other lawyers in a firm who provide no such assistance.

**COMMENT**

Rule 1.17, the general rule on conflict of interest, has always prohibited a lawyer from representing a client when the lawyer's ability to competently represent the client may be impaired by the lawyer's other personal or professional commitments. Under the general rule on conflicts and the rule on prohibited transactions (Rule 1.8), relationships with clients, whether personal or financial, that affect a lawyer's ability to exercise his or her independent professional judgment on behalf of a client are closely scrutinized. The rules on conflict of interest have always prohibited the representation of a client if a sexual relationship with the client presents a significant danger to the lawyer's ability to represent the client adequately. The present rule clarifies that a sexual relationship with a client is damaging to the lawyer-client relationship and creates an impermissible conflict of interest which cannot be ameliorated by the consent of the client.

**Exploitation of the Lawyer's Fiduciary Position**

The relationship between a lawyer and client is a fiduciary relationship in which the lawyer occupies the highest position of trust and confidence. The relationship is also inherently unequal. The client comes to a lawyer with a problem and puts his or her faith in the lawyer's special knowledge, skills, and ability to solve the client's problem. The same factors that lead the client to place his or her trust and reliance in the lawyer also have the potential to place the lawyer in a position of dominance and the client in a position of vulnerability.

A sexual relationship between a lawyer and a client may involve unfair exploitation of the lawyer's fiduciary position. Because of the dependence that so often characterizes the attorney-client relationship, there is a significant possibility that a sexual relationship with a client resulted from the exploitation of the lawyer's dominant position and influence. Moreover, if a lawyer permits the otherwise benign and even recommended client reliance and trust to become the catalyst for a sexual relationship with a client, the lawyer violates one of the most basic ethical obligations, i.e., not to use the trust of the client to the client's disadvantage. This same principle underlies the rules prohibiting the use of client confidences to the disadvantage of the client and the rules that seek to ensure that lawyers do not take financial advantage of their clients. See Rule 1.6 and Rule 1.8.

**Impairment of the Ability to Represent the Client Competently**

A lawyer must maintain his or her ability to represent a client dispassionately and without impairment to the exercise of independent professional judgment on behalf of the client. The existence of a sexual relationship between lawyer and client under the circumstances proscribed by this rule presents a significant danger that the lawyer's ability to represent the client competently may be adversely affected because of the lawyer's emotional involvement. This emotional involvement has the potential to undercut the objective detachment that is demanded for adequate representation. A sexual relationship also creates the risk that the lawyer will be subject to a conflict of interest. For example, a lawyer who is sexually involved with his or her client risks becoming an adverse witness to his or her own client in a divorce action where there are issues of adultery and child custody to resolve. Finally, a blurred line between the professional and personal relationship may make it difficult to predict to what extent client confidences will be protected by the attorney-client privilege in the law of evidence since client confidences are protected by privilege only when they are imparted in the context of the attorney-client relationship.

**No Prejudice to Client**

The prohibition upon representing a client with whom a sexual relationship develops applies regardless of the absence of a showing of prejudice to the client and regardless of whether the relationship is consensual.

**Prior Consensual Relationship**

Sexual relationships that predate the lawyer-client relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are not present when the sexual relationship exists prior to the commencement of the lawyer-client relationship. However, before proceeding with the representation in these circumstances, the lawyer should be confident that his or her ability to represent the client competently will not be impaired.

**No Imputed Disqualification**

The other lawyers in a firm are not disqualified from representing a client with whom the lawyer has become intimate. The potential impairment of the lawyer's ability to exercise independent professional judgment on behalf of the client with whom he or she is having a sexual relationship is specific to that lawyer's representation of the client and is unlikely to affect the ability of other members of the firm to competently and dispassionately represent the client.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 1.18 has no counterpart in either the Model Rules or the superseded (1985) Rules of Professional Conduct. The text of Rule 1.18 is derived from similar rules in other states. The comment to Rule 1.18 draws heavily from the text of ABA Formal Opinion 92-364, "Sexual Relations with Clients," adopted by the ABA Standing Committee on Ethics and Professional Responsibility on July 6, 1992.

**DISCIPLINARY HEARING NOTES**

Attorney engaged in unwanted touching of client in violation of superseded Rule 1.2(b) and (d), prohibiting criminal conduct and conduct prejudicial to the administration of justice. Three Year Suspension, six months active and thirty months stayed upon certain conditions. 94 DHC 1.Attorney made unwanted sexual advances to several female clients and thereby engaged in conflicts of interest and conduct prejudicial to the administration of justice in violation of superseded Rules 5.1 and 1.2, respectively. Disbarred. **95 DHC 13.**

# COUNSELOR

## Rule 2.1. Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

**COMMENT**

**Scope of Advice**

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

**Offering Advice**

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 2.1 is identical to Model Rule 2.1. Rule 2.1 has no counterpart in the superseded (1985) Rules of Professional Conduct.

## Rule 2.2. Intermediary.

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer adequately discloses to each client the implication of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges and confidentiality, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

### COMMENT

A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role, the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails, the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

**Confidentiality and Privilege**

A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

**Consultation**

In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances. The lawyer should explain to the clients the effect of the common representation upon the lawyer's duty of confidentiality and the attorney-client privilege. The lawyer should also disclose that the lawyer must withdraw from the representation of both clients in the event that their interests prove to be in irreconcilable conflict.

Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

**Withdrawal**

Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 2.2 closely follows Model Rule 2.2. Rule 2.2 has no counterpart in the superseded (1985) Rules of Professional Conduct.

## ETHICS OPINION NOTES

**RPC 210.** Opinion examines the circumstances in which it is acceptable for a lawyer to represent the buyer, seller, and the lender in the closing of a residential real estate transaction.

**97 Formal Ethics Opinion 8.** Opinion examines the circumstances in which it is acceptable for the lawyer who regularly represents a real estate developer to represent the buyer and the developer in the closing of a residential real estate transaction.

## Rule 2.3. Evaluation for use by third persons.

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client so requests or the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

### COMMENT

**Definition**

An evaluation may be performed at the client's direction for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

**Duty to Third Person**

When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken on behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

**Access to and Disclosure of Information**

The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

**Financial Auditors' Requests for Information**

When a question concerning the legal situation of a client arises at the instance of the

client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 2.3 closely follows Model Rule 2.3. Rule 2.3 has no counterpart in the superseded (1985) Rules of Professional Conduct.

# ADVOCATE

## Rule 3.1. Meritorious claims and contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

### COMMENT

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 3.1 is identical to Model Rule 3.1 and similar to Rule 7.2(a)(1) and (2) of the superseded (1985) Rules of Professional Conduct.

### DISCIPLINARY HEARING NOTES

The attorney filed pleadings which were not well grounded in fact or law and falsely certified to the court that he had served the pleadings on opposing counsel. The client later discharged the attorney, who refused to withdraw, refused to return the client's file, and insisted on charging a contingent fee, rather than the reasonable value of his services. Two Year Suspension, with reinstatement conditioned on the attorney passing the bar examination. **90 DHC 22.**

### ETHICS OPINION NOTES

**CPR 122.** An attorney representing the defendant in divorce action, when advised by the client that parties have not been separated a year, must file an answer denying the allega-

tion of separation even though the client does not wish to contest the divorce.

**CPR 321.** It is improper for an attorney to file motions and pleadings for the mere purpose of delay.

## Rule 3.2. Expediting litigation.

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

### COMMENT

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 3.2 is identical to Model Rule 3.2. Rule 3.2 has no counterpart in the superseded (1985) Rules of Professional Conduct.

### ETHICS OPINION NOTES

**CPR 321.** It is improper for an attorney to file motions and pleadings for the mere purpose of delay.

## Rule 3.3. Candor toward the tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

### COMMENT

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

**Representations by a Lawyer**

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the comment to Rule 8.4(b).

**Misleading Legal Argument**

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

**False Evidence**

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. A lawyer who receives information clearly establishing that a person other than the client has perpetrated fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

**Perjury by a Criminal Defendant**

Whether an advocate for a criminally accused has a duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer may reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

**Remedial Measures**

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate may make disclosure to the court. In the event of such disclosure, it is for the court then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication if the

lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and, as such, a waiver of the right to further representation.

**Constitutional Requirements**

The definition of the lawyer's ethical duty when serving as defense counsel in a criminal case may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. These provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

**Duration of Obligation**

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

**Refusing to Offer Proof Believed to Be False**

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may be denied this authority by constitutional requirements governing the right to counsel.

**Ex Parte Proceedings**

Ordinarily, an advocate has the limited responsibility of presenting one side of the matter that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 3.3 is identical to Model Rule 3.3. Comment [10] to Rule 3.3, however, clarifies that the lawyer may, but is not required to disclose client perjury, whereas comment [10] to Model Rule 3.3 implies that disclosure is required. Rule 3.3 generally corresponds to Rule 7.2 of the superseded (1985) Rules of Professional Conduct. The superseded rule requires a lawyer who learns of a client's perjury, to withdraw from the litigation if the client refuses to rectify the fraud, but does not permit disclosure of client perjury. In a significant departure from the superseded (1985) Rules, Rule 3.3 requires a lawyer in an ex parte proceeding to inform the court of all material facts known to the lawyer, even those adverse to the client's position.

**Legal Periodicals.** — For article on the criminal defendant who proposes or commits perjury, see 17 N.C. Cent. L.J. 157 (1988).

## CASE NOTES

**Preparation of Witness.** — It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner he can. Such preparation is the mark of a good trial lawyer, and is to be commended because it promotes more efficient administration of justice and saves court time. Nothing improper occurs so long as the attorney prepares the witness to give the witness' testimony at trial and not the testimony that the attorney has placed in the witness' mouth or false or perjured testimony. State v. McCormick, 298 N.C. 788, 259 S.E.2d 880 (1979).

**Client Perjury.** — Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court he must withdraw from representation of the client, seeking leave of the court, if necessary. The right of a client to effective counsel in any case (civil or criminal) does not include the right to compel counsel to knowingly assist or participate in the

commission of perjury or the creation or presentation of false evidence. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

**Preventing Witness Perjury** — The defense counsel's decision to exclude an individual from the witness list was "well within the range of professionally reasonable judgments" where counsel believed he would perjure himself. State v. Miller, 142 N.C. App. 435, 543 S.E.2d 201 (2001).

**Concealment of Material Facts.** — Intentionally encouraging the concealment of material facts relevant to the identity of the driver in a driving under the influence prosecution is prejudicial to the administration of justice. Such conduct raises serious doubts as to the attorney's desire to bring about a just result in such a prosecution and adversely reflects on the attorney's fitness to practice law. North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

**Failure to Inform Court of Opposing Party's Address.** — An attorney clearly engaged in conduct involving fraud, dishonesty, deceit and misrepresentation when, in a divorce action, she failed to inform the court of a letter which contained the opposing party's return address, while at the same time presenting to the court an affidavit she had drafted in which her client swore that her husband's whereabouts were unknown and could not with due diligence be ascertained. North Carolina State Bar v. Wilson, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

**Quoted** in Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637, 535 S.E.2d 55 (2000).

## DISCIPLINARY HEARING NOTES

The attorney knowingly used perjured testimony in an attempt to receive a set-off for federal estate taxes due; failed to keep adequate records and accounts for an incompetent client; perpetrated a fraud upon a Florida court by false testimony; and failed to give a complete and timely accounting to his incompetent client's personal representative. Disbarred. **81 DHC 2.**

The attorney filed pleadings which were not well grounded in fact or law and falsely certified to the court that he had served the pleadings on opposing counsel. The client later discharged the attorney, who refused to withdraw, refused to return the client's file, and insisted on charging a contingent fee, rather than the reasonable value of his services. Two Year Suspension, with reinstatement conditioned on the attorney passing the bar examination. **90 DHC 22.**

The attorney misrepresented to an administrative law judge and a state agency that he had been advised by the former chief administrative law judge to take certain actions on behalf of his client when, in fact, the attorney had not discussed the client's case with the former judge. Censure. **92 DHC 3.**

## ETHICS OPINION NOTES

**99 Formal Ethics Opinion 16** Opinion rules that a lawyer may not participate in the presentation of a consent judgment to a court if the lawyer knows that the consent judgment is based upon false information.

**CPR 92.** An attorney who knows that criminal clients gave arresting officers fictitious names should call upon the clients to disclose their true identities to the court and, if they refuse, seek to withdraw.

**CPR 122.** An attorney representing the defendant in divorce action, when advised by the client that parties have not been separated a year, must file an answer denying the allegation of separation even though the client does not wish to contest the divorce.

**CPR 284.** An attorney may seek alimony for a wife although he has evidence of the wife's adultery so long as he does not have to offer perjured testimony or other false evidence.

**RPC 33.** If an attorney's client testifies falsely regarding a material matter, such as his or her name or criminal record, the attorney must call upon the client to correct the testimony. If the client refuses, the attorney must seek to withdraw in accordance with the rules of the tribunal.

**RPC 203.** Dismissal of an action alone is not sufficient to rectify the perjury of a client in a deposition and the lawyer must demand that the client inform the opposing party of the falsity of the deposition testimony or, if the client refuses, withdraw from the representation.

**Revised 98 Formal Ethics Opinion 1.** Opinion rules that a lawyer representing a client in a social security disability hearing is not required to inform the administrative law judge of material adverse facts known to the lawyer.

**98 Formal Ethics Opinion 5.** Opinion rules that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and client did not criminally or fraudulently misrepresent the driving record to the prosecutor

or the court, and further provided, that on application for a limited driving privilege, there is no misrepresentation to the court about the client's prior driving record.

**98 Formal Ethics Opinion 20.** Opinion rules that, subject to a statute prohibiting the withholding of such information, a lawyer's duty to disclose confidential client information to a bankruptcy court ends when the case is closed although the debtor's duty to report new property continues for 180 days.

## Rule 3.4. Fairness to opposing party and counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, counsel or assist a witness to hide or leave the jurisdiction for the purpose of being unavailable as a witness, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey or advise a client to disobey a rule or ruling of a tribunal except a lawyer acting in good faith may take appropriate steps to test the validity of such a rule or ruling;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, ask an irrelevant question that is intended to degrade a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or a managerial employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

### COMMENT

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness's expenses, including lost income, or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Paragraph (c) permits a lawyer to take steps in good faith and within the framework of the law to test the validity of rules, however, the lawyer is not justified in consciously violating such rules and the lawyer should be diligent in the effort to guard against the unintentional violation of them. As examples, a lawyer should subscribe to or verify only

those pleadings that the lawyer believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless the lawyer believes that the statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing the witness; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, and as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact and is prohibited by paragraph (e). However, a lawyer may argue, on an analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

Paragraph (f) permits a lawyer to advise managerial employees of a client to refrain from giving information to another party because the statements of employees with managerial responsibility may be imputed to the client. See also Rule 4.2.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 3.4 is substantially similar to Model Rule 3.4. Rule 3.4 generally corresponds to provisions of Rules 7.2(a)(7), 7.6 and 7.9 of the superseded (1985) Rules of Professional Conduct.

## CASE NOTES

**Interjection of Personal Opinion.** — Counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).

**Interjection of Unsupported Knowledge and Belief.** — Counsel may not, by agreement or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).

**Preparation of Witness.** — It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner he can. Such preparation is the mark of a good trial lawyer, and is to be commended because it promotes more efficient administration of justice and saves court time. Nothing improper occurs so long as the attorney prepares the witness to give the witness' testimony at trial and not the testimony that the attorney has placed in the witness' mouth or false or perjured testimony. State v. McCormick, 298 N.C. 788, 259 S.E.2d 880 (1979).

**Informing a potential witness to plead the U.S. Const., Amend. V or to stay away from court unless subpoenaed** is not unethical. Certainly no rule prevents an attorney from informing a potential witness of his legal rights. North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

**Ethical transgressions by trial counsel do not always constitute legal error.** State v. Sanders, 303 N.C. 608, 281 S.E.2d 7, cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L.Ed.2d 392 (1981).

**Argument Containing Personal Belief.** — The defendant contended on appeal that the prosecutor's argument to the jury contained the prosecutor's personal belief as to the defendant's guilt in violation of the Code. The court held that the statements could be interpreted in several ways, but that even if the prosecutor's argument had contained such a statement, the violation did not entitle the defendant to a new trial. State v. Sanders, 303 N.C. 608, 281 S.E.2d 7, cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

**Argument That Testifying Officers Could Be Prosecuted If They Lied.** — A prosecutor who, in closing, made arguments based on matters outside the record by suggesting that the officers who testified against the defendant could be prosecuted for perjury and fired from their jobs, and lose their pensions if they lied, placed the jurors in the moral dilemma of either convicting the defendant or, in the alternative, causing the officers to suffer the grievous penalties suggested by the prose-

cutor. The argument was, therefore, improper and the defendant was entitled to a new trial. State v. Potter, 69 N.C. App. 199, 316 S.E.2d 359, disc. rev. denied, 312 N.C. 624, 323 S.E.2d 925 (1984).

**Interference with Prosecuting Witness.** — Immediately prior to trial, the defense attorney negotiated an agreement between the prosecuting witness and the accused, which called for his client to pay for damages to a car and a hospital bill in return for a promise not to press charges. He also told the witness she could leave the courthouse because her testimony would not be needed. The attorney's efforts on behalf of his client went far beyond representing the client "zealously within the bounds of the law" and constituted a direct attempt to interfere with a State's witness who was under subpoena to testify in a case. State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492, cert. denied, 311 N.C. 767, 319 S.E.2d 284 (1984), appeal dismissed, 469 U.S. 1101, 105 S. Ct. 769, 83 L. Ed. 2d 766 (1985).

**Failure to Inform Court of Opposing Party's Address.** — An attorney clearly engaged in conduct involving fraud, dishonesty, deceit and misrepresentation when, in a divorce action, she failed to inform the court of a letter which contained the opposing party's return address, while at the same time presenting to the court an affidavit she had drafted in which her client swore that her husband's whereabouts were unknown and could not with due diligence be ascertained. North Carolina State Bar v. Wilson, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

**Interference with Prosecuting Witness.** — Immediately prior to trial, the defense attorney negotiated an agreement between the prosecuting witness and the accused which called for his client to pay for damages to the witness' car and the witness' hospital bills in return for a promise not to press charges. He also told the witness she could leave the courthouse because her testimony would not be needed. The defendant attorney's efforts on behalf of his client went far beyond representing the client "zealously within the bounds of the law" and constituted a direct attempt to interfere with a State's witness who was under subpoena to testify in a named case. State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492, cert. denied, 311 N.C. 767, 319 S.E.2d 284 (1984), appeal dismissed, 469 U.S. 1101, 105 S. Ct. 769, 83 L. Ed. 2d 766 (1985).

**Prosecutor's questioning of capital murder defendant's mother** about locks placed on the outside of defendant's bedroom door was highly prejudicial and of no probative value; however, such error was harmless where the question of defendant's guilt was strong, the trial court properly sustained defendant's objections to the questions, and the mother testified that she was not afraid of her son. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

## DISCIPLINARY HEARING NOTES

The attorney advised a potential State's witness that his client would not testify against him if he did not testify against his client and also counseled the witness that he could plead the U.S. Const., Amend. V. Public Censure. **79 DHC 10.**

The attorney knowingly used perjured testimony in an attempt to receive a set-off for federal estate taxes due; failed to keep adequate records and accounts for an incompetent client; perpetrated a fraud upon a Florida court by false testimony; and failed to give a complete and timely accounting to his incompetent client's personal representative. Disbarred. **81 DHC 2.**

## ETHICS OPINION NOTES

**CPR 2.** An attorney generally does not need the consent of the adverse party to talk to witnesses.

**CPR 121.** If a defendant is not represented, the attorney for the plaintiff in a divorce action may send the defendant a copy of the complaint, and a summons for acceptance of service; but may not send a prepared answer or a consent order.

**CPR 284.** An attorney may seek alimony for a wife although he has evidence of the wife's adultery so long as he does not have to offer perjured testimony or other false evidence.

**CPR 340.** An attorney may represent a client with a malpractice claim even though the client has entered a contingent fee contract with a medical consultant for case evaluation, preparation and expert witness location, so long as the consultant does not present evidence and the compensation of the expert witness provided by the consultant is not contingent upon the outcome of the litigation.

**RPC 225.** The lawyer for a defendant in criminal and civil actions arising out of the same event may seek the cooperation of a crime victim on a plea agreement provided the settlement of the victim's civil claim against the defendant is not contingent upon the content of the testimony of the victim or the outcome of the case.

**Rule 3.5. Impartiality and decorum of the tribunal.**

(a) A lawyer shall not:

(1) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(2) communicate ex parte with a juror or prospective juror except as permitted by law;

(3) communicate ex parte with a judge or other official except

(i) in the course of official proceedings;

(ii) in writing, if a copy of the writing is furnished simultaneously to the opposing party;

(iii) orally, upon adequate notice to opposing party; or

(iv) as otherwise permitted by law.

(4) engage in conduct intended to disrupt a tribunal; including:

(i) failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply;

(ii) engaging in undignified or discourteous conduct that is degrading to a tribunal;

(iii) intentionally or habitually violating any established rule of procedure or evidence; or

(5) after discharge of the jury, ask questions of or make comments to a juror that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service.

(b) All restrictions imposed by this rule also apply to communications with or investigations of members of the family of a venireman or a juror.

(c) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his or her family, of which the lawyer has knowledge.

COMMENT

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the North Carolina Code of Judicial conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of provisions. The rule also prohibits gifts of substantial value to judges or other officials of a tribunal and stating or implying an ability to influence improperly a public official.

To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with a juror is permitted so long as the lawyer refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, the lawyer could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on the lawyer's behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on the lawyer's behalf are subject to the restrictions imposed upon the lawyer with respect to the lawyer's communications with or investigations of veniremen and jurors.

Because of the duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror or a member of the family of either should make a prompt report to the court regarding such conduct.

The impartiality of a public servant in our

legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counselor to the adverse party if unrepresented. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private importunities by another with a judge or hearing officer on behalf of the lawyer or the client.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 3.5 generally follows Model Rule 3.5, except that Rule 3.5 imposes additional restrictions concerning ex parte communications with judges and communications with a juror's family members. Provisions in Rule 3.5 correspond to provisions of Rules 7.6, 7.8, and 7.10 of the superseded (1985) Rules of Professional Conduct.

## CASE NOTES

**The trial judge did not abuse his discretion in removing a juror and substituting an alternate juror** when the original juror contacted defense counsel at his home during the weekend recess and persisted in discussing matters of a personal nature, including counsel's marital status. Although there was no evidence that any matter which related to the trial of the defendant was discussed during the conversation, the exercise of discretion by the trial judge served to safeguard the trial of the defendant from even the appearance of impropriety. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

**Ethical transgressions by trial counsel do not always constitute legal error.** State v. Sanders, 303 N.C. 608, 281 S.E.2d 7, cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L.Ed.2d 392 (1981).

**Argument That Testifying Officers Could Be Prosecuted If They Lied.** — A prosecutor who, in closing, made arguments based on matters outside the record by suggesting that the officers who testified against the defendant could be prosecuted for perjury and fired from their jobs, and lose their pensions if they lied, placed the jurors in the moral dilemma of either convicting the defendant or, in the alternative, causing the officers to suffer the grievous penalties suggested by the prosecutor. The argument was, therefore, improper and the defendant was entitled to a new trial. State v. Potter, 69 N.C. App. 199, 316 S.E.2d 359, disc. rev. denied, 312 N.C. 624, 323 S.E.2d 925 (1984).

**The intentional act of soliciting someone to disrupt a criminal trial** by an attorney representing a defendant was not a felony, but would support an order of disbarment. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), cert. denied, 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

**Quoted** in State v. Bunch, 104 N.C. App. 106, 408 S.E.2d 191 (1991).

## DISCIPLINARY HEARING NOTES

Attorney illegally contacted a juror to discuss a case. Three Year Suspension. **78 DHC 5.**

ETHICS OPINION NOTES

**98 Formal Ethics Opinion 13** Opinion restricts informal written communication with a judge or judicial official relative to a pending matter.

**98 Formal Ethics Opinion 20** — Opinion rules that, subject to a statute prohibiting the withholding of the information, a lawyer's duty to disclose confidential client information to a bankruptcy court ends when the case is closed although the debtor's duty to report new property continues for 180 days after the date of filing the petition.

**CPR 16.** A lawyer or group of lawyers may contribute to a judge's campaign in a reasonable amount.

**CPR 183.** An attorney who represents a judge may not appear before the judge.

**CPR 225.** It is permissible for an attorney to appear before his brother judge if the lawyer for the adverse party and his client consent.

**CPR 226.** Although an attorney may not appear before his brother judge without the consent of the parties, his partners and associates may.

**CPR 283.** The fact that a law firm's secretary is the spouse of a magistrate does not disqualify members of the law firm from practicing criminal law before the magistrate.

**CPR 318.** The fact that an attorney's spouse is a judge's secretary does not disqualify the attorney from practicing before the judge.

**CPR 337.** After a jury trial, an attorney may communicate with jurors as to why they decided issues as they did and their opinions of the attorney's performance, unless such is prohibited by court rule.

**RPC 122.** A member of the attorney general's staff may not consult ex parte with a trial court judge if it is likely that that attorney or another attorney working in the same division of the attorney general's office will represent the state in the appeal of the case.

**RPC 214.** A lawyer may not send a jury questionnaire directly to prospective members of the jury but, if the questionnaire is sent out by the court, such communications are not prohibited.

**RPC 237.** A lawyer may not communicate with the judge before whom a proceeding is pending to request an ex parte order unless opposing counsel is given adequate notice or unless authorized by law.

**97 Formal Ethics Opinion 1.** A lawyer may appear in court before a judge the lawyer represents in a personal matter provided there is disclosure of the representation and all parties and lawyers agree that the relationship between the lawyer and the judge is immaterial to the trial of the matter.

**97 Formal Ethics Opinion 3.** A lawyer may engage in an ex parte communication with a judge regarding a scheduling or administrative matter only if necessitated by the administration of justice or exigent circumstances and diligent efforts to notify opposing counsel have failed.

**97 Formal Ethics Opinion 5.** A lawyer must provide the opposing counsel with a copy of a proposed order at the same time that the lawyer submits the proposed order to the judge in an ex parte communication.

**98 Formal Ethics Opinion 12.** Opinion sets forth the disclosures a lawyer must make to the judge prior to engaging in an ex parte communication.

## Rule 3.6. Trial publicity.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that the statement will materially prejudice an adjudicative proceeding in the matter.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, or reputation of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or

failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

(c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(d) The foregoing provisions of Rule 3.6 do not preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(e) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule.

**COMMENT**

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.

Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 3.6 is similar to Model Rule 3.6. Notably, Model Rule 3.6 specif-

ically permits a lawyer to make an extrajudicial statement to protect a client from the prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. Rule 3.6 is silent on this matter. Rule 3.6 corresponds to Rule 7.7 of the superseded (1985) Rules of Professional Conduct. In additional to organizational changes, however, Rule 3.6 contains a more liberal "material prejudice" standard for evaluating when an extrajudicial statement is prohibited.

### CASE NOTES

**Cited** in Sherrill v. Amerada Hess Corp., 130 N.C. App. 711, 504 S.E.2d 802 (1998).

### ETHICS OPINION NOTES

**CPR 4.** The rule restricting pretrial publicity does not apply when the case is on appeal.

**98 Formal Ethics Opinion 4.** Opinion examines the restrictions on a lawyer's public comments about a pending civil proceeding in which the lawyer is participating.

## Rule 3.7. Lawyer as witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

### COMMENT

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not

such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 3.7 is identical to Model Rule 3.7. Rule 3.7 is also similar to Rule 5.2 of the superseded (1985) Rules of Professional Conduct, except Rule 3.7 limits the disqualification of a testifying lawyer to litigation in which the lawyer is a "necessary" witness. Unlike the superseded rule, Rule 3.7 also permits another lawyer in the testifying lawyer's firm to represent the client at trial although the testifying lawyer is disqualified.

## CASE NOTES

**Counsel Is Not Incompetent to Testify.** — The weight of authority in this country is that while it is a breach of professional ethics for a party's attorney to testify about other than formal matters without withdrawing from the litigation, he is not incompetent to testify. The testimony is admissible if otherwise competent. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

**But Is Discouraged from Doing So.** — The Supreme Court of North Carolina has historically discouraged the practice of attorneys testifying on behalf of clients, and although it has been allowed, in most instances the lawyer acting as a witness for his client had previously surrendered his right to participate in the litigation. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

**Exceptions Where Counsel May Testify for Client.** — While the Disciplinary Rules set forth in the Code of Professional Conduct (now replaced by the Rules of Professional Conduct) do not control the admissibility of evidence or the competency of witnesses, they do govern the ethics and conduct of attorneys licensed to practice law in the State. It should be the policy of the courts to give effect to these rules which specifically address the question of when an attorney may be a witness for a party he represents. Both the Code of Professional Conduct and the common practice recognized by the North Carolina Supreme Court provide for exceptions where attorneys may testify on their clients' behalf. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

**Testimony for Client Before Administrative Board.** — There is no compelling reason to extend existing law by holding that evidence presented by an attorney who testifies while representing a client before a local administrative board may not be considered by such local administrative board. However, attorneys are strongly discouraged from serving as both witnesses and advocates, even before local administrative boards, unless compelling circumstances exist. Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment, 44 N.C. App. 539, 261 S.E.2d 520, cert. denied, 299 N.C. 737, 267 S.E.2d 663 (1980).

**Discretion of Trial Judge.** — Whether to allow defense counsel to testify on a collateral matter, impeachment of a witness, is in the discretion of the trial judge. State v. Elam, 56 N.C. App. 590, 289 S.E.2d 857, cert. denied, 305 N.C. 461, 292 S.E.2d 577 (1982).

**Request by Defendant for Withdrawal of Plaintiff's Counsel.** — Defendant's request that counsel for plaintiff be precluded from testifying at trial or that his law firm be disqualified from further representation of plaintiff would be denied, where plaintiff had not yet determined who its witnesses would be. If plaintiff subsequently determined that counsel should be called as a witness at trial, then the court, at the appropriate time, could order his withdrawal, as well as that of his law firm. FDIC v. Kerr, 111 F.R.D. 476 (W.D.N.C. 1986).

**This rule only applies to lawyers,** not their employees. Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643, cert. denied, 322 N.C. 113, 367 S.E.2d 917 (1988).

**Preference for Other Witnesses.** — If other witnesses are available who can provide the information sought, it is not error not to permit an attorney for a party to testify. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994).

**Testimony Not Prejudicial.** — Defendant could show no prejudice from defense counsel's testimony during a voir dire hearing on a collateral matter regarding the attorney's handling of evidence. State v. Parker, 119 N.C. App. 328, 459 S.E.2d 9 (1995).

**Applied** in SuperGuide Corp. v. DirecTV Enters., Inc., 141 F. Supp. 2d 616 (W.D.N.C. 2001).

**Stated** in Spivey v. United States, 912 F.2d 80 (4th Cir. 1990); H.B.S. Contractors v. Cumberland County Bd. of Educ., 122 N.C. App. 49, 468 S.E.2d 517 (1996).

**Cited** in Central Carolina Nissan, Inc. v. Sturgis, 98 N.C. App. 253, 390 S.E.2d 730 (1990); State ex rel. Long v. American Sec. Life

Assurance Co., 109 N.C. App. 530, 428 S.E.2d 200 (1993); Berkeley Fed. Sav. & Loan Ass'n v. Terra Del. Sol, Inc., 111 N.C. App. 692, 433 S.E.2d 449 (1993); Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995).

**ETHICS OPINION NOTES**

**CPR 18.** An attorney may testify on behalf of his former client after he has withdrawn, even if he is to be reimbursed for expenses advanced while he was employed from any recovery.

**CPR 93.** A law firm may not continue to represent a husband charged with his wife's murder after the public defender who had represented a codefendant who had agreed to testify against the husband in the same case joins the firm.

**CPR 162.** An attorney may testify as to the value of his services, but may not testify as to his client's emotional condition.

**CPR 212.** An attorney who is sued may have his partner represent him and may testify in his own behalf without his partner's having to withdraw.

**CPR 350.** An attorney may continue to serve as administrator C.T.A. even though his secretary may testify as a witness.

**RPC 19.** An attorney may represent a client even though his secretary must be called as a witness.

**RPC 142.** A lawyer may not represent an estate in litigation against a claimant where the lawyer's testimony may be necessary to resolve the validity of the claim.

## Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client, or participate in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer, unless:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information.

(g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

**COMMENT**

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

The prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute. During trial the prosecutor is not only an advocate, but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all. In our system of criminal justice, the accused is to be given the benefit of all reasonable doubt. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial hardship to an individual or to the public interest.

Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings, and search warrants for client information, to those situations in which there is a genuine need to intrude into the client-lawyer relationship. The provision applies only when someone other than the lawyer is the target of a criminal investigation

Paragraph (g) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended October 17, 2001.

**Editor's note.** — Rule 3.8 is substantially similar to Model Rule 3.8. Rule 3.8 is similar to Rule 7.3 of the superseded (1985) Rules of Professional Conduct, except that Rule 3.8 restricts the circumstances in which a prosecutor may subpoena a lawyer.

**Legal Periodicals.** — For comment, "Grand Jury Subpoenas to Defense Attorneys Representing Targets: An Ethical/Legal Tug of War," see 9 Campbell L. Rev. 347 (1987).

For article, "Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger," see 65 N.C.L. Rev. 693 (1987).

**ETHICS OPINION NOTES**

**RPC 197.** A prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

**RPC 204.** It is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

**RPC 243.** It is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.

## Rule 3.9. Reserved.

# TRANSACTIONS WITH PERSON OTHER THAN CLIENTS

## Rule 4.1. Truthfulness in statements to others.

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

### COMMENT

**Misrepresentation**

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

**Statements of Fact**

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 4.1 is similar to Model Rule 4.1, although the Model Rule also requires disclosure when necessary to avoid assisting a criminal or fraudulent act by a client. Rule 4.1 has no counterpart in the superseded (1985) Rules of Professional Conduct.

### ETHICS OPINION NOTES

**RPC 182.** A lawyer must disclose to an adverse party with whom the lawyer is negotiating a settlement that the lawyer's client died.

**RPC 236.** A lawyer may not issue a subpoena containing misrepresentations as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.

## Rule 4.2. Communication with person represented by counsel.

(a) During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. It is not a violation of this Rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good faith attempt to resolve the controversy.

(b) Notwithstanding section (a) above, in representing a client who has a dispute with a government agency or body, a lawyer may communicate, about the subject of the representation with the elected officials who have authority over such government agency or body, even if the lawyer knows that the government agency or body is represented by another lawyer in the matter, but such communications may only occur under the following circumstances:

(1) in writing, if a copy of the writing is promptly delivered to opposing counsel;

(2) orally, upon adequate notice to opposing counsel; or

(3) in the course of official proceedings.

## COMMENT

This Rule does not prohibit a lawyer who does not have a client relative to a particular matter from consulting with a person or entity who, though represented concerning the matter, seeks another opinion as to his or her legal situation. A lawyer from whom such an opinion is sought should, but is not required to, inform the first lawyer of his or her participation and advice.

This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, a lawyer having an independent justification or legal authorization for communicating with a represented person is permitted to do so.

This Rule does not prohibit a lawyer from lobbying elected officials on behalf of a client where the government body upon which the elected official serves is not an opposing party in the particular matter. Communications authorized by law include the right of a party to a controversy with a government agency or body to speak with government officials about the matter. Even when the government agency or body is represented by a lawyer with regard to a particular matter, a lawyer may communicate with the elected government officials who have authority over that agency under the circumstances set forth in paragraph (b).

Parties to a matter may communicate directly with each other. The purpose of this rule is to prohibit a lawyer, or the lawyers agents, from undermining an opponent's client-lawyer relationship through direct contact with a client in the absence of opposing counsel. Nothing herein is intended to discourage good faith efforts by individual parties to resolve their differences. Nor does the Rule prohibit a lawyer from encouraging a client to communicate with the opposing party with a view toward the resolution of their dispute.

After a lawyer for another person or entity has been notified that an organization is represented by counsel in a particular matter, this Rule would prohibit communications by the lawyer concerning the matter with persons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an employee or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication would be sufficient for purposes of this Rule.

This Rule also applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 4.2(a) is similar to Model Rule 4.2 and Rule 7.4(1) of the superseded (1985) Rules of Professional Conduct. Rule 4.2(a), unlike its counterparts in the Model Rules and superseded (1985) Rules, includes a provision permitting a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good faith attempt to resolve the controversy. Rule 4.2(b), setting forth guidelines for communications with represented government officials, has no counterpart in either the Model Rules or the superseded (1985) Rules.

## CASE NOTES

**This rule does not prevent a person in custody from making inculpatory statements** upon waiver of the right to counsel. State v. Romero, 56 N.C. App. 48, 286 S.E.2d 903, disc. rev. denied, 306 N.C. 391, 294 S.E.2d 218 (1982).

**Interview of Plaintiff's Physician by Defense Attorneys.** — Defense attorneys may not interview a plaintiff's treating physician privately without the plaintiff's express consent. Defendant must use the statutorily recognized methods of discovery set out in § 1A-1, Rule 26 of the Rules of Civil Procedure. Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990).

**Applied** in State v. Thompson, 332 N.C. 204, 420 S.E.2d 395 (1992).

**Quoted** in McCallum v. CSX Transp., Inc., 149 F.R.D. 104 (M.D.N.C. 1993).

## DISCIPLINARY HEARING NOTES

During an authorized visit with an adverse party whom attorney knew was represented by another attorney, the attorney exceeded his authority by discussing an aspect of the matter which he did not have the specific permission of opposing counsel to discuss. Private Reprimand. **79 DHC 23.**

## ETHICS OPINION NOTES

**CPR 2.** An attorney generally does not need the consent of the adverse party to talk to witnesses.

**CPR 138.** An attorney representing a party may not send copies of motions to another party he knows has counsel.

**RPC 15.** An attorney may interview a person with adverse interest who is unrepresented and make a demand or propose a settlement.

**RPC 30.** A district attorney may not communicate or cause another to communicate with a represented defendant without the defense lawyer's consent.

**RPC 39.** An attorney may not communicate settlement demands directly to an insurance company which has employed counsel to represent its insured unless that lawyer consents.

**RPC 61.** A defense attorney may interview a child who is the prosecuting witness in a molestation case without the knowledge or consent of the district attorney.

**RPC 67.** An attorney generally may interview a rank and file employee of an adverse corporate party without the knowledge or consent of the corporate party or its counsel.

**RPC 81.** A lawyer may interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer.

**RPC 87.** A lawyer wishing to interview a witness who is not a party, but who is represented by counsel, must obtain the consent of the witness' lawyer.

**RPC 93.** Opinion concerns several situations in which an attorney who represents a criminal defendant wishes to interview other individuals who are represented by attorneys who will not agree to permit the attorney to interview their clients.

**RPC 110.** An attorney employed by an insurer to defend in the name of the defendant pursuant to underinsured motorist coverage may not communicate with that individual without the consent of another attorney employed to represent that individual by her liability insurer.

**RPC 128.** A lawyer may not communicate with an adverse corporate party's house counsel, who appears in the case as a corporate manager, without the consent of the corporation's independent counsel.

**RPC 132.** A lawyer for a party adverse to the government may freely communicate with government officials concerning the matter until notified that the government is represented in the matter.

**RPC 162.** A lawyer may not communicate with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents.

**RPC 180.** A lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents.

**RPC 184.** The lawyer for opposing party may communicate directly with the pathologist who performed an autopsy on plaintiff's descendent without the consent of the personal representative of the decedent's estate.

**RPC 193.** The attorney for the plaintiffs in a personal injury action arising out of a motor vehicle accident may interview the unrepresented defendant even though the uninsured motorist insurer, which had elected to defend the claim in the name of the defendant, is represented by an attorney in the matter.

**RPC 202.** An attorney may communicate in writing with the members of an elected body which is represented by a lawyer in a matter if the purpose of the communication is to request that the matter be placed on the public meeting agenda of the elected body and a copy of the written communication is given to the attorney for the elected body.

**RPC 219.** A lawyer may communicate with a custodian of public records, pursuant to the North Carolina Public Records Act, for the purpose of making a request to examine public records related to the representation although the custodian is an adverse party whose lawyer does not consent to the communication.

**RPC 224.** Employer's lawyer may not engage in direct communications with the treating physician for an employee with a workers' compensation claim.

**RPC 233.** A deputy attorney general attorney who represents the state on the appeal of a death sentence should send to the defense lawyer a copy of a letter the deputy attorney general received from the defendant.

**RPC 249.** A lawyer may not communicate with a child who is represented by a guardian ad litem and an attorney advocate unless the

lawyer obtains the consent of the attorney advocate.

**97 Formal Ethics Opinion 2.** A lawyer may interview an unrepresented former employee of an adverse represented organization about the subject of the representation unless the former employee participated substantially in the legal representation of the organization in the matter.

**97 Formal Ethics Opinion 10.** A prosecutor may instruct a law enforcement officer to send an undercover officer into the prison cell of a represented criminal defendant to observe the defendant's communications with other inmates in the cell.

## Rule 4.3. Dealing with unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(a) give advice to the person, other than the advice to secure counsel, if the interests of such person are, or have a reasonable possibility of being, in conflict with the interests of the client; and

(b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

### COMMENT

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 4.3 is similar to Model Rule 4.3 and substantially similar to Rule 7.4(2) and (3) of the superseded (1985) Rules of Professional Conduct.

### ETHICS OPINION NOTES

**CPR 121.** If a defendant is not represented, the attorney for the plaintiff in a divorce action may send the defendant a copy of the complaint, and a summons for acceptance of service; but may not send a prepared answer or a consent order.

**CPR 296.** The attorney for the plaintiff in a domestic case may not make available to the defendant a form waiving the right to answer and other rights, nor may he allow his client to provide such a form to the defendant.

**RPC 15.** An attorney may interview a person with adverse interest who is unrepresented and make a demand or propose a settlement.

**RPC 165.** An attorney may provide a confession of judgment to an unrepresented adverse party for execution by that party so long as the lawyer does not undertake to advise the adverse party or feign disinterestedness.

**RPC 189.** The district attorney's staff may not give legal advice about pleas to an unrepresented person charged with a traffic infraction.

**RPC 193.** The attorney for the plaintiffs in a personal injury action arising out of a motor vehicle accident may interview the unrepresented defendant even though the uninsured motorist insurer, which had elected to defend the claim in the name of the defendant, is represented by an attorney in the matter.

**RPC 194.** In a letter to an unrepresented prospective defendant in a personal injury action, the plaintiff 's lawyer may not give legal advice nor may he create the impression that he is concerned about or protecting the interests of the unrepresented prospective defendant.

### Rule 4.4. Respect for rights of third persons.

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

COMMENT

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 4.4 is identical to Model Rule 4.4. Rule 4.4 has no counterpart in the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

**RPC 181.** A lawyer may not seek to disqualify another lawyer from representing the opposing party by instructing a client to consult with the other lawyer about the subject matter of the representation when the client has no intention of retaining the other lawyer.

## LAW FIRMS AND ASSOCIATIONS

### Rule 5.1. Responsibilities of a partner or supervisory lawyer.

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A partner or supervisory lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders the conduct involved; or

(2) the lawyer has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided, but fails to take reasonable action to avoid the consequences.

COMMENT

Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of

another may not assume that the subordinate lawyer will inevitably conform to the Rules.

Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).

Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction or knowledge of the violation.

Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Moreover, this Rule is not intended to establish a standard for vicarious criminal or civil liability for the acts of another lawyer. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 5.1 is substantially similar to Model Rule 5.1. Rule 5.1 has no counterpart in the superseded (1985) Rules of Professional Conduct.

## Rule 5.2. Responsibilities of a subordinate lawyer.

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

### COMMENT

Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 5.2 is identical to Model Rule 5.2. Rule 5.2 has no counterpart in the superseded (1985) Rules of Professional Conduct.

## Rule 5.3. Responsibilities regarding nonlawyer assistants.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders the conduct involved; or

(2) the lawyer has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided but fails to take reasonable action to avoid the consequences.

### COMMENT

Lawyers generally employ nonlawyers in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such nonlawyers, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such nonlawyers appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

A lawyer who discovers that a nonlawyer has wrongfully misappropriated money from the lawyer's trust account must inform the North Carolina State bar pursuant to Rule 1.15-2(l).

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 5.3 is substantially similar to Model Rule 5.3 and Rule 3.3 of the superseded (1985) Rules of Professional Conduct.

### DISCIPLINARY HEARING NOTES

Attorney failed to monitor clients' funds in his trust account which resulted in misappropriation of funds. Attorney's secretary signed attorney's name or her name to trust account checks and the attorney and his secretary received the benefit of the funds. Attorney did not adequately supervise the secretary with respect to handling client funds and with respect to handling attorney's trust and office account records. Disbarred. **94 DHC 4.**

Attorney's legal assistant had control and authority over attorney's trust, office, and personal bank accounts. Legal assistant stole large amount of client money from attorney's trust account and used it for her and attorney's benefit. Attorney did not monitor his trust and office account records. He also did not supervise legal assistant's handling of client funds in trust account. Disbarred. **95 DHC 17.**

### ETHICS OPINION NOTES

**99 Formal Ethics Opinion 6** Opinion examines the ownership of a title insurance agency by lawyers in North and South Carolina as well as the supervision of an independent paralegal.

**CPR 163.** An attorney may use a secretarial agency so long as reasonable care is used to protect confidentiality.

**CPR 182.** A layman may be employed to interview and represent social security claimants if the clients consent after disclosure of the layman's nonprofessional status.

**CPR 253.** A paralegal employed by a law firm may have a business card with the firm's identification.

**CPR 262.** A law firm's office manager may

have a business card with the firm's identification.

**CPR 334.** An attorney's secretary may also work for private investigator. The attorney must take care that client confidences are not compromised.

**RPC 29.** An attorney may not rely upon title information from an abstract firm unless he supervised the nonlawyer who did the work.

**RPC 70.** A legal assistant may communicate and negotiate with a claims adjuster if directly supervised by the attorney for whom he or she works.

**RPC 74.** A firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked if the paralegal is screened from participation in the case.

**RPC 102.** A lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.

**RPC 139.** An attorney, having undertaken to represent adoptive parents, may sign and file adoption petition prepared by social services organization under her direct supervision.

**RPC 152.** District attorney is responsible for plea negotiating practices of lay assistant under her supervision of which she has knowledge.

**RPC 176.** A lawyer who employs a paralegal is not disqualified from representing a party whose interests are adverse to that of a party represented by a lawyer for whom the paralegal previously worked.

**RPC 183.** A lawyer may not permit a legal assistant to examine or represent a witness at a deposition.

**RPC 216.** A lawyer may use the services of a nonlawyer independent contractor to search a title provided the nonlawyer is properly supervised by the lawyer.

**RPC 238.** A lawyer is subject to the Rules of Professional Conduct with respect to the provision of a law-related service, such as financial planning, if the law-related service is provided in circumstances that are not distinct from the lawyer's provision of legal services to clients.

## Rule 5.4. Professional independence of a lawyer.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased or disabled lawyer, or a lawyer who has disappeared may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer or a disbarred lawyer may pay to the estate of the deceased lawyer or to the disbarred lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer or the disbarred lawyer; and

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, engages, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

COMMENT

The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

Although a nonlawyer may serve as a director or officer of a professional corporation organized to practice law if permitted by law, such a nonlawyer director or officer may not have the authority to director control the conduct of the lawyers who practice with the firm.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended effective June 7, 2001.

**Editor's note.** — Rule 5.4 is substantially similar to Model Rule 5.4. Rule 5.4 expands upon the prohibitions in Rule 3.2 of the superseded (1985) Rules of Professional Conduct.

**Legal Periodicals.** — For a comment on ethical and legislative considerations of multidisciplinary practices, see 36 Wake Forest L. Rev. 193 (2001).

ETHICS OPINION NOTES

**CPR 239.** A law firm may set up a profit-sharing plan for firm members and lay employees.

**CPR 289.** It is improper for an attorney to agree to share a legal fee with a paralegal.

**CPR 343.** A succeeding attorney may share fee with a disbarred lawyer for services rendered prior to disbarment.

**RPC 38.** Attorneys in North Carolina may use an attorney placement service which places independent attorneys with other attorneys or firms on a temporary contract basis for a placement fee.

**RPC 104.** Associate attorneys may be leased back to their firms.

**RPC 147.** An attorney may not pay a percentage of fees to a paralegal as a bonus.

**98 Formal Ethics Opinion 17.** Opinion rules that a lawyer may not comply with an insurance carrier's billing requirements and guidelines if they interfere with the lawyer's ability to exercise his or her independent professional judgment in the representation of the insured.

## Rule 5.5. Unauthorized practice of law.

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(c) A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

(d) A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

COMMENT

The definition of the practice of law is established by N.C. Gen. Stat. 84-2.1. Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services

of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

In the absence of statutory prohibitions or specific conditions placed on a disbarred or suspended attorney in the order revoking or suspending the license, such individual may be hired to perform the services of a law clerk or legal assistant by a law firm with which he or she was not affiliated at the time of or after the acts resulting in discipline. Such employment is, however, subject to certain restrictions. A licensed attorney in the firm must take full responsibility for and employ independent judgment in adopting any research, investigative results, briefs, pleadings, or other documents or instruments drafted by such individual. The individual may not directly advise clients or communicate in person or in writing in such a way as to imply that he or she is acting as an attorney or in any way in which he or she seems to assume responsibility for a client's legal matters. The disbarred or suspended attorney should have no communications or dealings with or on behalf of clients represented by such disbarred or suspended attorneys or by any individual or group of individuals with whom he or she practiced during the period on or after the date of the acts which resulted in discipline through and including the effective date of the discipline. Further, the employing attorney or law firm should perform no services for clients represented by the disbarred or suspended attorney during such period. Care should be taken to ensure that clients fully understand that the disbarred or suspended attorney is not acting as an attorney, but merely as a law clerk or lay employee. Under some circumstances, as where the individual may be known to clients or in the community, it may be necessary to make an affirmative statement or disclosure concerning the disbarred or suspended attorney's status with the law firm. Additionally, a disbarred or suspended attorney should be paid on some fixed basis, such as a straight salary or hourly rate, rather than on the basis of fees generated or received in connection with particular matters on which he or she works. Under these circumstances, a law firm employing a disbarred or suspended attorney would not be acting unethically and would not be assisting a nonlawyer in the unauthorized practice of law.

An attorney or law firm should not employ a disbarred or suspended attorney who was associated with such attorney or firm at any time on or after the date of the acts which resulted in the disbarment or suspension through and including the time of the disbarment or suspension. Such employment would show disrespect for the court or body which disbarred or suspended the attorney. Such employment would also be likely to be prejudicial to the administration of justice and would create an appearance of impropriety. It would also be practically impossible for the disciplined lawyer to confine himself or herself to activities not involving the actual practice of law if he or she were employed in his or her former office setting and obliged to deal with the same staff and clientele.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 5.5 is similar to Model Rule 5.5, except that Rule 5.5 contains additional requirements regarding the employment of disbarred lawyers. Rule 5.5 is substantially similar to Rule 3.1 of the superseded (1985) Rules of Professional Conduct.

**Legal Periodicals.** — For note on the unauthorized practice of law by corporations, see 65 N.C.L. Rev. 1422 (1987).

## CASE NOTES

**A licensed attorney who is a full-time employee of an insurance company** may not ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage. Gardner v. North Carolina State Bar, 316 N.C. 285, 341 S.E.2d 517 (1986).

### DISCIPLINARY HEARING NOTES

Among other things, attorney engaged in the unauthorized practice of law when he performed legal work for residents of Florida and Maryland at a time when he was not licensed to practice in Florida or Maryland and was an inactive member of the Delaware Bar. Disbarred. **93 DHC 33.**

### ETHICS OPINION NOTES

**99 Formal Ethics Opinion 6** Opinion examines the ownership of a title insurance agency by lawyers in North and South Carolina as well as the supervision of an independent paralegal.

**CPR 19.** House counsel for an insurance company may not represent an insured in prosecuting a subrogation claim.

**CPR 325.** House counsel of a savings and loan association may not represent a subsidiary of the savings and loan association acting as trustee for a deed of trust in foreclosure.

**CPR 326.** House counsel for an insurance company may not represent the insured in defense of a third party claim or in prosecution of a subrogation claim.

**RPC 9.** House counsel for a mortgage bank which originates loans but has no proprietary interest of its own may not represent borrowers or lenders in closing loans originated by his employer.

**RPC 40.** For the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and the lender may prepare the closing documents. See also RPC 41.

**RPC 114.** Attorneys may give legal advice and drafting assistance to persons wishing to proceed pro se without appearing as counsel of record.

**RPC 139.** A lawyer may not sign an adoption petition prepared by an adoption agency as an accommodation to that agency without undertaking professional responsibility for the adoption proceeding.

**RPC 151.** Although a corporate insurer acting through its employees cannot practice law and appear on behalf of others, a lawyer who is a full-time employee of an insurance company may represent the company in an action where the company is a named party.

**98 Formal Ethics Opinion 7.** Opinion rules that a law firm may employ a disbarred lawyer as a paralegal provided the firm accepts no new clients who were clients of the disbarred lawyer's former firm during the period of misconduct; however, a disbarred lawyer may not work as a paralegal at a firm where he was employed as a lawyer during the period of misconduct.

**98 Formal Ethics Opinion 8.** Opinion rules that a lawyer may not participate in a closing or sign a preliminary title opinion if, after reasonable inquiry, the lawyer believes that the title abstract or opinion was prepared by a nonlawyer without supervision by a licensed North Carolina lawyer.

## Rule 5.6. Restrictions on right to practice.

(a) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer or law firm that restricts the right of a lawyer to practice after termination of the relationship created by the agreement, except as a condition to payment of retirement benefits.

(b) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his or her right to practice law.

### COMMENT

An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy, but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 5.6 is substantially similar to Model Rule 5.6 and Rule 2.7 of the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

**RPC 13.** A retirement agreement may require a lawyer to accept inactive status as a member of the State Bar as a condition of payment of retirement benefits.

**RPC 179.** A lawyer may not offer or enter into a settlement agreement that contains a provision barring the lawyer who represents the settling party from representing other claimants against the opposing party.

# PUBLIC SERVICE

## Rule 6.1. Reserved.

## Rule 6.2. Reserved.

## Rule 6.3. Membership in legal services organization.

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

COMMENT

Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established written policies in this respect can enhance the credibility of such assurances.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 6.3 is identical to Model Rule 6.3. Rule 6.3 has no counterpart in the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

**CPR 68.** An attorney may serve on the board of a legal aid society and represent a client against a party represented by a legal aid lawyer.

## Rule 6.4. Law reform activities affecting client interests.

A lawyer may serve as a director, officer or member of an organization

involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

COMMENT

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 6.4 is identical to Model Rule 6.4. Rule 6.4 has no counterpart in the superseded (1985) Rules of Professional Conduct.

## Rule 6.5. Action as a public official.

A lawyer who holds public office shall not:

(a) use his or her public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or herself, or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(b) use his or her public position to influence, or attempt to influence, a tribunal to act in favor of himself or herself or his or her client; or

(c) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

COMMENT

Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part time, should not engage in activities in which the lawyer's personal or professional interests are or foreseeably may be in conflict with his or her official duties.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 6.5 has no counterpart in the Model Rules. Rule 6.5 is identical to Rule 8.1 of the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

**CPR 177.** An attorney on the county board of health may not represent a client before such board, but he may resign and represent the client if he acquired no relevant confidential information while on the board.

**CPR 189.** An attorney member of the city council with control over the police department may not represent a criminal defendant when a police officer is a prosecuting witness.

**CPR 231.** An attorney-legislator may repre-

sent a criminal defendant when a State highway patrolman is the prosecuting witness.

**CPR 233.** An attorney member of the city council with control over the police department may not represent a criminal defendant when a police officer is a prosecuting witness even if he withdraws from consideration of the budget.

**CPR 263.** An emergency judge may not practice law.

**CPR 290.** An attorney who serves as a member of a county or municipal governing board, or State or federal legislative body, or any entity thereunder, or committee thereof, shall not hear or consider any matter coming before that governing body or entity in which that member or his firm has any direct or indirect interest.

Pursuant to such prohibition, it shall be unethical for that member to attempt to influence in any way, publicly or privately, the actions or decisions of the governing body or entity or its staff with respect to any matter on which his partner or associate is appearing.

If an attorney or his employee serves as a member of a county or municipal governing board, or State or federal legislative body of any entity thereunder, or committee thereof, it shall be unethical for his partner, associate or employer to represent such governing body or entity. (But see: RPC 193.)

It is not unethical as such for an attorney whose spouse or relative is on any county or municipal governing board, or State or federal legislative body, or any entity thereunder, or committee thereof, to appear before or represent that governing body or entity. However, it is unethical for an attorney to use his relationship to a member of any governing board to gain (or retain) employment or obtain favorable decisions.

**CPR 327.** An attorney who serves on per diem basis as a hearing examiner for a public agency may not participate in hearings on behalf of clients before other examiners. His partners and associates may not appear before him, but may appear before other hearing examiners. If the attorney-examiner is appointed to the full board he may not appear before the board under any conditions. His partners should abide by CPR 290.

**CPR 335.** An attorney-magistrate may privately practice law. He may not appear in any criminal case, in any civil case originating in the small claims court in his county, or in any case with which he had any connection as a magistrate.

**CPR 360.** An attorney may counsel a quasi-judicial board and also act as a hearing examiner rendering decisions appealable to the same board during the same time span, but may not act in both capacities in the same case.

**RPC 53.** A lawyer may sue a municipality his partner serves as a member of its governing body. (But see RPC 160.)

**RPC 63.** An attorney may represent the school board while serving as a county commissioner with certain restrictions.

**RPC 73.** Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants where a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

**RPC 95.** An assistant district attorney may prosecute cases while serving on the school board.

**RPC 105.** A public defender may represent criminal defendants while serving on the school board.

**RPC 130.** An attorney may accept employment on behalf of a governing board upon which his or her partner sits if such is otherwise lawful.

**RPC 160.** A lawyer whose associate is a member of a public hospital's board of trustees may not sue the hospital on behalf of a client.

## INFORMATION ABOUT LEGAL SERVICES

### Rule 7.1. Communications concerning a lawyer's services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

COMMENT

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful.The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 7.1 is identical to Model Rule 7.1 and Rule 2.1 of the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

**2000 Formal Ethics Opinion 1** Opinion rules that, in the absence of a full explanation, advertising a lawyer's or a law firm's record in obtaining favorable verdicts is misleading and prohibited.

**CPR 253.** A paralegal employed by a law firm may have a business card with the firm's identification.

**CPR 262.** A law firm's office manager may have a business card with the firm's identification.

**RPC 5.** An attorney holding a Juris Doctor degree may not on that basis refer to himself or herself as a "Doctor".

**RPC 135.** An attorney may not participate in a private lawyer referral service which advertises that its participants are "the best."

**RPC 161.** A television commercial for legal services which fails to mention that bankruptcy is the debt relief described in the commercial and describes results obtained for others is misleading.

**RPC 164.** Television commercials for an attorney's services that depict fictional clients and cases are misleading and prohibited.

**RPC 217.** A local or remote call forwarding telephone number may not be included in an advertisement for legal services disseminated in a community where the law firm has neither an office nor a lawyer present in the community unless an explanation is included in the advertisement.

**RPC 239.** A lawyer may display truthful information about the lawyer's legal services on a World Wide Web site accessed via the Internet.

**RPC 241.** A lawyer may participate in a directory of lawyers on the Internet if the information about the lawyer in the directory is truthful.

**97 Formal Ethics Opinion 6.** The omission of the lawyer's address from a targeted direct mail letter is a material misrepresentation.

## Rule 7.2. Advertising.

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or other written or recorded communication.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) Any communication made pursuant to this rule other than that of a lawyer referral service as described in subsection (e) shall include the name of at least one lawyer or law firm responsible for its content.

(d) A lawyer shall not give anything of value to a person for recommending the lawyers services except that a lawyer may:

(1) pay the reasonable cost of advertisements or communications permitted by this Rule; or

(2) pay for a law practice in accordance with Rule 1.17.

(e) A lawyer may participate in a lawyer referral service subject to the following conditions:

(1) the lawyer is professionally responsible for its operation including the use of a false, deceptive or misleading name by the referral service;

(2) the referral service is not operated for a profit;

(3) the lawyer may pay to the lawyer referral service only a reasonable sum which represents a proportionate share of the referral service's administrative and advertising costs;

(4) the lawyer does not directly or indirectly receive anything of value other than legal fees earned from representation of clients referred by the service;

(5) employees of the referral service do not initiate contact with prospective clients and do not engage in live telephone or in-person solicitation of clients;

(6) the referral service does not collect any sums from clients or potential clients for use of the service; and

(7) all advertisements by the lawyer referral service shall:

(i) state that a list of all participating lawyers will be mailed free of charge to members of the public upon request and state where such information may be obtained; and

(ii) explain the method by which the needs of the prospective client are matched with the qualifications of the recommended lawyer.

**COMMENT**

To assist the public in obtaining legal services, lawyers are permitted to make known their services not only through reputation, but also through organized information campaigns in the form of advertising. Nevertheless, lawyers should be aware that advertising may entail practices that are misleading, overreaching, deceptive, coercive, intimidating, or vexatious.

This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Neither this Rule nor Rule 7.3 prohibits communications authorized bylaw, such as notice to members of a class in class action litigation.

**Record of Advertising**

Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination.

**Paying Others to Recommend a Lawyer**

A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyers services Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Paragraph (d) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this rule.

A lawyer may participate in a lawyer referral service that is not operated for a profit and pay the usual fees charged by such programs. Any lawyer who participates in a referral service is professionally responsible for the operation of the service in accordance with these Rules regardless of the lawyers knowledge, or lack of knowledge, of the activities of the service. The service may not charge potential clients a fee and employees of the service may not engage in

telephone or in-person solicitation of clients. The term "referral" implies that some attempt is made to match the needs of the prospective client with the qualifications of the recommended lawyer. To avoid misrepresentation, paragraph (e)(vii)(B) requires that every advertisement for the service must include an explanation of the method by which a prospective client is matched with the lawyer to whom he or she is referred.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 7.2 is similar to Model Rule 7.2. Unlike the Model Rule, Rule 7.2 includes specific regulations governing participation in a lawyer referral service. Rule 7.2 is substantially similar to Rule 2.2 of the superseded (1985) Rules of Professional Conduct. However, some of the requirements for participation in a lawyer referral service are modified.

**Legal Periodicals.** — For note discussing commercial speech and disciplinary rules preventing attorney advertising and solicitation, see 65 N.C.L. Rev. 170 (1986).

For note discussing the liberalization of attorney commercial speech rights, in light of Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985), see 21 Wake Forest L. Rev. 1019 (1986).

For note on attorney solicitation by targeted, direct-mail advertisements, see 24 Wake Forest L. Rev. 481 (1989).

## DISCIPLINARY HEARING NOTES

Attorney engaged in in-person solicitation by participating in a lawyer referral service whose employees engaged in in-person and live telephone solicitation. Attorney also gave value to a person for recommending his services by paying the referral service $100 for each client referred who he agreed to represent. Reprimand. **93 DHC 13.**

## ETHICS OPINION NOTES

**CPR 14.** A lawyer may not perform title examinations and legal work for a developer for free or for a substantially reduced fee as consideration for the developer's promise to recommend the lawyer to prospective purchasers and their lenders.

**CPR 39.** A lawyer may participate in a call-in radio program and answer legal questions.

**CPR 40.** It is unethical for lawyers to offer free legal services to employees of a savings and loan association to get title work.

**CPR 58.** An attorney may write and publish pamphlets of a legal nature and offer them for sale to the public.

**CPR 116.** An attorney may write legal articles for publication in business journals and be identified.

**CPR 336.** An attorney may advertise that he or she is also in the securities business and the insurance business.

**CPR 359.** Attorneys may share the cost of advertising by means of a private lawyer referral service under certain conditions.

**RPC 10.** Attorney may affiliate with a private lawyer referral service administered by a for-profit business corporation so long as the corporation does not profit from the referrals. (But see Rule 7.2(e)(2).)

**RPC 94.** A private lawyer referral service must have more than one participating lawyer and all participants must share in the cost of operating the referral service. (But see Rule 7.2 (e)(2).)

**RPC 115.** A lawyer may sponsor truthful legal information which is provided by telephone to members of the public.

**RPC 135.** An attorney may not participate in a private lawyer referral service unless all advertisements of the service state that a list of all participating lawyers will be mailed free of charge to members of the public upon request and indicate that the service is not operated or endorsed by any public agency or any disinterested organization. (But see Rule 7.2(e)(2).)

**RPC 161.** A television commercial for legal services which fails to mention that bankruptcy is the debt relief described in the commercial and describes results obtained for others is misleading.

**RPC 239.** A lawyer may display truthful information about the lawyer's legal services on a World Wide Web site accessed via the Internet.

**RPC 241.** A lawyer may participate in a directory of lawyers on the Internet if the information about the lawyer in the directory is truthful.

**Rule 7.3. Direct contact with prospective clients.**

(a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, harassment, compulsion, intimidation, or threats.

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "This is an advertisement for legal services" on the outside envelope and at the beginning of the body of the written communication in print as large or larger than the lawyers or law firm's name and at the beginning and ending of any recorded communication.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan, so long as such contact does not involve coercion, duress, or harassment and is not false, deceptive, or misleading.

COMMENT

There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

The use of general advertising and written and recorded communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person or live telephone conversations between a lawyer to a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior family or professional relationship or where the

lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations.

Even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, harassment, compulsion, intimidation, or threats within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

Paragraph (c) of this Rule requires that all direct mail solicitations of prospective clients must be mailed in an envelope on which the statement "This is an advertisement for legal services" appears. Postcards may not be used for direct mail solicitations. The advertising disclosure statement must also appear at the beginning of the enclosed letter in print at least as large as the print used for the letterhead. The requirement that certain communications be marked "This is an advertisement for legal services" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

Paragraph (d) of this Rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (d) must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 7.3 is essentially the same as Model Rule 7.3 and identical to Rule 2.4 of the superseded (1985) Rules of Professional Conduct.

## CASE NOTES

**U.S. Const., Amend. I prohibits states from categorically prohibiting attorneys from soliciting legal business** for pecuniary gain by sending truthful letters to potential clients known to face particular legal problems. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988).

## DISCIPLINARY HEARING NOTES

Attorney attempted to solicit fee-generating professional employment through in-person contacts with persons who had influence with the potential client in violation of superseded

Rules 1.2(a) and 2.4(a). Six Month Suspension, stayed two years on certain conditions. **96 DHC 3.**

**ETHICS OPINION NOTES**

**CPR 52.** It is proper to notify former clients of changes in the law that could affect their wills.

**CPR 104.** Attorneys may request lenders and title insurance companies to place them on approved lists.

**CPR 191.** It is improper for an attorney to belong to a "Tip Club" in which members agree to refer business to each other.

**CPR 258.** In response to a request, an attorney may submit a bid for legal work to the FHA.

**CPR 352.** It is not improper for an attorney to inform a client with a personal injury claim that the spouse may also have a claim and that the attorney is willing to handle the claim.

**RPC 6.** An attorney may not solicit employment by corporations. (Decided prior to 1989 amendment to Rule 2.4 permitting targeted direct mail advertising.)

**RPC 20.** An attorney may not use an intermediary to arrange meetings between prospective business clients and the attorney for the purpose of soliciting legal business, nor may an attorney make "cold calls" upon prospective business clients.

**RPC 36.** A law firm may hold a seminar concerning automobile accident claims for members of the public who are randomly selected for invitation or who receive invitations through bulk mailing. (Decided prior to 1989 amendment to Rule 2.4 permitting targeted direct mail advertising.)

**RPC 57.** A lawyer may agree to be on a list of attorneys approved to handle all of a lender's title work.

**RPC 71.** An attorney may not accept legal employment by a prepaid legal service plan owned by the attorney's wife or another member of the attorney's immediate family, if the plan will market its services by in-person solicitation.

**RPC 98.** The opinion construes the term "professional relationship" and explores the circumstances under which solicitation of persons or organizations with whom a lawyer has had business and professional dealings is permissible. Targeted print advertising is also discussed.

**RPC 115.** A lawyer may sponsor truthful legal information which is provided by telephone to members of the public.

**RPC 146.** A law firm may invite existing clients to a social function hosted by the law firm prior to a bid letting for contracts and may host a social function for nonclients who attend the bid letting as long as the law firm does not solicit employment from the nonclients.

**RPC 161.** The recorded message which is heard when a television viewer dials a telephone number broadcast during a television advertisement for legal services must include the statement "this is an advertisement for legal services" at the beginning and ending of the recorded message.

**RPC 200.** The lawyers remaining with a firm may contact by phone or in person clients whose legal matters were handled exclusively by a lawyer who has left the firm.

**RPC 242.** A lawyer may send a letter describing his services to the incorporators of a new business provided the words "This is an advertisement for legal services" are included in the communication.

**97 Formal Ethics Opinion 6.** The omission of the lawyer's address from a targeted direct mail letter is a material misrepresentation.

## Rule 7.4. Communication of fields of practice.

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer may not communicate that the lawyer is a certified specialist or certified in a field of practice except as provided in this rule.

(c) A lawyer may communicate that the lawyer is certified as a specialist or certified in a field of practice when the communication states the name of the certifying organization and is not false or misleading, and

(1) the certification is granted by the North Carolina State Bar;

(2) the certification is granted by an organization which has been approved by the North Carolina State Bar; or

(3) the certification is granted by an organization which has been approved by the American Bar Association under procedures and criteria which have

been approved by the American Bar Association and which have been endorsed by the North Carolina State Bar.

COMMENT

The use of the word "specialize" in any of its variant forms connotes to the public a particular expertise often subject to recognition by the state. Indeed, the North Carolina State Bar has instituted programs providing for official certification of specialists in certain areas of practice. Certification procedures imply that an objective entity has recognized a lawyer's higher degree of specialized ability than is suggested by general licensure to practice law. Those objective entities should apply standards of competence, experience and knowledge to insure that a lawyer's recognition as a specialist is meaningful and reliable. To avoid misrepresentation and deception, a lawyer may not communicate that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this Rule. The Rule requires that any representation of specialty may be made only if the certifying organization is the North Carolina State Bar, an organization approved by the North Carolina State Bar, or an organization approved by the American Bar Association under procedures approved by the North Carolina State Bar. To insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization or agency must be included in any communication regarding the certification.

A lawyer may, however, describe his or her practice without using the term "specialize" in any manner which is truthful and not misleading. This rule specifically permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. The lawyer may, for instance, indicate a "concentration" or an "interest" or a "limitation".

Recognition of expertise in patent matters is a matter of long-established policy of the Patent and Trademark Office. A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 7.4 is similar to Model Rule 7.4, except Model Rule 7.4 specifically allows a lawyer to state that he or she is a specialist in patent practice and admiralty law. Rule 7.4 does not allow these or other designations as a specialist unless the lawyer is certified as a specialist by the State Bar or an organization approved by the State Bar or the ABA. Rule 7.4 is similar to Rule 2.5 of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

**U.S. Const., Amend. I prohibits states from categorically prohibiting lawyers from advertising their certification** as specialists by bona fide private organizations. Lesser restrictions are available to eliminate any potential confusion caused by such advertisements. Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990).

ETHICS OPINION NOTES

**RPC 43.** An attorney who is certified as a specialist by the Board of Legal Specialization may so indicate in an advertisement in any way that is not false, deceptive or misleading.

## Rule 7.5. Firm names and letterheads.

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may not be used by a lawyer in private practice if it implies a connection with a government agency or with a public or charitable legal services organization or is false or misleading in

violation of Rule 7.1. Every trade name used by a law firm shall be registered with the North Carolina State Bar, and upon a determination by the council that such name is potentially misleading, a remedial disclaimer or an appropriate identification of the firm's composition or connection may be required. For purposes of this paragraph, the use of the name of a deceased or retired former member of a firm shall not render the firm name a trade name nor shall the use of such designations as "Law Offices of John Doe," "Smith and Associates," "Jones Law Firm," and the like.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) A law firm maintaining offices only in North Carolina may not list any person not licensed to practice law in North Carolina as a lawyer affiliated with the firm unless the listing properly identifies the jurisdiction in which the lawyer is licensed and states that the lawyer is not licensed in North Carolina.

(d) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm, whether or not the lawyer is precluded from practicing law.

(e) Lawyers may state or imply that they practice in a partnership or other professional organization only when that is the fact.

(f) No lawyer may practice in a partnership or other professional organization in which any lawyer not licensed to practice law in North Carolina owns an interest as a partner, shareholder, member or other similar designation unless law offices are maintained in North Carolina and in a state where such other lawyer is licensed and a certificate of registration authorizing said professional relationship is first obtained from the secretary of the North Carolina State Bar.

**COMMENT**

A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." Use of trade names in law practice is acceptable so long as they are not misleading and are otherwise in conformance with the rules and regulations of the State Bar. It may be observed that any firm name including the name of a deceased or retired partner is, strictly speaking, a trade name. The use of such names, as well as such names as "Law Offices of John Doe" and "Smith and Associates," to designate law firms has proven a useful means of identification and are permissible. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm. It is also misleading to use a designation such as "Smith and Associates" for a solo practice. The name of a retired partner may be used in the name of a law firm only if the partner has ceased the practice of law.

It is unlawful for a person trained as an attorney to practice North Carolina law without a North Carolina law license. It is therefore misleading for such a person to be listed in the firm letterhead as having any continuing affiliation with the firm unless the law firm actively maintains a law office in a jurisdiction where the lawyer is licensed. If law offices are maintained in another jurisdiction, the law firm is an interstate law firm and must register with the North Carolina State Bar as required by 27 N.C.A.C. 1E, Section .0200.

This rule does not prohibit the employment by a law firm of a lawyer who is licensed to practice in another jurisdiction, but not in North Carolina, provided the lawyer's practice is limited to areas that do not require a North Carolina law license, such as immigration law, federal tort claims, military law, and the like. The lawyer's name may be included in the firm letterhead, provided all communications by such lawyer on behalf of the firm indicate the jurisdiction in which the lawyer is licensed as well as the fact that the lawyer is not licensed in North Carolina.

Nothing in these rules shall be construed to confer the right to practice North Carolina law upon any lawyer not licensed to practice law in North Carolina.

With regard to paragraph (e), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997; Adopted April 17, 1998.

**Editor's note.** — Rule 7.5 expands upon the restrictions imposed in Model Rule 7.5. Rule 7.5 is essentially the same as Rule 2.3 of the superseded (1985) Rules of Professional Conduct.

### ETHICS OPINION NOTES

**CPR 22.** Where father and son practice as Doe and Doe, son may, upon father's election to a judgeship, identify himself on his letterhead as Richard Doe, attorney at law-successor to Doe & Doe.

**CPR 69.** A lawyer may be a partner in more than one law firm.

**CPR 111.** A law firm which has a member taking temporary leave to work for the State may continue using the absent member's name in the firm name and on its letterhead.

**CPR 117.** A law firm in City X forming a partnership with Attorney in City Y may not use different names in the two cities.

**CPR 197.** It is permissible to cross out a partner's name when he becomes a judge without replacing the stationery on hand.

**CPR 211.** An attorney licensed in both North Carolina and South Carolina who has an office only in South Carolina and a partner licensed only in South Carolina may practice in North Carolina. His firm should use the same name in North Carolina as it uses in South Carolina and its letterhead should show the jurisdictional limitations of its lawyers.

**CPR 213.** A law firm may share offices with a common reception area with an accounting firm as long as separate telephones are maintained.

**CPR 234.** A law firm may operate a legal clinic.

**CPR 238.** An agreement between a North Carolina lawyer and a lawyer licensed in another state to list each other on their letterhead and to refer cases to each other is improper in the absence of a bona fide partnership.

**CPR 248.** The use of A and B as a firm name is improper when Attorney A employs Attorney B as an associate.

**CPR 256.** North Carolina firm may not use the name of an out-of-state firm from which it receives referrals where there is no bona fide interstate partnership.

**CPR 265.** Attorneys who share offices but are not partners may not answer phone as A, B, and C attorneys, but may answer "law offices." If there is a true partnership, partners must use stationery with the firm letterhead.

**CPR 274.** It is possible for attorneys to share offices and still represent conflicting interests if they maintain separate telephones and have different secretaries.

**CPR 307.** An attorney who is also a real estate broker may so indicate on his letterhead. He may operate both businesses from same office.

**CPR 330.** Letterhead of attorneys in realty business may also show the designation, "attorney at law."

**CPR 371.** An attorney who is unlicensed in North Carolina and who limits his practice to federal tax law may not become a partner of law firm nor be listed on the firm's letterhead. He may be employed and paid a salary. (But see Revised Rule 7.5(c).)

**RPC 5.** An attorney holding a Juris Doctor degree may not on that basis hold himself out as "Doctor."

**RPC 25.** It is improper to list an unlicensed attorney on letterhead as "of counsel" or "consulting attorney".

**RPC 31.** A law firm may not list on its letterhead a "corresponding" attorney in another location.

**RPC 34.** An attorney licensed in North Carolina and another state who is semi-retired from a law firm in the other state can be "of counsel" to the North Carolina firm so long as he has a close, though not necessarily daily, association with North Carolina firm.

**RPC 85.** An "of counsel" relationship may exist between lawyers practicing in different towns if the professional relationship is close, regular and personal and the designation is not otherwise false or misleading.

**RPC 126.** Nonlawyers may be listed as such on the letterhead of lawyers.

## MAINTAINING THE INTEGRITY OF THE PROFESSION

### Rule 8.1. Bar admission and disciplinary matters.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful

demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

**COMMENT**

The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and, in any event, may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware. It should also be noted that G.S. Sect. 84-28(b)(3) defines failure to answer a formal inquiry of the North Carolina State Bar as misconduct for which discipline is appropriate.

This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of the North Carolina Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 8.1 is identical to Model Rule 8.1 and Rule 1.1 of the superseded (1985) Rules of Professional Conduct.

**DISCIPLINARY HEARING NOTES**

The attorney was convicted in federal court of conspiracy to willfully misapply for his own use monies, funds and credits of a financial institution with intent to injure and defraud. Two Year Suspension. **80 DHC 1.**

The attorney took the LSAT and exchanged answers with another person to credit the other person with the attorney's high LSAT score. One Year Suspension. **83 DHC 1.**

Among other things, the attorney made false statements to the State Bar's Grievance Committee during a reciprocal disciplinary hearing. Disbarred. **91 DHC 13.**

Attorney failed to respond to the State Bar regarding a grievance filed against him. Sixty Day Suspension, stayed for thirty days. **93 DHC 6.**

Among other things, attorney failed to respond to 12th Judicial District Bar's Grievance Committee regarding four grievances filed against him and misrepresented to committee chairperson that he had responded in two grievances. Five Year Suspension, one year stayed upon certain conditions. **93 DHC 22 and 94 DHC 2.**

Among other things, attorney knowingly made false statements of material fact on his application for admission to the State Bar. Disbarred. **93 DHC 33.**

Assistant U.S. Attorney lied to defense counsel about timing of indictment in criminal case and then denied misconduct to the State Bar Grievance Committee. Reprimand. **96 DHC 9.**

## Rule 8.2. Judges and other adjudicatory officers.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other adjudicatory officer, or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

COMMENT

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. A lawyer should come to the defense of a member of the judiciary who the lawyer knows is being unjustly attacked.

While a lawyer as a citizen has a right to criticize such officials publicly, the lawyer should be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 8.2 is identical to Model Rule 8.2 and substantially similar to Rule 8.2 of the superseded (1985) Rules of Professional Conduct.

## Rule 8.3. Reporting professional misconduct.

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the North Carolina Judicial Standards Commission or other appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) A lawyer who has been disciplined in any state or federal court for a violation of the Rules of Professional Conduct in effect in such state or federal court will inform the secretary of such action in writing no later than 30 days after entry of the order of discipline.

COMMENT

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

Although the North Carolina State Bar is always an appropriate place to report a violation of the Rules of Professional Conduct, the courts of North Carolina have concurrent jurisdiction over the conduct of the lawyers who appear before them. Therefore, a lawyer's duty to report may be satisfied by reporting to the presiding judge the misconduct of any lawyer who is representing a client before the court. The court's authority to impose discipline on a lawyer found to have engaged in misconduct extends beyond the usual sanctions imposed in an order entered pursuant to Rule 11 of the North Carolina Rules of Civil Procedure.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense.

Such a requirement existed in many jurisdictions, but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek treatment through such program. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. For this reason, Rule 1.6(b) includes in the definition of confidential information any information regarding a lawyer or judge seeking assistance received by a lawyer acting as an agent of a lawyers' or judges'; assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court. Because such information is protected from disclosure by Rule 1.6, a lawyer is exempt from the reporting requirements of paragraphs (a) and (b) with respect to such information. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity, for example, conversion of client funds to his or her use.

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**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997; Amended December 30, 1998.

**Editor's note.** — Rule 8.3 is substantially similar to Model Rule 8.3 and Rule 1.3 of the superseded (1985) Rules of Professional Conduct.

## CASE NOTES

**Knowledge of a Clear Violation.** — An allegation that an attorney and a district court judge knew that the plaintiff's attorney failed to perfect an appeal did not support an inference that defendants had "knowledge of a clear violation of DR1-102" which should have been reported to the State Bar, since there are many legitimate reasons why an appeal may not be perfected. Williams v. Council of North Carolina State Bar, 46 N.C. App. 824, 266 S.E.2d 391, cert. denied, 301 N.C. 106 (1980).

## DISCIPLINARY HEARING NOTES

The attorney had unprivileged knowledge that his law partner had misappropriated client funds, but failed to report the misconduct to the Bar or other appropriate authority. Reprimand. **89 DHC 5.**

## ETHICS OPINION NOTES

**CPR 342.** An attorney is not obligated to report violations of the law committed by nonlawyers.

**RPC 17.** An attorney who acquires knowledge of apparent misconduct must report the matter to the State Bar.

**RPC 84.** An attorney may not condition settlement of a civil dispute on an agreement not to report lawyer misconduct.

**RPC 127.** An attorney must report information to the State Bar concerning another attorney's disbursement of conditionally delivered settlement proceeds without satisfying all conditions precedent if the disbursement was made in knowing disregard of such conditions and if such information is not confidential.

**RPC 243.** Opinion analyzes whether conduct "raises a substantial question" as to a lawyer's honesty, trustworthiness, or fitness so as to require reporting to the State Bar.

## Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

### COMMENT

Many kinds of illegal conduct reflect adversely on a lawyer's fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. A lawyers dishonesty, fraud, deceit or misrepresentation is not mitigated by virtue of the fact that the victim may be the lawyer's partners or law firm. A lawyer who steals funds, for instance, is guilty of the most serious disciplinary violation, regardless of whether the victim is the lawyer's employer, partner, law firm, client or a third party.

The purpose of professional discipline for misconduct is not punishment, but to protect the public, the courts and the legal profession. Lawyer discipline affects only the lawyer's license to practice law. It does not result in incarceration. For this reason, to establish a violation of Paragraph (b), the burden of proof is the same as for any other violation of the Rules of Professional Conduct: it must be shown, by clear, cogent and convincing evidence, that the lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Conviction of a crime is conclusive evidence that the lawyer committed a criminal act, although to establish a violation of paragraph (b), it must be shown that the criminal act reflects adversely on the lawyer's honestly, trustworthiness, or fitness as a lawyer. If it is established by clear, cogent, and convincing evidence that a lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, the lawyer may be disciplined for a violation of Paragraph (b) although the lawyer is never prosecuted or is acquitted or pardoned for the underlying criminal act.

A showing of actual prejudice to the administration of justice is not required to establish a violation of Paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. For example, in State Bar v. DuMont, 52 N.C.App. 1, 277 S.E.2d 827 (1981), modified on other grounds, 304 N.C. 627, 286 S.E.2d 89 (1982), the defendant was disciplined for advising a witness to give false testimony in a deposition even though the witness corrected his statement prior to trial. The phrase "conduct prejudicial to the administration of justice" in Paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings. In State Bar v. Jerry Wilson, 82 DHC 1, for example, a lawyer was disciplined for conduct prejudicial to the administration of justice after forging another individual's name to a guarantee agreement, inducing his wife to notarize the forged agreement, and using the agreement to obtain funds.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 8.4 is similar to Model Rule 8.4 and Rule 1.2 of the superseded (1985) Rules of Professional Conduct, except that Rule 8.4 defines as misconduct an activity that intentionally prejudices or damages a client during the course of a professional relationship. Neither the Model Rules nor the superseded (1985) Rules contain this provision.

## CASE NOTES

**Concealment of Material Facts.** — Intentionally encouraging the concealment of material facts relevant to the identity of the driver in a driving under the influence prosecution is prejudicial to the administration of justice. Such conduct raises serious doubts as to the attorney's desire to bring about a just result in such a prosecution and adversely reflects on the attorney's fitness to practice law. North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

**Misrepresentation as to Opposing Party's Whereabouts.** — An attorney clearly engaged in conduct which involved fraud, dishonesty, deceit and misrepresentation when, in a divorce action, she failed to inform the court of a letter which contained the opposing party's return address, while at the same time presenting to the court an affidavit she had drafted in which her client swore that her husband's whereabouts were unknown and could not with due diligence be ascertained. North Carolina State Bar v. Wilson, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

**Conversion of Client's Check.** — An attorney's act of forging a client's endorsement on an insurance check received by the attorney and converting the check to personal use constituted conduct involving moral turpitude. North Carolina State Bar v. Whitted, 82 N.C. App. 531, 347 S.E.2d 60 (1986), aff'd, 319 N.C. 398, 354 S.E.2d 501 (1987).

**Letter to Attorney Representing Former Clients.** — Findings by Disciplinary Hearing Commission did not support the Commission's conclusion that the defendant-attorney had engaged in conduct prejudicial to the administration of justice by writing a letter to the attorney representing the defendant-attorney's former clients where the Commission's order did not state whether the letter constituted a threat, the nature of the threat, if any, and how the conduct was prejudicial to the administration of justice. North Carolina State Bar v. Beaman, 100 N.C. App. 677, 398 S.E.2d 68 (1990).

**Misappropriation of Funds.** — The attorney misappropriated client funds in violation of Rule 1.2(B) of the Rules of Professional Conduct. It was no defense that the attorney intended at all times to return the funds and in fact did so. Evidence sufficient to support a charge of embezzlement also constitutes conduct involving dishonesty in violation of Rule 1.2(C) of the Rules of Professional Conduct. North Carolina State Bar v. Mulligan, 101 N.C. App. 524, 400 S.E.2d 123 (1991).

**Lending Money to Clients.** — The State Bar's hearing committee's finding adequately supported its conclusion that the defendant violated Rules 2.1 and 5.3(B) of Professional Responsibility where the undisputed facts were that: (1) the defendant kept $ 20,000.00 in his trust account for several years which came from his brother's company, and (2) he loaned this money to three clients to pay for one client's surgery; another client's rent and payments on a car note; and a third client's surgical, medical and travel expenses. North Carolina State Bar v. Harris, 137 N.C. App. 207, 527 S.E.2d 728 (2000).

**Conviction of Crime.** — Conviction of a crime is not a necessary element in a disciplinary proceeding. North Carolina State Bar v. Rush, 121 N.C. App. 488, 466 S.E.2d 340 (1996).

**Cited** in North Carolina State Bar v. Nelson, 107 N.C. App. 543, 421 S.E.2d 163 (1992).

## DISCIPLINARY HEARING NOTES

Defense attorney engaged in conduct prejudicial to the administration of justice by facilitating entry of judgment of careless and reckless driving in back hall of courthouse for client who was charged only with driving while impaired. 3 year suspension, all but 180 days stayed. **99 DHC 19.**

The attorney used false statements in reports to banks to influence them to grant him loans. Two Year Suspension. **77 DHC 9.**

The attorney was convicted of conspiracy to manufacture, distribute and possess amphetamines. Disbarred. **77 DHC 11.**

The attorney was found guilty of receiving stolen goods. Disbarred. **78 DHC 4.**

The attorney pled guilty to the crime of embracery arising from an illegal contact with a juror in a pending case. Three Year Suspension. **78 DHC 5.**

The attorney was convicted in federal court of conspiracy willfully to misapply for his own use monies, funds and credits of a financial institu-

tion with intent to injure and defraud. Two Year Suspension. **80 DHC 1.**

The attorney agreed to undertake the task of obtaining access to his client's landlocked real property. The attorney failed to initiate any legal action on behalf of his client but delivered to the client a document which purported to be an Order of the Superior Court dismissing a petition for a cartway. The document, purportedly signed by a judge, and bearing the seal and signature of an assistant clerk, was totally fraudulent. One Year Suspension. **81 DHC 1.**

Among other things, the attorney knowingly used perjured testimony in an attempt to receive a set-off for federal estate taxes due and perpetrated a fraud upon a Florida court by false testimony. Disbarred. **81 DHC 2.**

The attorney signed someone else's name to a guaranty agreement and falsely represented that the signature was authentic to obtain funds for his personal benefit. The attorney also instructed his wife, whose notary certificate had been revoked, to falsely witness and represent the signature to induce a bank to make funds available to the attorney. One Year Suspension. **82 DHC 1.**

The attorney failed to file an appeal on his client's behalf and later, in a letter to the State Bar concerning the matter, made false statements concerning the trial and his neglect in failing to file the record on appeal. Ninety Day Suspension. **82 DHC 3.**

The attorney failed to perfect an appeal for his client and instead filed a paper writing which purported to dismiss his client's appeal without the client's knowledge or consent and against the client's well-known wishes. Public Censure. **82 DHC 12.**

The attorney took the LSAT and exchanged answers with another person to credit the other person with the attorney's high LSAT score. One Year Suspension. **83 DHC 1.**

The attorney endorsed a client's medical payment draft without the client's authorization, knowledge or consent, deposited the funds in his personal account and converted the funds. Disbarred. **84 DHC 4.**

The attorney, while involved in a series of real estate transactions which required the defendant to deposit funds in a trust account, allowed the trust account balance to fall below the amount necessary to preserve the identity of his client's funds. The attorney used funds of one client to satisfy the obligations of another client and used clients' trust funds to satisfy his personal obligations. Disbarred. **84 DHC 5.**

The attorney was appointed by the court to represent an indigent criminal defendant. After the case was concluded, he sought and accepted payment from the State without disclosing to the court that he had been previously paid by the client's father. Public Censure. **84 DHC 8.**

Through a bank error, the attorney was left with $14,000 in his trust account following a loan closing. The attorney made no attempt to correct the error and used $10,660 for personal obligations. After realizing the seriousness of his actions, attorney took out a personal loan and repaid the funds to the rightful owner. One Year Suspension. **84 DHC 11.**

The attorney was convicted of conspiracy to conduct his judgeship through a pattern of racketeering activity by accepting bribes, and of facilitating an interstate phone call with the intent to carry on the unlawful activity of gambling. Disbarred. **85 DHC 4.**

The attorney attempted to coerce a favorable settlement in a civil case by threatening to expose the adverse party's alleged criminal conduct in an unrelated matter. Public Censure. **86 DHC 6.**

The attorney attempted to induce a witness who had testified against the attorney in a prior disciplinary hearing to sign a false statement recanting his testimony in the prior hearing. Disbarred. **89 DHC 15.**

The attorney prepared a codicil to her father's will when she knew or should have known that he lacked mental capacity to execute the codicil, thereby engaging in conduct prejudicial to the administration of justice and which adversely reflected upon her fitness to practice law, in violation of former DR1-102(A)(5) and DR1-102(A)(6). Public Reprimand. **89 DHC 21.**

The attorney advised a defendant in a drug case, who was already represented by another attorney, that if the defendant hired him, the defendant would serve no active time. The attorney suggested that he could bring about the deal owing to his friendship with the trial judge and an SBI official. The attorney also attempted ex parte communications with the judge about his client's sentencing and asked a law enforcement officer to state falsely that the defendant had rendered substantial assistance to the sheriff's department. Disbarred. **89 DHC 30.**

The attorney asked another attorney to sign a title opinion and other closing documents indicating that a prior loan owed by the first attorney would be paid off, then failed to pay off the loan. The attorney also obtained credit at a bank based upon a deposit of a $10,000 check which the attorney knew or should have known was worthless. Two Year Suspension, stayed for three years on certain conditions, including restitution to banks. **90 DHC 20.**

The attorney misappropriated funds belonging to an estate. Although the embezzlement was motivated in part by the attorney's addiction to cocaine, the attorney's drug use did not prevent him from recognizing the nature of his conduct and therefore did not mitigate his misconduct. Disbarred. **90 DHC 21.**

The attorney had two clients sign deeds,

rather than a deed of trust, to secure fees owed to him by the clients. One Year Suspension, stayed one year upon certain conditions. **89 DHC 23.**

The attorney made false statements to the State Bar's Grievance Committee during a reciprocal disciplinary hearing, lied to the State Bar's investigator regarding those false statements, and was untruthful during the disciplinary hearing. Disbarred. **91 DHC 13.**

Among other things, the attorney made false statements to the State Bar's Grievance Committee during a reciprocal disciplinary hearing. Disbarred. **91 DHC 13.**

The attorney charged an illegal rate of interest on a loan and lied to the debtor's attorney regarding balances owed on the loan. Two Year Suspension. **91 DHC 20.**

Among other things, the attorney failed to file income tax returns between 1985 and 1987. Five Year Suspension, stayed on certain conditions. **91 DHC 22.**

The attorney failed to file state income tax returns in 1988 and 1989. Five Year Suspension, stayed on certain conditions. **91 DHC 23.**

The attorney misrepresented to an administrative law judge and a state agency that he had been advised by the former chief administrative law judge to take certain actions on behalf of his client when, in fact, the attorney had not discussed that client's case with the former judge. Censure. **92 DHC 3.**

Among other things, the attorney submitted false information on a fee petition in two social security cases. One Year Suspension, stayed on certain conditions. **92 DHC 5.**

The attorney represented the seller in commercial real estate transaction while he was also general partner of the buyer. The attorney also improperly directed a $165,000 credit to the buyer and a corresponding debit to the seller at the closing of the transaction without the seller's consent and paid himself $150,000 in attorneys' fees from funds held in escrow, in violation of the escrow agreement. Three-Year Suspension. **92 DHC 16.**

An assistant district attorney engaged in conduct prejudicial to the administration of justice by failing to reveal certain aspects of a plea agreement to the court. Admonition. **92 DHC 18.**

The attorney improperly retained interest earned on client funds and also retained at least $4,671.23 in overpayments on title insurance premiums collected from various clients. Three-Year Suspension, stayed 30 months. **92 DHC 19.**

Attorney failed to respond to the State Bar regarding a grievance filed against him. Sixty Day Suspension, stayed for thirty days. **93 DHC 6.**

Attorney wrote checks to himself totalling $13,000 from an estate for commissions without approval of the clerk and without performing the normal duties of a personal representative. Disbarred. **93 DHC 2.**

Among other things, attorney falsely indicated on clients' ledger cards that monies had been received and fees paid on their behalf. One Year Suspension, stayed for three years upon certain conditions. **93 DHC 20.**

Among other things, attorney failed to respond to 12th Judicial District Bar's Grievance Committee regarding four grievances filed against him and misrepresented to committee chairperson that he had responded in two grievances. Five Year Suspension, one year stayed upon certain conditions. **93 DHC 22 and 94 DHC 2.**

Attorney forged two attorneys' names to title opinions, temporarily misappropriated client funds, misappropriated fees belonging to her former law firm, made material misrepresentations on a resume given to her former law firm, and attempted to persuade a witness to change prior truthful statements the witness had given the State Bar. Disbarred. **93 DHC 29.**

Attorney engaged in a check writing scheme involving writing checks from his trust account, business account, and personal account to cover worthless checks and removed funds from his trust account without the client's consent. Three Year Suspension, stayed 33 months upon certain conditions. **93 DHC 31.**

Among other things, attorney knowingly made false statements of material fact on his application for admission to the State Bar. Disbarred. **93 DHC 33.**

Attorney engaged in unwanted touching of client. Three-year suspension, six months active and thirty months stayed upon certain conditions. **94 DHC 1.**

Attorney made unwanted sexual advances to several female clients and thereby engaged in conflicts of interest and conduct prejudicial to the administration of justice. Disbarred. **95 DHC 13.**

Attorney attempted to solicit fee-generating professional employment through in-person contacts with persons who had influence with the potential client in violation of superseded Rules 1.2(a) and 2.4(a). Six Month Suspension, stayed two years on certain conditions. **96 DHC 3.**

Assistant U.S. Attorney lied to defense counsel about timing of indictment in criminal case and then denied misconduct to the State Bar Grievance Committee. Reprimand. **96 DHC 9.**

Attorney told client that attorney could use influence with prosecutor to get murder charge pending against client dismissed on payment of $10,000 fee, concealing fact that District Attorney had already decided to dismiss charge for lack of evidence. After client discovered deception and demanded return of fee, attorney threatened to reveal confidential communica-

tions of client. Attorney engaged in criminal and fraudulent conduct, implied ability to influence government official and collected excessive fee. Disbarred. **97 DHC 12.**

## ETHICS OPINION NOTES

**98 Formal Ethics Opinion 19** Opinion provides guidelines for a lawyer representing a client with a civil claim that also constitutes a crime.

**99 Formal Ethics Opinion 2** — Opinion rules that a defense lawyer may suggest that the records custodian of plaintiff's medical record deliver the medical record to the lawyer's office in lieu of an appearance at a noticed deposition provided the plaintiff's lawyer consents.

**CPR 110.** An attorney may not advise a client to seek Dominican divorce knowing that the client will return immediately to North Carolina and continue residence.

**CPR 168.** An attorney may file personal bankruptcy.

**CPR 188.** An attorney may not draw deeds or other legal instruments based on land surveys made by unregistered land surveyors.

**CPR 342.** An attorney should not close a loan where the transaction is conditioned by the lender upon the placement of title insurance with a particular company.

**CPR 369.** An attorney may close a loan if the lender merely suggests rather than requires the placement of title insurance with a particular company.

**RPC 127.** An attorney may not deliberately release settlement proceeds which were conditionally delivered without satisfying all conditions precedent.

**RPC 136.** An attorney may notarize documents which are to be used in legal proceedings in which the attorney appears.

**RPC 143.** A lawyer who represents or has represented a member of the city council may represent another client before the council provided the lawyer does not attempt improperly to influence the council.

**RPC 152.** The prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions when the plea is entered in open court.

**RPC 159.** An attorney may not participate in the resolution of a civil dispute involving allegations against a psychotherapist of sexual involvement with a patient if the settlement is conditioned upon the agreement of the complaining party not to report the misconduct to the appropriate licensing board.

**RPC 162 (Third Revision).** A lawyer may not communicate with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents.

**RPC 171.** A lawyer may tape record a conversation with an opposing lawyer without disclosure to the opposing lawyer.

**RPC 180.** A lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents to the communication.

**RPC 192.** A lawyer may not listen to an illegal tape recording made by his client nor may he use the information on the illegal tape recording to advance his client's case.

**RPC 197.** A prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

**RPC 204.** It is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

**RPC 221.** Absent a court order or law requiring delivery of physical evidence of a crime to the authorities, a lawyer for a criminal defendant may take possession of evidence that is not contraband to examine, test, or inspect the evidence. The lawyer must return inculpatory physical evidence that is not contraband to the source and advise the source of the legal consequences pertaining to the possession or destruction of the evidence.

**RPC 236.** A lawyer may not issue a subpoena containing misrepresentations as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.

**RPC 243.** It is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.

**98 Formal Ethics Opinion 2.** Opinion rules that a lawyer may explain the effect of service of process to a client but may not advise a client to evade service of process.

## Rule 8.5. Disciplinary authority; Choice of law.

(a) *Disciplinary Authority.* A lawyer admitted to practice in North Carolina is subject to the disciplinary authority of North Carolina, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both North Carolina and another jurisdiction where the lawyer is admitted for the same conduct.

(b) *Choice of Law.* In any exercise of the disciplinary authority of North Carolina, the Rules of Professional Conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct:

(i) if the lawyer is licensed to practice only in North Carolina, the rules to be applied shall be the rules of North Carolina, and

(ii) if the lawyer is licensed to practice in North Carolina and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

### COMMENT

**Disciplinary Authority**

Paragraph (a) restates long-standing law.

**Choice of Law**

A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in North Carolina and one or more other jurisdictions with differing rules, or may be admitted to practice before a particular court with rules that differ from those of North Carolina or other jurisdictions in which the lawyer is licensed to practice. In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.

Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of an attorney shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

Paragraph (b) provides that as to a lawyer's conduct relating to a proceeding in a court before which the lawyer is admitted to practice (either generally or pro hac vice), the lawyer shall be subject only to the rules of professional conduct of that court. As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in North Carolina shall be subject to the Rules of Professional Conduct of the North Carolina State Bar, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

If North Carolina and another admitting jurisdiction were to proceed against a lawyer for the same conduct, the two jurisdictions should, applying this rule, identify the same governing ethics rules.

The choice of law provision is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.

**History Note:** Statutory Authority G.S. 84-23; Adopted July 24, 1997.

**Editor's note.** — Rule 8.5 is identical to Model Rule 8.5. Rule 8.5 has no counterpart in the superseded (1985) Rules of Professional Conduct.

# Correlation Table 1: Revised Rules of Professional Conduct to 1985 Superseded Rules of Professional Conduct

| Revised Rules | Superseded Rules |
|---|---|
| Rule 1.1 | Rule 6(a) |
| Rule 1.2(a)(1) | Rule 7.1(c)(1) |
| Rule 1.2(a)(2) | Rule 7.1(a)(1) |
| Rule 1.2(a)(3) | Rule 7.1(b)(1) |
| Rule 1.2(b) | none |
| Rule 1.2(c) | Rule 7.1(b)(3) |
| Rule 1.2(d) | Rule 7.1(a)(4) |
| Rule 1.2(e) | Rule 7.1(c)(2) |
| Rule 1.3 | Rule 6(b)(3) |
| Rule 1.4 | Rule 6(b)(1)-(2) |
| Rule 1.5(a)-(b) | Rule 2.6(a)-(b) |
| Rule 1.5(c) | none |
| Rule 1.5(d)-(f) | Rule 2.6(c)-(e) |
| Rule 1.6(a)-(b) | Rule 4(a) |
| Rule 1.6(c) | Rule 4(b) |
| Rule 1.6(d)(1)-(4) | Rule 4(c)(1)-(4) |
| Rule 1.6(d)(5) | none |
| Rule 1.6(d)(6)-(7) | Rule 4(c)(5)-(6) |
| Rule 1.7 | Rule 5.1(a)-(c) |
| Rule 1.8(a) | Rule 5.4(a) |
| Rule 1.8(b) | Rule 5.4(c) |
| Rule 1.8(c) | Rule 5.5 |
| Rule 1.8(d) | Rule 5.4(b) |
| Rule 1.8(e) | Rule 5.3(b) |
| Rule 1.8(f) | Rule 5.6 |
| Rule 1.8(g) | Rule 5.7 |
| Rule 1.8(h) | Rule 5.8 |
| Rule 1.8(i) | Rule 5.9 |
| Rule 1.8(j) | Rule 5.3(a) |
| Rule 1.9(a) | Rule 5.1(d) |
| Rule 1.9(b) | Rule 5.11(b) |
| Rule 1.9(c) | none |
| Rule 1.10(a) | Rule 5.11(a) |
| Rule 1.10(b)-(c) | Rule 5.11(c)-(d) |
| Rule 1.11 | Rule 9.1 |
| Rule 1.12 | Rule 9.2 |
| Rule 1.13(a) | Rule 5.10 |
| Rule 1.13(b)-(e) | none |
| Rule 1.14 | none |
| Rule 1.15-1 | Rule 10.1 |
| Rule 1.15-2 | Rule 10.2 |
| Rule 1.15-3 | Rule 10.3 |
| Rule 1.16(a)(1) | Rule 2.8(b)(2) |
| Rule 1.16(a)(2) | Rule 2.8(b)(1) |
| | Rule 1.16(a)(3)-(4) |

| Revised Rules | Superseded Rules |
|---|---|
| Rule 1.16(b)(1) | Rule 2.8(b)(3)-(4) |
| Rule 1.16(b)(2) | Rule 2.8(c)(5) |
| Rule 1.16(b)(3) | Rule 2.8(c)(1)(G); (c)(1)(B) |
| Rule 1.16(b)(4) | Rule 2.8(c)(1)(E) |
| Rule 1.16(b)(5) | Rule 2.8(c)(1)(F) |
| Rule 1.16(b)(6) | Rule 2.8(c)(1)(D) |
| Rule 1.16(b)(7) | Rule 2.8(c)(1)(A) |
| Rule 1.16(c)-(d) | Rule 2.8(c)(6) |
| Rule 1.17 | Rule 2.8(a)(1)-(3) |
| Rule 1.18 | none |
| Rule 2.1 | none |
| Rule 2.2 | none |
| Rule 2.3 | none |
| Rule 3.1 | none |
| Rule 3.2 | Rule 7.2(a)(1)-(2) |
| Rule 3.3(a)(1) | none |
| Rule 3.3(a)(2) | Rule 7.2(a)(4) |
| Rule 3.3(a)(3) | *See* Rule 7.2(a)(8) |
| Rule 3.3(a)(4) | Rule 7.6(b)(1) |
| Rule 3.3(b)-(d) | Rule 7.2(a)(5)-(6); *see also* Rule 7.2(b) |
| Rule 3.4(a) | none |
| Rule 3.4(b) | Rule 7.2(a)(7) |
| Rule 3.4(c) | Rule 7.9(a)-(c) |
| Rule 3.4(d) | Rule 7.6(a) |
| Rule 3.4(e) | none |
| Rule 3.4(f) | Rule 7.6(c)(1)-(4) |
| Rule 3.5(a)(1) | Rule 7.9(d) |
| Rule 3.5(a)(2) | *See* Rule 7.10(a); Rule 7.8 |
| Rule 3.5(a)(3) | Rule 7.8(a)-(b) |
| Rule 3.5(a)(4) | Rule 7.10(b) |
| Rule 3.5(a)(5) | Rule 7.6(c)(5)-(8) |
| Rule 3.5(b)-(c) | Rule 7.8(d) |
| Rule 3.6 | Rule 7.8(f)-(g) |
| Rule 3.7(a) | Rule 7.7 |
| Rule 3.7(b) | Rule 5.2(a) |
| Rule 3.8(a)-(e) | none |
| Rule 3.8(f)-(g) | Rule 7.3 |
| Rule 4.1 | none |
| Rule 4.2(a) | none |
| Rule 4.2(b) | Rule 7.4(1) |
| Rule 4.3 | none |
| Rule 4.4 | Rule 7.4(2)-(3) |
| Rule 5.1 | none |
| Rule 5.2 | none |
| Rule 5.3 | none |
| Rule 5.4(a)(1) | Rule 3.3 |
| Rule 5.4(a)(2) | Rule 3.2(a) |
| Rule 5.4(a)(3)-(4) | none |
| Rule 5.4(b)-(d) | Rule 3.2(b)-(c) |
| | none |

| Revised Rules | Superseded Rules |
|---|---|
| Rule 5.5(a) | Rule 3.1(b) |
| Rule 5.5(b) | Rule 3.1(a) |
| Rule 5.5(c)-(d) | Rule 3.1(c)-(d) |
| Rule 5.6 | Rule 2.7 |
| Rule 6.1 Reserved | |
| Rule 6.2 Reserved | |
| Rule 6.3 | none |
| Rule 6.4 | none |
| Rule 6.5 | Rule 8.1 |
| Rule 7.1 | Rule 2.1 |
| Rule 7.2(a)-(b) | Rule 2.2(a)-(b) |
| Rule 7.2(c) | Rule 2.2(e) |
| Rule 7.2(d)(1) | Rule 2.2(c) |
| Rule 7.2(d)(2) | none |
| Rule 7.2(e)(1) | Rule 2.2(d) |
| Rule 7.2(e)(2) | Rule 2.2(c)(3) |
| Rule 7.2(e)(3) | Rule 2.2(c)(1)-(2) |
| Rule 7.2(e)(4) | *See* Rule 2.2(c)(3) |
| Rule 7.2(e)(5) | Rule 2.2(c)(4) |
| Rule 7.2(e)(6) | none |
| Rule 7.2(e)(7)(i) | Rule 2.2(c)(5)(B) |
| Rule 7.2(e)(7)(ii) | none |
| Rule 7.3 | Rule 2.4 |
| Rule 7.4(a) | none |
| Rule 7.4(b)-(c) | Rule 2.5(a)-(b) |
| Rule 7.5 | Rule 2.3 |
| Rule 8.1 | Rule 1.1 |
| Rule 8.2 | Rule 8.2 |
| Rule 8.3 | Rule 1.3 |
| Rule 8.4(a)-(f) | Rule 1.2 |
| Rule 8.4(g) | none |
| Rule 8.5 | none |

## Correlation Table 2: 1985 Superseded Rules of Professional Conduct to Revised Rules of Professional Conduct

| Superseded Rules | Revised Rules |
|---|---|
| Rule 1.1 | Rule 8.1 |
| Rule 1.2 | Rule 8.4(a)-(f) |
| Rule 1.3 | Rule 8.3 |
| Rule 2.1 | Rule 7.1 |
| Rule 2.2(a)-(b) | Rule 7.2(a)-(b) |
| Rule 2.2(c) | Rule 7.2(d)(1) |
| Rule 2.2(c)(1) | Rule 7.2(e)(3) |
| Rule 2.2(c)(2) | Rule 7.2(e)(3) |
| Rule 2.2(c)(3) | Rule 7.2(e)(2); *see* Rule 7.2(e)(4) |
| Rule 2.2(c)(4) | Rule 7.2(e)(5) |
| Rule 2.2(c)(5)(A) | none |
| Rule 2.2(c)(5)(B) | Rule 7.2(e)(7)(i) |
| Rule 2.2(c)(5)(C) | none |
| Rule 2.2(d) | Rule 7.2(e)(1) |
| Rule 2.2(e) | Rule 7.2(c) |
| Rule 2.3 | Rule 7.5 |
| Rule 2.4 | Rule 7.3 |
| Rule 2.5(a) | Rule 7.4(b) |
| Rule 2.5(b)(1)-(3) | Rule 7.4(c)(1)-(3) |
| Rule 2.6(a)-(b) | Rule 1.5(a)-(b) |
| Rule 2.6(c) | Rule 1.5(d)(1)-(2) |
| Rule 2.6(d)-(e) | Rule 1.5(e)-(f) |
| Rule 2.7 | Rule 5.6 |
| Rule 2.8(a)(1) | Rule 1.16(c) |
| Rule 2.8(a)(2)-(3) | Rule 1.16(d) |
| Rule 2.8(b)(1) | Rule 1.16(a)(2) |
| Rule 2.8(b)(2) | Rule 1.16(a)(1) |
| Rule 2.8(b)(3)-(4) | Rule 1.16(a)(3)-(4) |
| Rule 2.8(c)(1)(A) | Rule 1.16(b)(6) |
| Rule 2.8(c)(1)(B) | Rule 1.16(b)(2) |
| Rule 2.8(c)(1)(C) | Rule 1.16(b)(3) |
| Rule 2.8(c)(1)(D) | Rule 1.16(b)(5) |
| Rule 2.8(c)(1)(E) | Rule 1.16(b)(3) |
| Rule 2.8(c)(1)(F) | Rule 1.16(b)(4) |
| Rule 2.8(c)(1)(G) | Rule 1.16(b)(2) |
| Rule 2.8(c)(2)-(4) | none |
| Rule 2.8(c)(5) | Rule 1.16(b)(1) |
| Rule 2.8(c)(6) | Rule 1.16(b)(7) |
| Rule 3.1(a) | Rule 5.5(b) |
| Rule 3.1(b) | Rule 5.5(a) |
| Rule 3.1(c)-(d) | Rule 5.5(c)-(d) |
| Rule 3.2(a) | Rule 5.4(a)(1) |
| Rule 3.2(b) | Rule 5.4(a)(3) |
| Rule 3.2(c) | Rule 5.4(a)(4) |
| Rule 3.3 | Rule 5.3 |

| Superseded Rules | Revised Rules |
|---|---|
| Rule 4(a) | Rule 1.6(a)-(b) |
| Rule 4(b)(1)-(3) | Rule 1.6(c)(1)-(3) |
| Rule 4(c)(1)-(4) | Rule 1.6(d)(1)-(4) |
| Rule 4(c)(5)-(6) | Rule 1.6(d)(6)-(7) |
| Rule 5.1(a)-(c) | Rule 1.7 |
| Rule 5.1(d) | Rule 1.9(a) |
| Rule 5.2(a) | Rule 3.7(a) |
| Rule 5.2(b)-(c) | none |
| Rule 5.3(a) | Rule 1.8(j) |
| Rule 5.3(b) | Rule 1.8(e) |
| Rule 5.4(a) | Rule 1.8(a) |
| Rule 5.4(b) | Rule 1.8(d) |
| Rule 5.4(c) | Rule 1.8(b) |
| Rule 5.5 | Rule 1.8(c) |
| Rule 5.6 | Rule 1.8(f) |
| Rule 5.7 | Rule 1.8(g) |
| Rule 5.8 | Rule 1.8(h) |
| Rule 5.9 | Rule 1.8(i) |
| Rule 5.10 | Rule 1.13(a) |
| Rule 5.11(a) | Rule 1.10(a) |
| Rule 5.11(b) | Rule 1.9(b) |
| Rule 5.11(c) | Rule 1.10(b) |
| Rule 5.11(d) | Rule 1.10(c) |
| Rule 6(a)(1)-(2) | Rule 1.1(a)-(b) |
| Rule 6(b)(1) | Rule 1.4(a) |
| Rule 6(b)(2) | Rule 1.4(b) |
| Rule 6(b)(3) | Rule 1.3 |
| Rule 7.1(a)(1) | Rule 1.2(a) |
| Rule 7.1(a)(2)-(3) | none |
| Rule 7.1(a)(4) | Rule 1.2(d) |
| Rule 7.1(b)(1) | Rule 1.2(a)(3) |
| Rule 7.1(b)(2) | none |
| Rule 7.1(b)(3) | Rule 1.2(c) |
| Rule 7.1(c)(1) | Rule 1.2(a)(1) |
| Rule 7.1(c)(2) | Rule 1.2(e) |
| Rule 7.2(a)(1)-(2) | Rule 3.1; *see* Rule 1.16(a)(2) |
| Rule 7.2(a)(3) | none |
| Rule 7.2(a)(4) | Rule 3.3(a)(1) |
| Rule 7.2(a)(5) | Rule 3.3(a)(4) |
| Rule 7.2(a)(6) | Rule 3.3(a)(4) |
| Rule 7.2(a)(7) | Rule 3.4(a) |
| Rule 7.2(a)(8)-(9) | *See* Rule 3.3(a)(2) |
| Rule 7.2(b) | Rule 3.3(a)(4) |
| Rule 7.3 | Rule 3.8(a)-(e) |
| Rule 7.4(1) | Rule 4.2(a) |
| Rule 7.4(2)-(3) | Rule 4.3(1)-(2) |
| Rule 7.5 | none |
| Rule 7.6(a) | Rule 3.4(c) |
| Rule 7.6(b)(1) | Rule 3.3(a)(3) |
| Rule 7.6(b)(2) | none |

| **Superseded Rules** | **Revised Rules** |
|---|---|
| Rule 7.6(c)(1)-(4) | Rule 3.4(e) |
| Rule 7.6(c)(5) | Rule 3.5(a)(4)(i) |
| Rule 7.6(c)(6) | Rule 3.5(a)(4)(ii) |
| Rule 7.6(c)(7) | Rule 3.5(a)(4)(iii) |
| Rule 7.6(c)(8) | Rule 3.5(a)(4) |
| Rule 7.7 | Rule 3.6 |
| Rule 7.8(a)-(b) | Rule 3.5(a)(2) |
| Rule 7.8(c) | none |
| Rule 7.8(d) | Rule 3.5(a)(5) |
| Rule 7.8(e) | none |
| Rule 7.8(f) | Rule 3.5(b) |
| Rule 7.8(g) | Rule 3.5(c) |
| Rule 7.9(a)-(c) | Rule 3.4(b) |
| Rule 7.9(d) | Rule 3.4(f) |
| Rule 7.10(a) | *See* Rule 3.5(a)(1) |
| Rule 7.10(b) | Rule 3.5(a)(3) |
| Rule 8.1 | Rule 6.5 |
| Rule 8.2 | Rule 8.2 |
| Rule 9.1 | Rule 1.11 |
| Rule 9.2 | Rule 1.12 |
| Rule 10.1 | Rule 1.15-1 |
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# ORDER ESTABLISHING CLIENT SECURITY FUND

Adopted August 29, 1984,
with amendments received through September 10, 1997.

1. A Client Security Fund is hereby established. Each active member of the North Carolina State Bar as of 1 December 1984 shall pay the sum of $50.00 on or before 1 January 1985 and a like sum on or before 1 January of each year thereafter. The money shall be paid to the North Carolina State Bar and shall be placed by it in the Client Security Fund.

2. The Client Security Fund shall be administered by the North Carolina State Bar under rules and regulations adopted by it. Such rules and regulations, and any amendments thereto, shall not be effective until approved by this court.

3. The North Carolina State Bar shall submit annually a report to this court accounting for all monies collected and expended in the administration of the Client Security Fund.

4. To insure collection of payments due to the Client Security Fund by each attorney, the North Carolina State Bar is hereby empowered to use the same powers and procedures used to collect the dues provided for in Chapter 84 of the General Statutes of North Carolina.

5. Jurisdiction over the actions of the North Carolina State Bar in administering the Client Security Fund shall remain with this court for the entry of future orders when and as necessary to accomplish the purposes of the Client Security Fund.

**Cross References.** — As to the Client Security Fund Board of Trustees, see Art. VI, § 5 *l* of the Rules, Regulations and Organization of the North Carolina State Bar in this Volume.

As to the Rules of Procedure of the Client Security Fund, see Appx. I to the Rules, Regulations and Organization of the North Carolina State Bar in this Volume.

# RULES GOVERNING ADMISSION TO PRACTICE OF LAW

Effective February 1, 1976,
with amendments received through April 17, 1998.


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.0101. Address.
.0102. Purpose.
.0103. Membership.

**Section .0200. General Provisions**
.0201. Compliance.
.0202. Definitions.
.0203. Applicants.
.0204. List.
.0205. Hearings.
.0206. Nonpayment of fees.

**Section .0300. Reserved**

**Section .0400. Applications of General Applicants**
.0401. How to apply.
.0402. Application form.
.0403. Filing deadlines.
.0404. Fees.
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**Section .0500. Requirements for Applicants**
.0501. Requirements for general applicants.
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**Section .0600. Moral Character and General Fitness**
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**Section .1300. Licenses**
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## SECTION .0100. ORGANIZATION

### .0101. Address.

The offices of the Board of Law Examiners of the State of North Carolina are located in the N.C. State Bar Building at 208 Fayetteville Street Mall, Raleigh,

N.C. The mailing address is P.O. Box 2946, Raleigh, N.C. 27602. The offices are open from 9:00 a.m. to 5:00 p.m. Monday through Friday, excepting holidays.

**History Note:** Statutory Authority G.S. 84-24; 150A-60 (see now 150B-60); Eff. February 1, 1976; amended September 4, 1979.

**Editor's note.** — For North Carolina State Bar website, see www.ncbar.com.

### .0102. Purpose.

The Board of Law Examiners of the State of North Carolina was created for the purpose of examining applicants and providing rules and regulations for admission to the bar, including the issuance of licenses therefor.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976.

**Legal Periodicals.** — For survey regarding denial of admission to the bar which is based on the applicant's assertion of the Fifth Amendment privilege against self-incrimination with respect to questions concerning the applicant's subversive advocacy, see 19 N.C. Cent. L.J. 56 (1990).

### .0103. Membership.

The Board of Law Examiners of the State of North Carolina consists of eleven members of the N.C. Bar elected by the council of the North Carolina State Bar. One member of said Board is elected by the Board to serve as chairman for such period as the Board may determine. The Board also employs an executive director to enable the Board to perform its duties promptly and properly. The executive director, in addition to performing the administrative functions of the position, may act as attorney for the Board.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1977.

## SECTION .0200. GENERAL PROVISIONS

### .0201. Compliance.

No person shall be admitted to the practice of law in North Carolina unless that person has complied with these rules and the laws of the state.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

### .0202. Definitions.

(1) The term "Board" as used in this chapter refers to the "Board of Law Examiners of the State of North Carolina." A majority of the members of the Board shall constitute a quorum, and the action of a majority of a quorum, present and voting, shall constitute the action of the Board.

(2) The term "secretary" as used in this chapter refers to the "Executive Director of the Board of Law Examiners of the State of North Carolina."

(3) As used in these rules, the word "filing" or "filed" shall mean received in the office of the Board of Law Examiners. Except that applications placed in the United States mail properly addressed to the Board of Law Examiners and bearing sufficient first class postage and postmarked by the United States

Postal Service on or before a deadline date will be considered as having been timely filed if all required fees are included in the mailing. Mailings which are postmarked after a deadline or which if postmarked on or before a deadline and do not include required fees or which include a check in payment of required fees which is not honored due to insufficient funds will not be considered as timely filed. Applications which are not properly signed and notarized; or which do not include the properly executed Authorization and Release forms; or which are illegible; or which answers to the questions are not complete will not be considered filed and will be returned.

(4) As used in these rules, the word "Chapter" refers to the "Rules Governing Admission to the Practice of Law in the State of North Carolina."

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1977; amended February 3, 1988; amended April 17, 1998.

### .0203. Applicants.

For the purpose of these rules, applicants are classified either as "general applicants" or as "comity applicants." To be classified as a "general applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0501 of this Chapter. To be classified as "comity applicant" and certified as such for admission to practice law, a person shall satisfy the requirements of Rule .0502 of this Chapter.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976.

### .0204. List.

As soon as possible after each filing deadline for applications, the secretary shall prepare and maintain a list of general applicants for the ensuing examination.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980.

### .0205. Hearings.

Every applicant may be required to appear before the board to be examined about any matters pertaining to the applicant's moral character and general fitness, educational background or any other matters set out in Section .0500 of this Chapter.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

### .0206. Nonpayment of fees.

Failure to pay the application fees required by these rules shall cause the application not to be deemed filed. If the check payable for the application fee is not honored upon presentment for any reason other than error of the bank the application will be deemed not timely filed and will have to be refiled. All checks payable to the Board for any fees which are not honored upon presentment shall be returned to the applicant who shall pay to the Board in

cash, cashier's check, certified check or money order any fees payable to the Board including a fee for processing that check.

**History Note:** This rule was adopted by the Board of Law Examiners on June 23, 1977, and amended August 23, 1977; amended February 3, 1988.

## SECTION .0300.

(Reserved for future rule purposes)

**Editor's note.** — Former §§ .0301 to .0304 were deleted effective February 3, 1988.

## SECTION .0400. APPLICATIONS OF GENERAL APPLICANTS

### .0401. How to apply.

Applications for admission to an examination must be made upon forms supplied by the Board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by writing or telephoning the Board's offices.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

### .0402. Application form.

(1) The APPLICATION FOR ADMISSION TO TAKE THE NORTH CAROLINA BAR EXAMINATION form requires an applicant to supply full and complete information relating to the applicant's background, including family history, past and current residences, education, military service, past and present employment, credit status, involvement in disciplinary, civil or criminal proceedings, substance abuse, mental treatment and bar admission and discipline history. Applicants must list references and submit as part of the application:

—Four Certificates of Moral Character from individuals who know the applicant;
—A recent photograph;
—Two sets of clear fingerprints;
—Two executed informational Authorization and Release forms;
—A birth certificate;
—Transcripts from the applicant's undergraduate schools;
—A copy of all applications to take a bar examination or an attorney's examination or for admission to the practice of law that the applicant has filed with any state, territory, or the District of Columbia;
—A certificate from the proper court or agency of every state in which the applicant is or has been licensed, that the applicant is in good standing and not under pending charges of misconduct;
—Copies of any legal proceedings in which the applicant has been a party.

The application must be filed in duplicate. The duplicate may be a photocopy of the original.

(2) An applicant who has aptly filed a complete APPLICATION FOR ADMISSION TO TAKE THE NORTH CAROLINA BAR EXAMINATION for a particular bar examination may file a SUPPLEMENTAL APPLICATION on forms supplied by the Board, along with the applicable fees for the next subsequent bar examination. An applicant who has filed a SUPPLEMENTAL APPLICATION as provided by this rule immediately preceding the filing deadline specified in Rule .0403 of this Chapter may file a subsequent SUPPLEMENTAL APPLICATION along with the applicable fees for the next bar examination. The SUPPLEMENTAL APPLICATION will update the information previously submitted to the Board by the applicant. Said SUPPLEMENTAL APPLICATION must be filed by the deadline set out in Rule .0403 of this Chapter.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980; May 5, 1981; February 3, 1988; May 5, 1994.

**Legal Periodicals.** — For survey regarding denial of admission to the bar which is based on the applicant's assertion of the Fifth Amendment privilege against self-incrimination with respect to questions concerning the applicant's subversive advocacy, see 19 N.C. Cent. L.J. 56 (1990).

## .0403. Filing deadlines.

(1) Applications shall be filed and received by the secretary at the offices of the Board on or before the first Tuesday in January immediately preceding the date of the July written bar examination and on or before the first Tuesday in October immediately preceding the date of the February written bar examination.

(2) Upon payment of a late filing fee of $200 (in addition to all other fees required by these rules), an applicant may file a late application with the Board on or before the first Tuesday in March immediately preceding the July written bar examination and on or before the first Tuesday in November immediately preceding the February written bar examination.

(3) Applicants who fail to timely file their application **will not** be allowed to take the Bar Examination designated on the application.

(4) Any applicant who has aptly filed an application to stand the February written bar examination may make application to take the immediately following July bar examination by filing a Supplemental Application with the secretary of the Board at the offices of the Board on or before the first Tuesday in May immediately preceding the July written bar examination.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1977; February 5, 1979; September 4, 1979; February 25, 1980; amended April 17, 1998.

## .0404. Fees.

Every application by an applicant who:

(1) is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $500.00.

(2) is a licensed attorney in any other jurisdiction shall be accompanied by a fee of $1,000.00.

(3) is filing to take the North Carolina Bar Examination using a Supplemental Application shall be accompanied by a fee of $400.00.

(4) is filing after the deadline set out in Rule .0403(1) shall be accompanied by a late fee of $200.00 in addition to all other fees required by these rules.

**History Note:** Statutory Authority G.S. 84-24, 25; Eff. February 1, 1976; amended August 29, 1978; September 4, 1979; February 25, 1980; May 4, 1982; August 28, 1984; February 3, 1988; amended July 26, 1990; May 5, 1994.

**Editor's note.** — A former subdivision (5) of this section was deleted by amendment February 3, 1988.

### .0405. Refund of fees.

No part of the fee required by Rule .0404 (1), (2), (3) of this Chapter shall be refunded to the applicant unless the applicant shall file with the secretary a written request to withdraw as an applicant, not later than the 15th day of June preceding the July written bar examination and not later than the 15th day of January preceding the February written bar examination in which event not more than one-half of the fee may be refunded to the applicant in the discretion of the Board. No portion of any late fee will be refunded.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980; amended February 3, 1988.

### .0406. Bad check policy (Deleted).

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976. This rule was deleted by amendment of August 23, 1977.

## SECTION .0500. REQUIREMENTS FOR APPLICANTS

### .0501. Requirements for general applicants.

As a prerequisite to being licensed by the Board to practice law in the State of North Carolina, a general applicant shall:

(1) Possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law, and be of good moral character and entitled to the high regard and confidence of the public and have satisfied the requirements of Section .0600 of this Chapter both at the time the license is issued and at the time of standing and passing a written bar examination as prescribed in Section .0900 of this Chapter;

(2) Possess the legal educational qualifications as prescribed in Section .0700 of this Chapter;

(3) Be of the age of at least eighteen (18) years;

(4) Have filed formal application as a general applicant in accordance with Section .0400 of this Chapter;

(5) Stand and pass a written bar examination as prescribed in Section .0900 of this Chapter;

(6) Have stood and passed the Multistate Professional Responsibility Examination approved by the Board within the twenty-four (24) month period next preceding the beginning day of the written bar examination prescribed by Section .0900 of this Chapter which the applicant applies to take, or shall take and pass the Multistate Professional Responsibility Examination within the twelve (12) month period thereafter; or, if later, shall take and pass the first Multistate Professional Responsibility Examination offered after the Board releases the results of the applicant's written examination.

(7) If the applicant is or has been a licensed attorney then the applicant be in good professional standing and entitled to practice in every state or territory of the United States, or the District of Columbia, in which the applicant has been licensed to practice law and not under any pending charges of miscon-

duct. An applicant may be inactive and in good standing in any state in which the applicant has been licensed.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; Amended effective August 23, 1977; September 4, 1979; February 25, 1980; April 8, 1983; August 28, 1984; July 26, 1985; Amended effective February 3, 1988; Amended effective May 5, 1994; Amended effective March 6, 1997.

**Legal Periodicals.** — For survey regarding denial of admission to the bar which is based on the applicant's assertion of the Fifth Amendment privilege against self-incrimination with respect to questions concerning the applicant's subversive advocacy, see 19 N.C. Cent. L.J. 56 (1990).

CASE NOTES

**Consideration of Past Behavior.** — In making a proper determination regarding an individual's current moral character, the past behavior of that individual is an appropriate inquiry, because to disallow consideration of past behavior would limit the board's discretion and hinder the effectiveness of a system which exists to ensure the integrity of the legal profession and to protect the public at large. In re Legg, 337 N.C. 628, 447 S.E.2d 353 (1994).

## .0502. Requirements for comity applicants.

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, upon written application may, in the discretion of the board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(1) File with the Secretary, upon such forms as may be supplied by the Board, a typed application in duplicate which will be considered by the Board after at least six (6) months from the date of filing; the application requires:

(a) That an applicant supply full and complete information in regard to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, references, the nature of the applicant's practice of law, and familiarity with the Code of Professional Responsibility as Promulgated by the North Carolina State Bar;

(b) That the applicant furnish the following documentation:

i. Certificates of Moral Character from four (4) individuals who know the applicant;

ii. A recent photograph;

iii. Two (2) sets of clear fingerprints;

iv. A certification of the Court of Last Resort from the jurisdiction from which the applicant is applying;

v. Transcripts from the applicant's undergraduate and graduate schools;

vi. A copy of all applications for admission to the practice of law that he has filed with any state, territory, or the District of Columbia;

vii. A certificate of admission to the bar of any state, territory, or the District of Columbia;

viii. A certificate from the proper court or body of every state in which the applicant is licensed therein that he is in good standing and not under pending charges of misconduct;

(2) Pay to the Board with each typewritten application, a fee of $1,500.00, no part of which may be refunded to the applicant whose application is denied;

(3) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein, the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Secretary, actively

and substantially engaged in the full-time practice of law. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include:

(a) The practice of law as defined by G.S. 84-2.1; or

(b) Activities which would constitute the practice of law if done for the general public; or

(c) Legal Service as a corporate counsel; or

(d) Judicial service in a court of record or other legal service with any local or state government or with the federal government; or

(e) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States, whether or not such service is in the jurisdiction in which applicant is duly licensed; or

(f) A full time faculty member in a law school approved by the Council of the North Carolina State Bar.

Employment in North Carolina, when conducted pursuant to a license granted by another jurisdiction, to meet the requirement of this rule is limited to:

(a) Employment as house counsel by a person, firm, association, or corporation engaged in business in this state which business does not include the selling or furnishing of legal advice or services to others; or

(b) Employment as a full time faculty member of a law school approved by the Council of the North Carolina State Bar; or

(c) Employment as a full time member of the faculty of the Institute of Government of the University of North Carolina at Chapel Hill; or

(d) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States.

(4) Satisfy the Board that the state, or territory of the United States, or the District of Columbia, in which the applicant is licensed and from which he seeks comity will admit North Carolina attorneys to the practice of law in such state, or territory of the United States, or the District of Columbia, without written examination, other than the Multistate Professional Responsibility Examination;

(5) Be at all times, in good professional standing and entitled to practice in every state, or territory of the United States, or the District of Columbia, in which the applicant has been licensed to practice law, and not under pending charges of misconduct while the application is pending before the Board; except that the applicant may be inactive in any jurisdiction as to which the applicant is not relying to meet the Board's comity rule;

(6) Be of good moral character and have satisfied the requirements of Section .0600 of this Chapter;

(7) Meet the educational requirements of Section .0700 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971;

(8) Not have taken and failed the written North Carolina Bar Examination within ten (10) years prior to the date of filing the applicant's comity application;

(9) Have stood and passed the Multistate Professional Responsibility Examination approved by the Board.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended January 31, 1977; August 23, 1977; February 23, 1978; August 29, 1978; September 4, 1979; February 25, 1980; May 4, 1982; November 10, 1982; April 8, 1983; August 28, 1984; July 26, 1985; February 3, 1988; May 5, 1994; amended April 17, 1998.

CASE NOTES

**Board of Law Examiners was justified in denying application** submitted pursuant to this section where the applicant did not actively and substantially engage in the practice of law for at least four out of the last six years immediately prior to filing for comity in North Carolina and where her statements showed a lack of candor and had a negative bearing on her character. In re Braun, 352 N.C. 327, 531 S.E.2d 213 (2000).

**Applied** in In re Golia-Paladin, 327 N.C. 132, 393 S.E.2d 799 (1990).

## SECTION .0600. MORAL CHARACTER AND GENERAL FITNESS

### .0601. Burden of proof.

Every applicant shall have the burden of proving that the applicant possesses the qualifications of character and general fitness requisite for an attorney and counselor-at-law and is possessed of good moral character and is entitled to the high regard and confidence of the public.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

CASE NOTES

**"Good Moral Character" Defined.** — Good moral character is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**What Character Encompasses.** — Character encompasses both a person's past behavior and the opinion of members of his community arising from it. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**Burden of Showing Good Moral Character.** — An applicant for admission to the bar has the burden of showing his good moral character. At the outset, he must come forward with sufficient evidence to make out a prima facie case. The board, or any other person wishing to contest an application, may then offer rebuttal evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Each applicant for admission has, pursuant to this rule, the burden of proving his good moral character, and must initially come forward with sufficient evidence to make out a prima facie case. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

**Burden on Board to Show Particular Instances of Misconduct.** — To place the burden on the applicant to disprove acts of misconduct would be a distortion of the intended effect of the rule requiring the applicant to prove, overall, his good character. In order to avoid this distortion it is necessary to distinguish between applicant's overall burden of showing good moral character and the board's burden of proving particular instances of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

When an applicant makes a prima facie showing of good moral character and the board, to rebut the showing, relies on specific acts of misconduct the commission of which are denied by the applicant, the board must prove the specific acts by the greater weight of the evidence. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

The board's brief should be directed to whether the specific findings are supported by the evidence and if so whether they along with other findings of misconduct are sufficient to rebut the applicant's prima facie case. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

**Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents.** In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**An application for admission to the bar may not be denied on the basis of suspi-**

**cions or accusations alone.** In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**Burden of Proof to Be by Preponderance of Evidence.** — When an applicant makes a prima facie showing of his good moral character and, to rebut the showing, the board relies on specific acts of misconduct the commission of which is denied by the applicant, the board must assume the burden of proving the specific acts by the greater weight of the evidence. The rule that applicant has the overall burden to prove his good moral character does not relieve the board from having to prove such specific acts of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**Where Essential Facts Are Indisputably Established.** — In cases in which all the essential facts either appear on the face of the application or are otherwise indisputably established, the board need only weigh the evidence and determine whether the applicant has shown his good moral character. However, even in such cases, while it might be permissible for the board not to make specific findings of fact, a detailing of the facts on which it bases its conclusions would facilitate judicial review. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**Board to Make Specific Findings of Fact.** — When a decision of the board of law examiners rests on a specific fact or facts the existence of which is contested, the board's duty to resolve the factual dispute by specific findings is no less than that of other administrative agencies. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979); In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

The board cannot meet its burden of proving specific acts of misconduct without setting out with specificity what they are and that they have been proved by the greater weight of the evidence. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

Where the only facts which could support a conclusion that the applicant did not show good moral character are in sharp dispute, the board must necessarily serve as the adjudicator of the facts in dispute and must ultimately find with regard to them what it believes the truth to be. Mere recitation of the testimony heard by the board will not suffice. Administrative agencies must find facts when factual issues are presented. They cannot fulfill this duty by merely summarizing the evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**Application Denied on Basis of Ethical Violations in Another State.** — Board of Law Examiners committed no error in denying petitioner's application for admission to the bar exam and in finding that petitioner failed to carry her burden of establishing that she possessed the requisite qualifications of character and general fitness for an attorney and counselor-at-law, although she could practice law in California, with some restrictions, where she had executed an ALD (Agreement in Lieu of Discipline) admitting that she violated three ethical rules. In re Gordon, 352 N.C. 349, 531 S.E.2d 795 (2000).

**Scope of Judicial Review.** — The "whole record" test is the proper scope of judicial review of findings of the board of law examiners. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**Constitutional Challenge Held Moot.** — Action seeking injunctive relief and declaration that bar rules regarding moral character were unconstitutional held moot following plaintiffs' admission to bar. See Nestler v. Board of Law Exmrs., 611 F.2d 1380 (4th Cir. 1980).

## .0602. Permanent record.

All information furnished to the Board by an applicant shall be deemed material, and all such information shall be and become a permanent record of the Board.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

## .0603. Failure to disclose.

No one shall be licensed to practice law by examination or comity or be allowed to take the bar examination in this state:

(1) who fails to disclose fully to the Board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to the applicant's professional conduct, whether same have been terminated or not, in this or any other state, or any federal court or other jurisdiction, or

(2) who fails to disclose fully to the Board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant, whether the same have been terminated or not in this or any other state or in any of the federal courts or other jurisdictions.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

**Legal Periodicals.** — For survey regarding denial of admission to the bar which is based on the applicant's assertion of the Fifth Amendment privilege against self-incrimination with respect to questions concerning the applicant's subversive advocacy, see 19 N.C. Cent. L.J. 56 (1990).

### .0604. Bar candidate committee.

Every applicant shall appear before a bar candidate committee, appointed by the chairman of the Board, in the judicial district in which the applicant resides, or in such other judicial district as the Board in its sole discretion may designate to the applicant, to be examined about any matter pertaining to the applicant's moral character and general fitness to practice law. An applicant who has appeared before a bar candidate committee may, in the Board's discretion, be excused from making a subsequent appearance before a bar candidate committee. The applicant shall give such information as may be required on such forms provided by the Board. A bar candidate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee such information and documents as it may reasonably require pertaining to the moral character and general fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be advised when to appear before the bar candidate committee.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980; February 3, 1988.

### .0605. Denial; Re-application.

No new application or petition for reconsideration of a previous application from an applicant who has either been denied permission to take the bar examination or has been denied a license to practice law on the grounds set forth in Section .0600 shall be considered by the Board within a period of three (3) years next after the date of such denial unless, for good cause shown, permission for re-application or petition for a reconsideration is granted by the Board.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

**CASE NOTES**

**Applied** in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

## SECTION .0700. EDUCATIONAL REQUIREMENTS

### .0701. General education.

Each applicant must have satisfactorily completed the academic work required for admission to a law school approved by the Council of the North Carolina State Bar.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1977; February 3, 1988.

### .0702. Legal education.

Every applicant applying for admission to practice law in the State of North Carolina, before being granted a license to practice law, shall prove to the satisfaction of the board that said applicant has graduated from a law school approved by the Council of the North Carolina State Bar or that said applicant will graduate within thirty (30) days after the date of the written bar examination from a law school approved by the Council of the North Carolina State Bar. There shall be filed with the secretary a certificate of the dean, or other proper official of said law school, certifying the date of the applicant's graduation. A list of the approved law schools is available in the office of the secretary.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended September 4, 1979; February 25, 1980; February 3, 1988.

**CASE NOTES**

**Promulgation of Rule.** — A rule requiring a candidate for the bar exam to have graduated from an ABA-accredited law school was properly adopted, even though it was not promulgated as a rule under the Administrative Procedure Act, as this section gives the State Bar Council specific directions on how to adopt rules, and the Council complied with these directions in adopting the rule. Bring v. North Carolina State Bar, 348 N.C. 655, 501 S.E.2d 907 (1998).

## SECTION .0800. PROTEST

### .0801. Nature of protest.

Any person may protest the application of any applicant to be admitted to the practice of law either by examination or by comity.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976.

### .0802. Format.

A protest shall be made in writing, signed by the person making the protest and bearing the person's home and business address, and shall be filed with the secretary prior to the date on which the applicant is to be examined.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

### .0803. Notification; Right to withdraw.

The secretary shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the secretary a written withdrawal as a candidate for admission to the practice of law at that examination.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976.

**CASE NOTES**

**Cited** in In re Legg, 337 N.C. 628, 447 S.E.2d 353 (1994).

### .0804. Hearing.

In case the applicant does not withdraw as a candidate for admission to the practice of law at that examination, the person or persons making the protest and the applicant in question shall appear before the Board at a time and place to be designated by the Board. In the event time will not permit a hearing on the protest prior to the examination, the applicant may take the written examination, and the results will be sealed until final disposition of the protest in favor of the applicant.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

### .0805. Refusal to license.

Nothing herein contained shall prevent the Board on its own motion from refusing to issue a license to practice law until the Board has been fully satisfied as to the moral character and general fitness of the applicant as provided by Section .0600 of this Chapter.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended September 4, 1979; February 3, 1988.

## SECTION .0900. EXAMINATIONS

### .0901. Written examination.

Two written bar examinations shall be held each year for those applying to be admitted to the practice of law in North Carolina.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980; February 3, 1988.

### .0902. Dates.

The written bar examinations shall be held in the City of Raleigh beginning in the months of February and July on such dates as the board may set from year to year.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980.

### .0903. Subject matter.

The examination may deal with the following subjects: Business Associations (including agency, corporations, and partnerships), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Family Law, Legal Ethics, Real Property, Security Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended September 4, 1979; July 26, 1985.

**Cross References.** — As to when changes in the educational requirements of the examination become effective, see § 84-24.

### .0904. Passing score.

The Board shall determine what shall constitute the passing of an examination.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976.

## SECTION .1000. REVIEW OF WRITTEN BAR EXAMINATION

### .1001. Review.

An unsuccessful applicant to the bar examination may examine the test booklets containing the applicant's essay examination along with model answers and the essay examination in the Board's offices.

**History Note:** Statutory Authority G.S. 93B-8; Eff. February 1, 1976; amended February 3, 1988.

### .1002. Fees.

The Board will furnish an unsuccessful applicant a copy of the applicant's essay examination at a cost to be determined by the secretary not to exceed $20.00. No copies of any model answers will be made or furnished to the applicant.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

### .1003. Multistate bar examination.

There is no provision for review of the Multistate Bar Examination.

**History Note:** Statutory Authority G.S. 93B-8; Eff. February 1, 1976.

### .1004. Scores.

(1) Upon written request the Board will release to an unsuccessful applicant the applicant's scores on the bar examination.

(2) Upon written request of an applicant, the Board will furnish the Multistate Bar Examination score of said applicant to another Board of bar examiners, or like organization that administers the admission of attorneys into that jurisdiction.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980; August 24, 1981; February 3, 1988.

### .1005. Board representative.

The secretary of the Board serves as the representative of the Board during this review of the written bar examination by an unsuccessful applicant. The secretary is not authorized to discuss any specific questions and answers on the bar examination.

**History Note:** Statutory Authority G.S. 93B-8; Eff. February 1, 1976.

## SECTION .1100. RULEMAKING PROCEDURES

(Reserved for future rule purposes)

## SECTION .1200. BOARD HEARINGS

### .1201. Nature of hearings.

(1) All general applicants may be required to appear before the Board or a Panel at a hearing to answer inquiry about any matter under these rules.

(2) Each comity applicant shall appear before the Board or Panel to satisfy the Board that he or she has met all the requirements of Rule .0502.

**History Note:** Statutory Authority G.S. 150A-11 (see now 150B-11); 150A-23 (see now 150B-23); Eff. February 1, 1976; amended August 23, 1977; September 4, 1979.

#### CASE NOTES

**The purpose of the hearing before the board** is to probe matters set forth in the notice of hearing required by Rule .1202. Such an inquiry must of necessity concern acts which occurred prior to the hearing. The board should first determine whether in fact the applicant committed the prior acts of misconduct. If it determines that he did, it must then say whether these acts so reflect on the applicant's character that they are sufficient to rebut his prima facie showing of good character. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

**"Good Moral Character" Defined.** — Good moral character is something more than the absence of bad character. It is the good name

which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**What Character Encompasses.** — Character encompasses both a person's past behavior and the opinion of members of his community arising from it. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**Burden of Showing Good Moral Character.** — An applicant for admission to the bar has the burden of showing his good moral character. At the outset, he must come forward with sufficient evidence to make out a prima facie case. The board, or any other person wishing to contest an application, may then offer rebuttal evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**Burden on Board to Show Particular Instances of Misconduct.** — To place the burden on the applicant to disprove acts of misconduct would be a distortion of the intended effect of the rule requiring the applicant to prove, overall, his good character. In order to avoid this distortion it is necessary to distinguish between applicant's overall burden of showing good moral character and the board's burden of proving particular instances of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents.** In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**An application for admission to the bar may not be denied on the basis of suspicions or accusations alone.** In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**Burden of Proof to Be by Preponderance of Evidence.** — When an applicant makes a prima facie showing of his good moral character and, to rebut the showing, the board relies on specific acts of misconduct the commission of which is denied by the applicant, the board must assume the burden of proving the specific acts by the greater weight of the evidence. The rule that applicant has the overall burden to prove his good moral character does not relieve the board from having to prove such specific acts of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**Where Essential Facts Are Indisputably Established.** — In cases in which all the essential facts either appear on the face of the application or are otherwise indisputably established, the board need only weigh the evidence and determine whether the applicant has shown his good moral character. However, even in such cases, while it might be permissible for the board not to make specific findings of fact, a detailing of the facts on which it bases its conclusions would facilitate judicial review. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**Board to Make Specific Findings of Fact.** — When a decision of the board of law examiners rests on a specific fact or facts the existence of which is contested, the board's duty to resolve the factual dispute by specific findings is no less than that of other administrative agencies. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where the only facts which could support a conclusion that the applicant did not show good moral character are in sharp dispute, the board must necessarily serve as the adjudicator of the facts in dispute and must ultimately find with regard to them what it believes the truth to be. Mere recitation of the testimony heard by the board will not suffice. Administrative agencies must find facts when factual issues are presented. They cannot fulfill this duty by merely summarizing the evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

**Scope of Judicial Review.** — The "whole record" test is the proper scope of judicial review of findings of the board of law examiners. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

## .1202. Notice of hearing.

The chairman will schedule the hearings before the Board or Panel and such hearings will be scheduled by the issuance of a notice of hearing mailed to the applicant or the applicant's attorney within a reasonable time before the date of the hearing.

**History Note:** Statutory Authority G.S. 150B-23; Eff. February 1, 1976; amended August 23, 1977; September 4, 1979; February 3, 1988.

CASE NOTES

**Applied** in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

## .1203. Conduct of hearings.

(1) All hearings shall be heard by the Board except that the chairman may designate two or more members to serve as a Panel to conduct these hearings.

(2) The Panel will make a determination as to the applicant's eligibility to stand the written bar examination or to be licensed by comity. The Panel may grant the application, deny the application, or refer it to the Board for a de novo hearing. The applicant will be notified in writing of the Panel's determination. In the event of an adverse determination by the Panel, the applicant may request a hearing de novo before the Board by giving written notice to the secretary at the offices of the Board within ten (10) days following receipt of the Panel's determination. Failure to file such notice in the manner and within the time stated shall operate as a waiver of the right of the applicant to request a hearing de novo before the Board and shall result in the determination of the Panel becoming final.

(3) The Board or a Panel of the Board may require an applicant to make more than one appearance before the Board or Panel, to furnish information and documents as it may reasonably require, and to submit to reasonable physical or mental examinations, all at the applicant's expense, pertaining to the moral character or general fitness of the applicant to be licensed to practice law in North Carolina.

(4) The Board or a Panel of the Board may allow an applicant to take the bar examination but seal the results of that examination until the Board or a Panel has made a final determination that the applicant possesses the qualifications of character and general fitness requisite for an attorney and counselor at law and is possessed of good moral character and is entitled to the high regard and confidence of the public.

**History Note:** Statutory Authority G.S. 150A-11 (see now 150B-11); Eff. February 1, 1976; amended November 4, 1976; August 23, 1977; September 4, 1979; February 25, 1980; April 8, 1983; February 3, 1988; amended April 17, 1998.

CASE NOTES

**Cited** in In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989).

## .1204. Continuances; motions for such.

Continuances, adjournments and like dispositions will be granted to a party only in compelling circumstances, especially when one such disposition has been previously requested by and granted to that party. Motions for continuance should be made to the secretary of the Board and will be granted or denied by the chairman of the Board.

**History Note:** Statutory Authority G.S. 150A-24 (see now 150B-24); Eff. February 1, 1976; amended August 23, 1977.

### .1205. Subpoenas.

(1) The Board shall have the power to subpoena and to summon and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the hearing as set forth in G.S. 84-24.

(2) The secretary of the Board is delegated the power to issue subpoenas in the Board's name.

**History Note:** Statutory Authority G.S. 150A-23 (see now 150B-23); Eff. February 1, 1976; amended August 23, 1977.

### .1206. Depositions and discovery.

(1) A deposition may be used in evidence when taken in compliance with the N.C. Rules of Civil Procedure, G.S. 1A-1. The Board may also allow the use of depositions or written interrogatories for the purpose of discovery or for the use as evidence in the hearing or for both purposes pursuant to the N.C. Rules of Civil Procedure.

(2) Any party or the Board may submit sworn affidavits as evidence to be considered by the Board in a Board Hearing. The Board will take under consideration sworn affidavits presented to the Board by persons desiring to protest an applicant's admission to the North Carolina Bar.

**History Note:** Statutory Authority G.S. 150A-11 (see now 150B-11); Eff. February 1, 1976; amended August 23, 1977; September 4, 1979.

**CASE NOTES**

**Cited** in In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989).

### .1207. Reopening of a case.

After a final decision has been reached by the Board in any matter, a party may petition the Board to reopen or reconsider a case. Petitions will not be granted except when petitioner can show that the reasons for reopening or reconsidering the case are to introduce newly discovered evidence which was not presented at the initial hearing because of some justifiable, excusable or unavoidable circumstances and that fairness and justice require reopening or reconsidering the case. The petition shall be made within a reasonable time and not more than ninety days after the decision of the Board has been entered.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1979; February 3, 1988.

**CASE NOTES**

**Applied** in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

**Cited** in In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989); In re Legg, 337 N.C. 628, 447 S.E.2d 353 (1994).

## SECTION .1300. LICENSES

### .1301. Interim permit for comity applicants (Deleted).

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976.

### .1302. Licenses for general applicants.

Upon compliance with the rules of the Board, and all orders of the Board, the secretary, upon order of the Board, shall issue a license to practice law in North Carolina to each applicant as may be designated by the Board in the form and manner as may be prescribed by the Board, and at such times as prescribed by the Board.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976.

## SECTION .1400. JUDICIAL REVIEW

### .1401. Appeals.

A general applicant may appeal from an adverse ruling or determination by the Board as to the applicant's eligibility to take the written examination. After a general applicant has successfully passed the written examination, the applicant may appeal from any adverse ruling or determination withholding the applicant's license to practice law. A comity applicant may appeal from an adverse ruling of the Board of Law Examiners denying the applicant's application to the North Carolina Bar by comity for failure to meet any of the requirements of Rule .0502 of this Chapter.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

CASE NOTES

**Cited** in In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989); In re Legg, 337 N.C. 628, 447 S.E.2d 353 (1994).

### .1402. Notice of appeal.

Notice of appeal shall be given, in writing, within twenty (20) days after notice of such ruling or determination and written exceptions to the ruling or determination filed with the secretary, which exceptions shall state the grounds of objection to such ruling or determination. Failure to file such notice of appeal in the manner and within the time stated shall operate as a waiver of the right to appeal and shall result in the decision of the Board becoming final.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

CASE NOTES

**Applied** in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

## .1403. Record to be filed.

Within sixty days after receipt of the notice of appeal, and after the applicant has paid the cost of preparing the record, the secretary shall prepare, certify, and file with the clerk of the Superior Court of Wake County the record of the case, comprising:

(1) the application and supporting documents or papers filed by the applicant with the Board;

(2) a complete transcription of the testimony when taken at the hearing;

(3) copies of all pertinent documents and other written evidence introduced at the hearing;

(4) a copy of the decision of the Board; and

(5) a copy of the notice of appeal containing the exceptions filed to the decision.

With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 3, 1988.

CASE NOTES

**Applied** in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981); In re McCarroll, 313 N.C. 315, 327 S.E.2d 880 (1985).

## .1404. Wake County Superior Court.

Such appeal shall lie to the Superior Court of Wake County and shall be heard by the presiding judge or resident judge, without a jury, who may hear oral arguments and receive written briefs, but no evidence not offered at the hearing shall be taken except that in cases of alleged omissions or errors in the record. Testimony thereon may be taken by the court. The findings of fact by the Board when supported by competent evidence, shall be conclusive and binding upon the court. The court may affirm, reverse or remand the case for further proceedings. If the court reverses or remands for further proceedings the decision of the Board, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or remand.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976.

CASE NOTES

**Applied** in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

**Cited** in In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979); In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989); In re Legg, 337 N.C. 628, 447 S.E.2d 353 (1994).

## .1405. North Carolina Supreme Court.

Any party to the review proceeding, including the Board, may appeal to the Supreme Court from the decision of the superior court. No appeal bond shall be required of the Board.

**History Note:** Statutory Authority G.S. 84-24; Eff. February 1, 1976.

### CASE NOTES

**Applied** in In re Moore, 308 N.C. 771, 303 S.E.2d 810 (1983).

**Cited** in In re Elkins, 308 N.C. 317, 302 S.E.2d 215 (1983); In re Legg, 337 N.C. 628, 447 S.E.2d 353 (1994).

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# REGULATIONS GOVERNING CONTINUING LEGAL EDUCATION

With amendments received through September 10, 1997.

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Index containing the Regulations Governing Continuing Legal Education and the Continuing Legal Education Rules follows these Regulations Governing Continuing Legal Education

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1. Organization.
2. General course approval.
3. Accredited sponsors.
4. Accreditation of videotape or other audiovisual programs.
5. Computation of credit.
6. Fees.
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Index follows Rules.


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**Cross References.** — As to Continuing Legal Education Rules, see this Volume.

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## Regulation 1. Organization.

1.1. *Quorum.* Five members shall constitute a quorum of the Board.

1.2. *The executive committee.* The Executive Committee of the Board shall be comprised of the chairperson, a vice-chairperson elected by the members of the Board, and a member to be appointed by the chairperson. Its purpose is to conduct all necessary business of the Board that may arise between meetings of the full Board. In such matters it shall have complete authority to act for the Board.

1.3. *Other committees.* The chairperson may appoint from time to time any committees he or she deems advisable of not less than three members for the purpose of considering and deciding matters submitted to them.

1.4. *Definitions.* As used herein, "Board" means the Board of Continuing Legal Education, "CLE" means continuing legal education, and "Rules" means the Rules for the Continuing Legal Education Program adopted by the Supreme Court of North Carolina.

## Regulation 2. General course approval.

2.1. *Law school courses.* Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved activities. Computation of CLE credit for such courses shall be as prescribed in Regulation 5.1. No more than 12 CLE hours in any year may be earned by such courses. No credit is available for law school courses attended prior to becoming an active member of the North Carolina State Bar.

2.2. *Bar review/refresher course.* Courses designed to review or refresh recent law school graduates or attorneys in preparation for any bar examination shall not be approved for CLE credit.

2.3. *Approval.* CLE activities may be approved upon the written application of a sponsor, other than an accredited sponsor, on an individual program basis or of an active member on an individual program basis. An application for such CLE course approval shall meet the following requirements:

(a) If advance approval is requested, the application and supporting documentation including two substantially complete sets of the written materials to be distributed at the course or program, shall be submitted at least 45 days prior to the date on which the course or program is scheduled.

(b) In all other cases the application and supporting documentation shall be submitted not later than 45 days after the date the course or program was presented or prior to the end of the calendar year in which the course or program was presented, whichever is earlier.

(c) The application shall be submitted on a form furnished by the Board.

(d) The application shall contain all information requested on the form.

(e) The application shall be accompanied by a course outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic, and shows each date and location at which the program will be offered.

(f) The application shall include a detailed calculation of the total CLE hours and hours of professional responsibility.

2.4. *Course quality.* The application and materials provided shall reflect that the program to be offered meets the requirements of Rule 19(E). Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval. Any sponsor, including an accredited sponsor, who expects to conduct a CLE activity for which suitable written materials will not be made available to all attendees may obtain approval for that activity only by application to the board at least 45 days in advance of the presentation showing why written materials are not suitable or readily available for such a program.

2.5. *Records.* Sponsors, including accredited sponsors, shall within 30 days after the course is concluded:

(a) furnish to the Board a list in alphabetical order, on magnetic tape if available, of the names of all North Carolina attendees and their North Carolina State Bar membership numbers;

(b) remit to the Board the appropriate sponsor fee.

(c) furnish to the Board a complete set of all written materials distributed to attendees at the course or program.

2.6. *Announcement.* Accredited sponsors and sponsors who have advanced approval for courses may include in their brochures or other course descriptions the information contained in the following illustration:

> This course (or seminar or program) has been approved by the Board of Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of ____ hours, of which ____ hours will also apply in the area of professional responsibility and ____ will apply toward the practical skills requirement. This course is not sponsored by the Board.

2.7. *Notice.* Sponsors not having advanced approval shall make no representation concerning the approval of the course for CLE credit by the Board.

The Board will mail a notice of its decision on CLE activity approval requests within 15 days of their receipt when the request for approval is submitted before the program and within 30 days when the request is submitted after the program. Approval thereof will be deemed if the notice is not timely mailed. This automatic approval will not operate if the sponsor contributes to the delay by failing to provide the complete information requested by the Board, or if the Board timely notifies the sponsor the matter has been tabled and the reason therefor.

2.8. *In-house CLE and self-study.* No approval will be provided for in-house CLE or self-study by attorneys, except those programs exempted by the Board under Rule 19(G).

2.9. *Facilities.* Sponsors ordinarily must provide a facility with adequate lighting and temperature control ventilation. For a nonclinical CLE activity, the facility should be set up in classroom or similar style to provide a writing surface for each preregistered attendee or sufficient space for taking notes, and shall provide sufficient space between the chairs in each row to permit easy access to and exit from each seat. Crowding in the facility detracts from the learning process and will not be permitted.

2.10. *Course materials.* In addition to the requirements of sections 2.3 and 2.5 above, sponsors, including accredited sponsors, and active members seeking credit for an approved activity shall furnish upon request of the Board a copy of all materials presented and distributed at a CLE course or program.

2.11. *Nonlegal educational activities.* Except in extraordinary circumstances, approval will not be given for general and personal educational activities. For example, the following types of courses will not receive approval: (a) courses within the normal college curriculum such as English, history, social studies and psychology; (b) courses which deal with the individual lawyer's human development, such as stress reduction, quality of life or substance abuse; (c) courses which deal with the development of personal skills generally, such as public speaking (other than oral argument and courtroom presentation), nonlegal writing and financial management; and (d) courses designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from courses dealing with development of law office procedures and management designed to raise the level of service provided to clients.)

A course or segment may be granted credit by the board when a bar organization course trains volunteer attorneys in service to the profession if all or segments of the course are devoted to CLE as defined in Rule 1(B)(5) or professional responsibility (Rule 1(B)(13)), if such course or segment meets the standards of these rules, and if the sponsor represents that such course or segment meets these standards. No more than three hours of professional responsibility will be credited per training course.

**Regulation 3. Accredited sponsors.**

In order to receive designation as an "accredited sponsor" of courses, programs or other continuing legal education activities under Rule 20(A), the application of the sponsor must meet the following requirements:

(a) the application for accredited sponsor status shall be submitted on a form furnished by the Board.

(b) the application shall contain all information requested on the form.

(c) the application shall be accompanied by course outlines or brochures that describe the content, identify the instructors, list the time devoted to each topic, show each date and location at which three programs have been sponsored in each of the last three consecutive years, and enclose the actual course materials.

(d) the application shall include a detailed calculation of the total CLE hours specified in each of the programs sponsored by the organization.

(e) the application shall reflect that the previous programs offered by the organization in continuing legal education have been of consistently high quality and would otherwise meet the standards set forth in Rule 19.

(f) notwithstanding the provisions of (c), (d) and (e) above, any law school which has been approved by The North Carolina State Bar for purposes of qualifying its graduates for the North Carolina Bar examination, may become an accredited sponsor upon application to the Board.

**Regulation 4. Accreditation of videotape or other audiovisual programs.**

4.1. The Board may permit an active member to receive credit for attendance at, or participation in, videotape presentations or where audio-visual recorded or reproduced material is used.

4.2. An attorney attending such a presentation is entitled to credit hours if:

(a) The presentation from which the program is made would, if attended by an active member, be an accredited course; and

(b) All other conditions imposed by these regulations, or by the Board in advance, are met.

4.3. Unless the entire program has been produced by an accredited sponsor, the person or organization sponsoring the program must receive advance approval and accreditation from the Board. Board Form 2 may be utilized for this purpose.

4.4. To receive approval for attendance at such programs, the following conditions must be met:

(a) The person or organization sponsoring the program must keep accurate records of attendance, and must forward a copy of the record of attendance of active members to the Board within 30 days after presentation of the videotape program is completed.

(b) Unless clearly inappropriate for the particular course, detailed papers, manuals, study materials, or written outlines are presented to the persons attending the program which substantially pertain to the subject matter of the program. Any materials made available to persons attending the course from which the program is made must be made available to those persons attending the program who desire to receive credit under these regulations.

(c) Attendance must be verified by a responsible party who is not attempting to earn credit hours by virtue of attendance at that presentation. Proof of attendance may be made by the verifying person on Board Form 5.

(d) A suitable classroom or rooms must be available for viewing the program and taking of notes.

4.5. A minimum of five active members must physically attend the presentation of the program.

EXAMPLE (1): Attorney X, an active member, attends a videotape seminar sponsored by an accredited sponsor. If a person attending the program from which the videotape is made would receive credit, Attorney X is also entitled to receive credit, if the additional conditions under Regulation 4 are also met.

EXAMPLE (2): Attorney Y, an active member, desires to attend a videotape program. However, the proposed videotape program (a) is not presented by an accredited sponsor, and (b) has not received individual course approval from the Board. Attorney Y may not receive any credit hours for attending that videotape presentation without advance approval from the Board.

EXAMPLE (3): Attorney Z, an active member, attends a videotape program. The presentation of the program from which the videotape was made has already been held, and approved by the Board for credit. However, no person is present at the videotape program to record attendance. Attorney Z may not obtain credit for viewing the videotape program, unless it is viewed in the presence of a person who is not attending the videotape program for credit, and who verifies the attendance of Attorney Z and of other attorneys at the program. All other conditions must also be met (i.e., materials available at the original presentation must be available at the videotape presentation, at least five active members must be present, etc.).

**Regulation 5. Computation of credit.**

5.1. *Computation formula.* CLE and ethics hours shall be computed by the following formula:

$$\frac{\text{sum of the total minutes of actual instruction}}{60} = \text{Total Hours}$$

For example, actual instruction totalling 195 minutes would equal 3.25 hours toward CLE.

5.2. *Actual instruction.* Only actual education shall be included in computing the total hours of actual instruction. The following shall not be included:

(a) Introductory remarks;

(b) Breaks;

(c) Business meetings;

(d) Keynote speeches or speeches in connection with meals;

(e) Questions and answer sessions at a ratio in excess of 15 minutes per CLE hour and programs less than 30 minutes in length.

5.3. *Teaching.* As a contribution to professionalism, credit may be earned for teaching in an approved continuing legal education activity. Presentations accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of three hours of credit for each thirty minutes of presentation. Repeat presentations qualify for one-half of the credits available for the initial presentation. For example, a presentation of 45 minutes would qualify for 4.5 hours of credit.

**Regulation 6. Fees.**

6.1. *Sponsor fee.* The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved activities presented in North Carolina and by accredited sponsors located in North Carolina for approved activities wherever presented, except that no sponsor fee is required where approved activities are offered without charge to attendees. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee is set at $1.25 per approved CLE hour per active member of the North Carolina State Bar in attendance.

The fee is computed as shown in the following formula and example which assumes a 6-hour course attended by 100 North Carolina lawyers seeking CLE credit:

Fee: $1.25
x Total Approved CLE hours (6)
x Number of NC Attendees (100)
= Total Sponsor Fee ($750.00)

6.2. *Attendee fee.* The attendee fee is paid by the North Carolina attorney who requests credit for a program for which no sponsor fee was paid. An attorney should remit the fees along with his or her affidavit before February 28 following the calendar year for which the report is being submitted. The amount of the fee is set at $1.25 per approved CLE hour for which the attorney claims credit.

It is computed as shown in the following formula and example which assumes that the attorney attended an activity approved for 3 hours of CLE credit:

Fee: $1.25
x Total Approved CLE hours (3)
= Total of Attendee Fee ($3.75)

6.3. *Fee review.* The fee charged to sponsors and attendees will be increased

only to the extent necessary for those fees to pay the costs of administration of the CLE program.

6.4. *Uniform application.* The fee shall be applied uniformly without exceptions or other preferential treatment for a sponsor or attendee.

**Regulation 7. Special cases and exemptions.**

7.1. Attorneys who have a permanent disability which makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The Board shall review and approve or disapprove such plans on an individual basis and without delay.

7.2. Other requests for substitute compliance, partial waivers, other exemptions for hardship or extenuating circumstances may be granted by the Board on a yearly basis upon written application of the attorney.

7.3. Credit is earned through service as a bar examiner of the North Carolina Board of Law Examiners. The Board will award 12 hours of CLE credit for the preparation and grading of a bar examination by a member of the North Carolina Board of Law Examiners.

7.4. Newly admitted active members who have previously been licensed to practice law in this state or in some other state and who have actually practiced law for a period of at least five years may apply to the Board for an exemption from the practical skills requirement of Rule 18(C). This application must be filed prior to July 31 of the year for which the exemption is initially sought.

**Regulation 8. General compliance procedures.**

8.1. *Affidavit.* Prior to January 31 of each year, commencing in 1990, the prescribed affidavit form shall be mailed to all active members of The North Carolina State Bar concerning compliance with the Continuing Legal Education Program for the preceding year.

8.2. *Late filing penalty.* Any attorney who, for whatever reasons, files the affidavit showing compliance or declaring an exemption after the February 28 due date shall pay a $75.00 late filing penalty. The due date for filing the affidavit for the 1988 reporting year only shall be March 31, 1989. This penalty shall be submitted with the affidavit. An affidavit that is either received by the Board or postmarked on or before February 28 (March 31 in 1989 only) shall be considered to have been timely filed. An attorney who complies with the requirements of the Rules during the probationary period under Rule 23 shall pay a late compliance fee of $125.00.

**Regulation 9. Noncompliance procedures.**

9.1. *Reinstatement fee.* The uniform reinstatement fee is $250 and must accompany the reinstatement petition.

9.2. *Policy.* Reinstatement will be granted only upon a showing that the member has attended sufficient approved CLE activity to make up his or her previous deficiency.

9.3. *Petition.* The petition for reinstatement shall list the CLE activities according to a form provided by the Board.

**Regulation 10. Authority for appeals.**

10.1. *Appeals.* Except as otherwise provided, the Board is the final authority on all matters entrusted to it under these Rules. Therefore, any decision by a committee of the Board pursuant to a delegation of authority may be appealed to the full Board.

10.2. *Procedure.* A decision made by the staff of the Board pursuant to a delegation of authority may also be reviewed by the full Board, but should first be appealed to any committee of the Board having jurisdiction on the subject involved. All appeals shall be in writing. The Board has the discretion to, but is not obligated to, grant a hearing in connection with any appeal regarding the accreditation of a program.

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# RULES AND REGULATIONS RELATING TO THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CERTAIN CRIMINAL CASES

Adopted September 16, 1969,
with amendments received through September 10, 1997.


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## RULES AND REGULATIONS

### ARTICLE I. AUTHORITY

**Section 1.1.**

These Rules and Regulations are issued pursuant to the authority contained in G.S. 7A-459, Chapter 1013 of the Session Laws of 1969.

### ARTICLE II. DETERMINATION OF INDIGENCY

**Section 2.1.**

Prior to the appointment of counsel on grounds of indigency, the Court shall require the defendant to complete and sign under oath an Affidavit of Indigency in a form approved by the Director of the Administrative Office of the Courts.

**Section 2.2.**

Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally under oath to determine the truth of the statements made in the Affidavit of Indigency.

**Section 2.3.**

The defendant's Affidavit of Indigency shall be filed in the records of the case.

**Section 2.4.**

Upon the basis of the defendant's Affidavit of Indigency, his statements to the Court on this subject, and such other information as may be brought to the

attention of the Court which shall be made a part of the record in the case, the Court shall determine whether or not the defendant is in fact indigent.

## ARTICLE III. WAIVER OF COUNSEL

### Section 3.1.

Any defendant desiring to waive the right to counsel as provided in G.S. 7A-457 shall complete and sign under oath a Waiver of Counsel in a form approved by the Director of the Administrative Office of the Courts. If such defendant waives the right to counsel but refuses to execute such waiver, the Court shall so certify in a form approved by the Director of the Administrative Office of the Courts.

### Section 3.2.

Prior to the call of the case for trial, the Judge shall make reasonable inquiry of the defendant personally to determine that the defendant has understandingly waived his right to counsel.

### Section 3.3.

The Judge, upon being so satisfied, shall accept the Waiver of Counsel executed by the defendant, sign the same and cause it to be filed in the record of the case.

## ARTICLE IV. APPOINTMENT OF COUNSEL

### Section 4.1.

The North Carolina State Bar shall adopt a model plan for the appointment of counsel for indigent persons charged with certain crimes or otherwise entitled to representation. Each judicial district bar shall adopt a plan or plans for the appointment of counsel by the public defender and/or the court to represent indigent persons which provides for the appointment of experienced counsel for persons charged with serious crimes, with respect to which the Model plan may serve as a guide or example. A plan may be applicable to the entire district, or, at the election of the district bar, separate plans may be adopted by the district bar for use in each separate county within the district. (Amended November 19, 1984; amended March 4, 1992.)

### Section 4.2.

Such plan or plans as adopted by the judicial district bar shall be certified to the Council of the North Carolina State Bar for its approval, following which the plan or plans shall be certified to the Clerk of Superior Court of each county to which each plan is applicable by the Secretary of the North Carolina State Bar and shall constitute the method by which counsel shall be selected in said district for appointment to indigent defendants. Thereafter all appointments of counsel for indigent defendants in said district shall be made in conformity with such plan or plans, unless the trial judge or, where authorized, the public defender, in the exercise of his discretion deems it proper in furtherance of justice to appoint as counsel for an indigent defendant or defendants some lawyer or lawyers residing and practicing in the judicial district, who is or are not on the plan or list certified to the Clerk of Superior Court, and if so, the trial judge or, where authorized, the public defender, may appoint as counsel to

represent an indigent defendant some lawyer or lawyers not on said plan or list residing and practicing in the judicial district. (Amended November 19, 1984; amended March 4, 1992.)

**Section 4.3.**

No attorney shall be appointed as counsel for an indigent defendant in a court of any district except the district in which he resides or maintains an office except by consent of counsel so appointed.

**Section 4.4.**

No indigent defendant shall be entitled or permitted to select or specify the attorney who shall be assigned to defend him.

**Section 4.5.**

The Clerk of Superior Court of each county shall file or record in his office, maintain and keep current the plan for the assignment of counsel applicable to said county as certified to him by the Secretary of the North Carolina State Bar. (Amended November 19, 1984.)

**Section 4.6.**

The Clerk of Superior Court of each county shall keep a record of all counsel eligible for appointment under the plan applicable to said county as certified to him by the Secretary of the North Carolina State Bar. (Amended November 19, 1984; amended March 4, 1992.)

**Section 4.7.**

Orders for the appointment of counsel shall be entered by the court in a form approved by the Director of the Administrative Office of the Courts.

**Section 4.8.**

Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, two counsel shall be appointed to represent an indigent defendant charged with murder where the State is seeking the death penalty. (Added May 26, 1978; amended March 4, 1992.)

**Section 4.9.**

Notwithstanding any other provisions of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime:

(a) Who does not have a minimum of five years' experience in the general practice of law, provided that the Court or, where authorized, the public defender, may in its or his discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the court or, where authorized, the public defender, appointing him to have a demonstrated proficiency in the field of criminal trial practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office. (Added May 26, 1978; amended March 4, 1992.)

**Section 4.10.**

Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime:

(a) Who does not have a minimum of five years' experience in the general practice of law, provided, that the Court or, where authorized, the public defender, may in its or his discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the trial judge or, where authorized, the public defender, to have a demonstrated proficiency in the field of appellate practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

Unless good cause is shown an attorney representing the indigent defendant at the trial level shall represent him at the appellate level if the attorney is otherwise qualified under the provisions of this section. (Added May 26, 1978; amended March 4, 1992.)

**Section 4.11.**

In those cases in which a public defender has authority to appoint a member of a judicial district bar to represent an indigent person, the public defender shall make the appointment pursuant to the procedures set out herein. (Added March 4, 1992.)

**Section 4.12.**

It is contemplated that in those districts with a public defender, additional outside counsel will be appointed in those instances in which the volume of work handled by the public defender necessitates additional counsel and in those instances where a conflict of interest exists as regards the public defender and multiple defendants. Provided, when a conflict of interest on the part of the public defender necessitates additional counsel, the court shall appoint outside counsel. (Added March 4, 1992.)

**Section 4.13.**

Nothing in these regulations or in the Model Plan shall be construed to prohibit assignment of otherwise qualified counsel to represent indigent defendants pursuant to specialized programs, plans or contracts which may be implemented from time to time to improve efficiency and economy where such programs, plans or contracts are consistent with the ends of justice and are approved by the Council of the N.C. State Bar. (Added March 4, 1992.)

## ARTICLE V. WITHDRAWAL BY COUNSEL

**Section 5.1.**

At any time during or pending the trial or re-trial of a case, the trial Judge, the appointing judge, or the resident judge of the district, upon application of the attorney, and for good cause shown, may permit said attorney to withdraw from the defense of the case.

**Section 5.2.**

At any time after the trial of a case and during the pendency of an appeal, the trial attorney, for good cause shown, may apply to the Appellate Court for permission to withdraw from the defense of the case upon the appeal.

**Section 5.3.**

Applications for permission to withdraw as counsel shall be made only for good cause where compelling reasons or actual hardship exists.

**CASE NOTES**

**Withdrawal Where Counsel Finds Appeal Wholly Frivolous or Lacking in Merit.** — In appeals wholly frivolous or simply lacking in merit, counsel should avoid the dilemma of deciding between his professional and personal integrity as an attorney and the right of the defendant to the assistance of counsel. Virgil v. Harris, 299 F. Supp. 509 (E.D.N.C. 1969).

If a court-appointed counsel finds an appeal to be wholly frivolous and desires to be released of further responsibility, he should apply to the Supreme Court of North Carolina for permission to withdraw as appellate counsel. If this statutory procedure is followed, the Court could determine by the application of State and federal requirements whether the appeal is wholly frivolous, and whether to grant counsel's request to withdraw and dismiss the appeal, or proceed to a decision on the merits. Virgil v. Harris, 299 F. Supp. 509 (E.D.N.C. 1969).

There is a distinction between cases that are wholly frivolous in which counsel may be permitted to withdraw, and those apparently lacking in merit, but presenting arguable questions. Virgil v. Harris, 299 F. Supp. 509 (E.D.N.C. 1969).

If a court-appointed counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court — not counsel — then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds, it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal. Virgil v. Harris, 299 F. Supp. 509 (E.D.N.C. 1969).

## ARTICLE VI. PROCEDURE FOR PAYMENT OF COMPENSATION

**Section 6.1.**

Upon completion of the representation of an indigent defendant by appointed counsel in the trial court, the trial judge shall, upon application enter an order allowing such compensation as is provided in G.S. 7A-458.

**Section 6.2.**

Upon the completion of any appeal, the trial judge, the resident judge or the judge holding the courts of the district, shall, upon application, enter a supplemental order in the cause allowing the appointed attorney upon the appeal such additional compensation as may be appropriate.

**Section 6.3.**

Orders for the payment of compensation to counsel for representation of indigent defendants shall be entered by the judge in a form approved by the Director of the Administrative Office of the Courts.

**Section 6.4.**

Two certified copies of the order for the payment of fees shall be forwarded by the clerk of the Superior Court to the Administrative Office of the Courts, Attention: Assistant Director, Raleigh, North Carolina, for payment.

**Section 6.5.**

Upon the entry of the order for the payment of counsel fees, the court shall upon final conviction likewise enter a judgment against the defendant for whom counsel was assigned in the amount allowed as counsel fees, said judgment to be in the form approved by the Director of the Administrative Office of the Courts.

**Section 6.6.**

Counsel appointed for the representation of indigent defendants shall not accept any compensation other than that awarded by the Court. (Added August 31, 1973.)

## MODEL PLAN

## REGULATIONS FOR APPOINTMENT OF COUNSEL IN INDIGENT CASES IN THE _____ JUDICIAL DISTRICT

### ARTICLE I. PURPOSE

The purpose of these regulations is to provide for effective representation of indigent criminal defendants at all stages of trial and appellate proceedings.

### ARTICLE II. APPLICABILITY

These regulations apply to any criminal case arising in the _____ Judicial District in which the court has determined that the defendant is entitled to the appointment of counsel. Reference to the masculine gender shall be construed to include both male and female persons. Reference to the singular shall, as appropriate, be construed to include the plural.

### ARTICLE III. LISTS OF ATTORNEYS

**Section 3.1.**

Any attorney engaged in the private practice of law primarily in the _____ Judicial District who

(a) Maintains an office in the _____ Judicial District, and

(b) Practices criminal law in the courts of the _____ Judicial District to an appreciable extent, or intends or desires to do so,

may be placed on one of three lists governing the appointment of counsel in criminal cases involving indigent persons. No other attorneys will be placed on the lists.

**Section 3.2.**

Attorneys included on the first list may only be appointed to represent defendants charged with misdemeanors or felonies punishable by imprisonment for not more than five years.

**Section 3.3.**

Attorneys on the second list may be appointed to represent defendants charged with misdemeanors or felonies other than capital crimes, provided that an attorney may request the Committee on Indigent Appointments that he not be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

**Section 3.4.**

Attorneys on the third list may be appointed to represent defendants charged with any crimes, provided that an attorney may request the Committee on Indigent Appointments that he not be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

**Section 3.5.**

The Committee on Indigent Appointments shall, prior to the effective date of these regulations, meet and develop three lists of attorneys of the types described herein from the roster of attorneys currently accepting appointments in indigent cases in the _____ Judicial District. The first list shall include all such attorneys who have been licensed less than two years or who have been admitted by comity. The second list shall include all such attorneys who have been licensed for two years or more. The third list shall include all such attorneys who have had not less than five years experience in the general practice of law and who have demonstrated proficiency in the field of criminal trial practice. With respect to these initial lists, any other requirement not otherwise met by any listed attorney is hereby waived unless the committee determines that it ought not to be waived. (Amended March 4, 1992.)

**Section 3.6.**

Subject to the exception contained in Section 3.5, requirements for inclusion on the three lists are as follows:

(a) An attorney licensed to practice law in North Carolina may be included on the first list if the Committee on Indigent Appointments finds that:

(1) He is competent to represent criminal defendants charged with misdemeanors and felonies, and

(2) Two attorneys who have engaged in the practice of law in the _____ Judicial District for not less than three years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent criminal defendants charged with misdemeanors and felonies and that they recommend that he be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation.

(b) An attorney who has been licensed to practice law in North Carolina for not less than two years or who has been admitted to the North Carolina State Bar by comity may be included on the second list if the committee finds that:

(1) He has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters, and

(2) Two attorneys who have engaged in the private practice of law in the _____ Judicial District for not less than four years preceding the committee's consideration, at least one of whom being included on one of the

three lists, have stated in writing that they believe he is competent to represent criminal defendants charged with felonies and that they recommend that he be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation, and

(3) He is competent to represent criminal defendants charged with felonies.

(c) An attorney who has been licensed to practice law in North Carolina for not less than five years may be included on the third list if the committee finds that:

(1) He has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters, and

(2) Two attorneys who have engaged in the private practice of law in the _____ Judicial District for not less than five years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent defendants charged with capital crimes and that they recommend that he be included on the third list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation, and

(3) He has not less than five years experience in the general practice of law, provided that the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any District Attorney's office, and

(4) He is competent to represent criminal defendants charged with capital crimes.

**Section 3.7.**

The Committee on Indigent Appointments shall review the lists not less than once a year to ensure that the lists are current and that the attorneys whose names appear on the lists meet the qualifications set out herein. (Amended March 4, 1992.)

## ARTICLE IV. COMMITTEE ON INDIGENT APPOINTMENTS

**Section 4.1.**

A Committee on Indigent Appointments is hereby established to assist in the implementation of these regulations. The committee shall have authority to act when the regulations become effective.

**Section 4.2.**

All members of the committee shall be attorneys who

(a) Are included on one of the appointment lists, and

(b) Have practiced criminal law in the _____ Judicial District, whether as a prosecutor or defense counsel, for not less than five years, and

(c) Are knowledgeable about practicing attorneys in the _____ Judicial District.

**Section 4.3.**

The committee shall consist of _____ members appointed by the President of the _____ Judicial District Bar. At least one member shall be appointed from each county in the district. Members of the committee shall be appointed for terms of two years, except that initially a minority of the members shall be designated to serve one year terms in order to stagger terms. The appointments shall be made by letter, a copy of which shall be maintained

in the records of the committee. No member shall serve two consecutive terms, except that a person who has been appointed to replace a member who did not complete his term may be appointed to a full term following his completion of the partial term. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced for his term as soon as practicable.

**Section 4.4.**

The President of the _____ Judicial District Bar shall appoint one of the members as Chairman of the Committee, who shall serve at the pleasure of the president as shall all other members of the committee.

**Section 4.5.**

The committee shall meet at the call of the Chairman upon reasonable notice. The first meeting shall be on _____. Thereafter, the committee shall meet as often as is necessary to dispatch its business.

**Section 4.6.**

The committee shall have complete authority to accomplish the following:
(a) Supervise the administration of these regulations;
(b) Review requests from attorneys concerning their placement on any list and obtain information pertaining to such placement;
(c) Approve or disapprove an attorney's addition to or deletion from any list or the transfer of any attorney from one list to another, provided that an attorney's request to be deleted from a list or transferred to a lower numbered list shall not require committee approval;
(d) Establish procedures with which to carry out its business;
(e) Interview attorneys seeking placement on any list and witnesses for or against such placement.

**Section 4.7.**

A majority of the committee must be present at any meeting in order to constitute a quorum. The committee may take no action unless a quorum is present. A majority vote in favor of a motion or any proposed action shall be required in order for the motion to pass or for the action to be taken.

**Section 4.8.**

The committee shall meet in private, except it may invite persons to make limited appearances to be interviewed. Discussions of the committee, its records, and its actions shall be treated as confidentially as possible. The names of the members of the committee shall not be confidential.

## ARTICLE V. PLACEMENT OF ATTORNEYS ON LIST

**Section 5.1.**

Any attorney who wishes to have his name added to or deleted from any list, or to have his name transferred from one list to another, shall file a written request with the administrator. The request shall include information that will facilitate the committee's determination whether the attorney meets the standards set forth in Article III for placement on a certain list. The written statements of competency required by Article III must be attached to the request.

**Section 5.2.**

The administrator shall maintain records for the committee and shall advise each member of the committee of the name of the requesting attorney and the nature of this request before the committee meets to review the request. The administrator shall assure that all requests properly filed are brought to the committee's attention at the next meeting at which it is practicable for the committee to review the request. (Amended March 4, 1992.)

**Section 5.3.**

The administrator shall assure that all District Court Judges, Resident Superior Court Judges, any special Superior Court Judge with a permanent office in the _____ Judicial District, and the District Attorney for the _____ Judicial District, and the District's Public Defender, if any, are advised of any request concerning placement on any list so that such officials will have an opportunity to comment on the request to the committee. (Amended October 21, 1994.)

**Section 5.4.**

When the committee meets to review placement requests, it may require any requesting attorney to appear before it to be interviewed and may require information in addition to that submitted in the request. Any member of the committee may discuss requests with other members of the bar in a confidential manner and may relate information obtained thereby to the other members. Rules of evidence do not apply with respect to the review of requests. The committee may hold a request in abeyance for a reasonable period of time while obtaining additional information.

**Section 5.5.**

The committee shall determine whether an attorney requesting to be added to a list when he is not currently on any list or to be transferred from a lower numbered list to a higher numbered list (such as from the first list to the second list) meets all the applicable standards set out in Article III. The request shall be granted or the addition or transfer allowed if the committee finds that he does meet all the standards. Conversely, the request shall be denied if the committee does not find that he meets all the standards. The findings shall be reduced to writing and kept in the regular records of the committee by the administrator. The committee shall assure that the requesting attorney is given prompt notice of the action taken with respect to his request and is advised of the basis for denial if the request is not granted.

**Section 5.6.**

If at any time it reasonably appears to the committee that an attorney no longer meets a standard set forth in Article III for the list on which he is placed, or that he can no longer meet the responsibilities of representing indigent defendants with respect to such list, the committee shall direct the attorney to show cause why he should not be deleted from the list or transferred from a higher numbered list to a lower numbered list. If the attorney cannot show sufficient cause, the committee may take appropriate action, including suspending the attorney from receiving appointments in indigent cases for a definite or indefinite time, or deleting his name from the list he is on, or transferring him from a higher numbered list to a lower numbered list. Appropriate written findings shall be made by the committee in this regard,

and the attorney shall be informed of the basis of any action taken. (Amended March 4, 1992.)

**Section 5.7.**

An attorney whose name is deleted from a list or who is transferred to another list by the committee may appeal the committee's action to the senior resident superior court judge of the _____ judicial district. In such a case the resident superior court judge will make the final decision regarding the deletion or transferral of the attorney. (Amended March 4, 1992.)

**Section 5.8.**

Whenever an attorney who provides information to the committee, collectively or through any member, requests that his name not be used or that his information be treated confidentially, his request shall be granted unless doing so results in manifest unfairness.

ARTICLE VI. APPOINTMENT PROCEDURE (NON-CAPITAL CASES)

**Section 6.1.**

The administrator shall provide the clerk in each courtroom in the district and Superior Criminal Courts of the _____ Judicial District with current lists of attorneys subject to appointment in indigent cases. Attorneys shall be appointed only in accordance with the lists on which they appear, and only in cases to be tried in counties in which they maintain offices, unless they agree in advance to accept cases from other counties.

**Section 6.2.**

Each courtroom clerk shall maintain a record of attorneys subject to appointment to represent indigents. Beside each attorney's name shall appear the number of any list he is on. The court shall proceed in sequence in appointing attorneys. If an attorney's name is passed over because he is not on a list relating to a particular charge, the court shall return to his name for the next appointment consistent with his lists. The court may pass over the name of any attorney known not to be reasonably available because of vacation, illness or other reasons. (Amended March 4, 1992.)

**Section 6.3.**

In its discretion, the court may appoint an attorney in any case without regard to sequence or an attorney not maintaining an office in the county where the case is to be tried. (Amended March 4, 1992.)

**Section 6.4.**

The clerk shall provide notice of the appointment to the attorney concerned as soon as possible. Further, the clerk shall advise the defendant of the name of his attorney.

**Section 6.5.**

The court may appoint an attorney to represent more than one defendant in a single case.

**Section 6.6.**

In those cases in which the public defender cannot serve, and is authorized to appoint a substitute member of the bar to represent an indigent defendant, the public defender shall consult the current lists of attorneys subject to appointment in indigent cases maintained by the court administrator and referred to in Article III herein, and shall appoint the next eligible attorney on the list. The public defender shall proceed in sequence in appointing attorneys, but may pass over the name of any attorney known to be unavailable because of vacation, illness or other reasons, or, in his or her discretion, where justice so requires. (Added March 4, 1992.)

**Section 6.7.**

If a judge is not reasonably available to appoint counsel to represent an indigent defendant, the clerk of court shall appoint the next eligible attorney on the list. Appointments of counsel by the clerk shall be subject to review and approval by the judge. (Added March 4, 1992.)

## ARTICLE VII. APPOINTMENTS IN CAPITAL CASES

**Section 7.1.**

In addition to the provisions of Article VI, the provisions of this Article shall apply to the appointment of counsel in capital cases.

**Section 7.2.**

A counsel and an assistant counsel shall be appointed to represent an indigent defendant charged with murder, in cases in which the State is seeking the death penalty. The assistant counsel may be on the second list or the third list of attorneys. (Amended March 4, 1992.)

**Section 7.3.**

No attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime:

(a) Who has less than five years experience in the general practice of law, provided that the court may, in its discretion, appoint as assistant counsel an attorney who has less experience; or

(b) Who has not been found by the court appointing him to have a demonstrated proficiency in the field of criminal trial practice.

For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office.

## ARTICLE VIII. APPELLATE APPOINTMENTS

**Section 8.1.**

If a criminal defendant who has given notice of appeal from a conviction is found to be eligible, because of indigency, for appointment of counsel at the appellate level, the attorney representing the defendant at the trial level may be appointed to represent the defendant at the appellate level. If the attorney representing the defendant at the trial level was retained, he may be appointed to represent the defendant at the appellate level even though he does not meet all the requirements of Article III or the other pertinent provisions of these regulations. For good cause, the attorney at the trial level may be relieved of

responsibility for the appeal. Whenever it is otherwise necessary to appoint an attorney to represent an indigent person at the appellate level, the attorney appointed shall be selected in a manner consistent with appointment of counsel at the trial level. If the trial attorney is not appointed, the appellate defender's office or any other qualified attorney may be appointed, in a manner consistent with these rules, to represent the defendant at the appellate level. (Amended March 4, 1992.)

**Section 8.2.**

No attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime:

(a) Who has less than five years experience in the general practice of law, provided, however, that the court or, where authorized, the public defender, may, in its or his discretion, appoint as assistant counsel an attorney who has less experience; or

(b) Who has not been found by the court or the public defender to have a demonstrated proficiency in the field of appellate practice.

For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office. (Amended March 4, 1992.)

## ARTICLE IX. ADMINISTRATION

**Section 9.1.**

The Senior Resident Superior Court Judge for the _____ Judicial District shall designate a person to serve as administrator of these regulations.

**Section 9.2.**

The administrator will perform the duties described previously and particularly shall:

(a) Maintain records relating to these regulations and to the actions of the Committee on Indigent Appointments;

(b) Keep current the three lists of attorneys;

(c) Assist the courtroom clerks and the Clerk of Superior Court in carrying out these regulations;

(d) Attend meetings of the committee as appropriate;

(e) Inform the judges of the district and the district attorney and the members of the committee of requests by attorneys concerning placement on any lists;

(f) Perform other administrative tasks necessary to the implementation of these regulations.

**Section 9.3.**

The administrator shall have such office, supplies, and equipment as can be provided by the Senior Resident Superior Court Judge or the committee.

**Section 9.4.**

The Clerk of Superior Court of each county in the _____ Judicial District shall file and keep current these regulations for the assignment of counsel as certified to him by the Secretary of the North Carolina State Bar.

**Section 9.5.**

The Clerk of Superior Court of each county in the _____ Judicial District shall keep a record of all counsel eligible for appointment under these regulations and a permanent record of all appointments made in his county.

## ARTICLE X. MISCELLANEOUS

**Section 10.1.**

These regulations are issued pursuant to Article IV of the rules and regulations promulgated in accordance with North Carolina General Statute 7A-459 by the North Carolina State Bar Council, entitled Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases, as set out in the Rules Volume of The General Statutes of North Carolina (published by The Michie Company). Nothing contained herein shall be construed or applied inconsistently with the regulations established by the North Carolina State Bar Council or with other provisions of state law.

**Section 10.2.**

It is recognized that the court has the inherent discretionary power in any case to decline to appoint a particular attorney to represent an indigent person. It is also recognized that occasionally the court may determine that the interests of justice would be best served by appointing a particular lawyer to handle a particular case even though he is not next in sequence or does not maintain an office in the county where the case is to be tried. (Amended March 4, 1992.)

**Section 10.3.**

These regulations shall be construed liberally in order to carry out the purpose stated in Article I.

**Section 10.4.**

These regulations shall become effective on _____, and shall supersede any existing regulations or plan concerning the appointment of counsel in indigent cases.

APPROVED AND PROMULGATED THIS _____ DAY OF _____, _____.

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# NORTH CAROLINA SUPREME COURT LIBRARY RULES

Adopted December 20, 1967,
with amendments received through September 10, 1997.


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## GENERAL PROVISIONS

### Rule 1. Short title.

The following rules and regulations shall be known and may be cited as North Carolina Supreme Court Library Rules.

### Rule 2. Definitions.

Subject to additional definitions contained in subsequent sections and applicable to specific parts of these Rules, and unless the context otherwise requires, the following definitions shall apply for purposes of these Rules:

(a) "Assistant Librarian" means the Assistant Librarian of the Supreme Court Library.

(b) "Librarian" means the Librarian of the Supreme Court Library.

(c) "Library" means the North Carolina Supreme Court Library.

(d) "Library Committee" means that committee appointed and acting pursuant to G.S. 7A-13 of the General Statutes of North Carolina.

(e) "Library material" means any book, paper, document, map, magazine, pamphlet, newspaper, manuscript, film, periodical, or other item or material, regardless of physical form of characteristics, that is a part of the collection or holdings of the Library.

(f) "Official Register" means that list of positions of the State of North Carolina that is appended to these Rules as Appendix I.

(g) "Rules" means any rules or regulations contained in the North Carolina Supreme Court Library Rules.

(h) "Staff" means any assistants or other persons or employees appointed by or working under the supervision of the Librarian of the Supreme Court Library. (Amended November 28, 1972.)

## HOURS AND USE OF LIBRARY

### Rule 3. Hours.

Except when the Library Committee authorizes that it be closed, the Library shall be open for public use on Monday through Friday from eight-thirty o'clock in the morning until five o'clock in the afternoon. (Amended July 24, 1980; November 8, 1983, eff. January 1, 1984.)

### Rule 4. Use during regular hours.

Any person who conducts himself in a quiet, orderly, and lawful manner and who abides by the Rules and the reasonable requests of the staff may visit the Library and reasonably use its material to such extent, in such manner, and for such duration as in the discretion of the Librarian or Assistant Librarian reasonably does not or will not interfere with the performance of the Library's primary function of serving the Appellate Division of the General Court of Justice.

### Rule 5. Use after hours.

Only members and employees of the Supreme Court and the Court of Appeals may enter the Library or use the material or facilities of the Library when the Library is not open for public use. (Amended April 14, 1975; July 24, 1980; September 1, 1982.)

### Rule 6. Entrance and exits.

All visitors and users of the Library shall enter and leave the Library through an elevator except in emergency situations and times when an elevator is not in operation.

### Rule 7. Conduct.

Smoking, consumption of food or beverages other than from water fountains in the Library, loud talking, boisterous or disorderly conduct, and the use of dictating equipment shall not be permitted in the Library.

## USE OF MATERIAL

### Rule 8. Clearing of tables.

At the end of each day the staff shall clear all tables and reshelve all unshelved books in the reading area of the Library; however, provided that no books shall be left on tables for more than two consecutive nights, the staff may leave material on tables overnight when the person using the material leaves on it a signed and dated request that it not be reshelved.

### Rule 9. Abuse of material.

No person shall damage or abuse any Library material or equipment in any respect. Marking, writing upon, cutting, tearing, defacing, disfiguring, soiling, obliterating, or breaking such material or equipment, or folding pages, closing a book with a writing instrument or other object within it, tearing out or removing any page or pocket part without authority, or stacking other books or heavy objects on an open book are included within this prohibition.

**Rule 10. Replacement of lost materials.**

Any person who unintentionally or inadvertently shall lose or misplace any Library material and for that reason fail to return it within the time that it is due to be returned shall, within thirty (30) days from such due date, make such replacement as will be acceptable to the Librarian in his discretion, or pay to the Library the fair value of the material as determined by the Librarian.

## SERVICES

**Rule 11. Copy service, fees, and certification.**

The Library shall operate a copy service by means of which it shall furnish requested copies of all or portions of any Library material that legally may be copied, such copies to be furnished subject to the following terms and conditions:

(a) All copies requested by members and employees of the Supreme Court and the Court of Appeals shall be furnished without charge.

(b) Provided that the number of copies requested at any one time does not exceed ten (10) pages, or with the permission of the Librarian or the Assistant Librarian regardless of the number of copies requested, the Library shall furnish without charge such copies as personally are requested by persons holding positions listed in the Official Register and that such persons state are to be used in the discharge of their official duties; however, when the request is for more than ten (10) pages at any one time, or total requests from the same person in any single month exceed fifty (50) pages, the Librarian or Assistant Librarian may require the approval of the Library Committee before making such copies without charge, such approval then to be given only for good cause shown and upon the written and signed application of the person requesting the copies.

(c) Except as provided for in sections (a) and (b) of this Rule, the Library shall charge and collect a fee of twenty cents ($.20) per page for each copy that it makes.

(d) The Librarian shall charge and collect a fee of one dollar ($1.00) for each individual case, statute, or other distinct item that he certifies pursuant to G.S. 7A-13(f) of the General Statutes of North Carolina, except that certificates requested by persons holding positions listed in the Official Register shall be provided without charge. Preparation of copies to be certified and the charges therefor, if any, shall be as provided by sections (a), (b) and (c) of this Rule.

(e) Fees for making or certifying copies shall be paid on or before delivery, except that copies requested by members of the North Carolina State Bar, Inc., may be made and delivered upon the condition that full payment will be made within forty-eight (48) hours after the delivery of the copies.

(f) Patrons may make their own photocopies for ten cents ($.10) per page. (Amended July 24, 1980.)

**Rule 12. Research service.**

No member of the Library staff shall do law research for or give legal advice or counsel to any person except as requested by a member of the Supreme Court or the Court of Appeals for his own use, or as authorized by the Librarian.

## BORROWING AND REMOVING MATERIAL

**Rule 13. Who may borrow material.**

The following persons only may borrow and remove material from the Library:

(a) Members and employees of the Supreme Court and the Court of Appeals, in person or upon his or her signed memorandum.

(b) The Attorney General and members of his staff who are members of the North Carolina State Bar, Inc., in person or upon his or her signed memorandum.

(c) The Governor and members of the Council of State, in person or upon his or her signed memorandum.

(d) The President of the Senate, the Speaker of the House of Representatives, and the respective chairmen of the committees of the General Assembly, in person or upon his or her signed memorandum.

(e) The heads or duly constituted representatives of established agencies or institutions that offer reciprocal services to the Library and that are engaged in what the Librarian in his discretion deems to be worthy educational, historical, library, archival, or bibliographical activity for which they have a legitimate need to borrow the material requested.

(f) The Secretary-Treasurer of the North Carolina State Bar, Inc. (Amended July 24, 1980.)

**Rule 14. Return of borrowed material.**

Material borrowed from the Library shall be returned to the Library within the time provided below:

(a) Members of the Supreme Court and the Court of Appeals shall return borrowed material as early as possible, but in no event shall any item be retained for more than one week from the time of borrowing.

(b) Borrowers who are not members of the Supreme Court or the Court of Appeals shall return borrowed material before the closing of the Library on the day that the item is borrowed except when upon the borrower's written request stating good reason the Librarian or the Assistant Librarian in his or her respective discretion authorizes that any specific item be retained by the borrower until a later time as set by the Librarian or the Assistant Librarian.

**Rule 15. Receipts for borrowed material.**

Each person who borrows material from the Library shall give a receipt therefor on a form prescribed for that purpose by the Librarian and available in the Library.

**Rule 16. Borrowing proscriptions and limitations.**

The Librarian in his discretion may limit or proscribe the borrowing of old books, rare books, digests, indexes, general reference materials, looseleaf services, encyclopedias, advance sheets, and other materials that because of their particular value, nature, or frequent use should remain in the Library at all times or have only limited circulation.

**Rule 17. Removal from the justice building.**

No borrower, except a Judge of the Court of Appeals upon his written request, may remove any Library material from the Justice Building except when each of the following conditions exists:

(a) It is not reasonably possible for the person desiring to use the material to do so within the Justice Building.

(b) It is impracticable to copy the material by use of the facilities available in the Justice Building, or such copies reasonably would not serve the purpose of the person desiring to borrow the material.

(c) Material that is identical or substantially the same may not be borrowed and removed from the North Carolina State Library or any other public library in Raleigh.

(d) The material is not out of print and it reasonably could be replaced.

(e) The Library has more than one copy of the material.

**Rule 18. Transportation of material.**

Library materials may not be sent through State Interoffice Mail or transported by or through any other person, agency, or means that the Librarian in his discretion deems unsafe.

## INTERNAL RULES

**Rule 19. Policies and procedures.**

The Librarian shall be responsible for the general administration of the Library, and he shall execute the policies established by the Library Committee.

## PENALTY

**Rule 20. Contempt of court.**

Any person who intentionally and wilfully violates any North Carolina Supreme Court Library Rule shall, upon formal complaint filed in the Supreme Court by the Librarian, be subject to being adjudged in contempt of the Supreme Court.

## RECORDS AND ANNUAL REPORT

**Rule 21. Records and annual report.**

The Librarian shall keep Library records in a form acceptable to the Library Committee, and on or before September 1 of each year he shall make to the Supreme Court a summary report of Library activities for the fiscal year that ended on the preceding June 30.

# APPENDIX I

## OFFICIAL REGISTER, STATE OF NORTH CAROLINA

(1) The Senators, Representatives, Legislative Services Officer, Director of Legislative Drafting, and Director of Research for the General Assembly.

(2) The Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.

(3) The Secretary of the Department of Administration, Secretary of the Department of Commerce, Secretary of the Department of Correction, Secretary of the Department of Crime Control and Public Safety, Secretary of the Department of Cultural Resources, Secretary of the Department of Human Resources, Secretary of the Department of Natural Resources and Community Development, Secretary of the Department of Revenue, and Secretary of the Department of Transportation.

(4) The Judges of the Superior Court and the Judges of the District Court.

(5) The District Attorneys and the Public Defenders.

(6) The State Librarian.

(7) The Director of the Division of Archives and History.

(8) The Director, Assistant Director, and Counsel of the Administrative Office of the Courts.

(9) The Chairman of the Judicial Standards Commission.

(10) The Secretary-Treasurer of the North Carolina State Bar, Inc.

(11) The State President of the Department of Community Colleges.

(12) The Director of the Office of Administrative Hearings.

(13) The Chairman of the Administrative Review Commission. (Added November 28, 1972; amended July 24, 1980; July 19, 1982; November 8, 1983; June 21, 1984; March 18, 1986; September 12, 1988.)

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## ARTICLE I. ADMINISTRATION

### Rule 101. Location of offices and hours of business.

The offices of the North Carolina Industrial Commission (hereinafter "Industrial Commission") are located in the Dobbs Building, 430 North Salisbury Street, in Raleigh, North Carolina. The General Mailing Address is North Carolina Industrial Commission, 4319 Mail Service Center, Raleigh, NC

27699-4319. The same office hours will be observed by the Industrial Commission as are, or may be, observed by other State offices in Raleigh. The offices are open between the hours of 8:00 a.m. and 5:00 p.m. to accept documents for filing.

**Rule 102. Transaction of business by the Commission.**

The Industrial Commission will remain in continuous session subject to the call of the Chair to meet as a body for the purpose of transacting such business as may come before it.

In reviewing an Opinion and Award of a Deputy Commissioner or of a sole Commissioner acting as the hearing officer, the Full Commission may sit en banc or in panels of three.

**Rule 103. Official forms.**

(1) The Industrial Commission will supply, on request, forms identified by number and title as follows:

| | |
|---|---|
| Form 17 | Workers' Compensation Notice |
| Form 18 | Notice of Accident to Employer and Claim of Employee or His Personal Representative or Dependents (N.C. Gen. Stat. § 97-22 through 24) |
| Form 18B | Claim by Employee or His Personal Representative or Dependents for Workers' Compensation Benefits for Lung Damage, Including Asbestosis, Silicosis, and Byssinosis (N.C. Gen. Stat. § 97-53) |
| Form 18M | Employee's Claim for Additional Medical Compensation |
| Form 19 | Employer's Report of Employee's Injury to the Industrial Commission |
| Form 21 | Agreement for Compensation for Disability Pursuant to N.C. Gen. Stat. § 97-82 |
| Form 22 | Statement of Days Worked and Earnings of Injured Employee (Wage Chart) |
| Form 24 | Application to Terminate or Suspend Payment of Compensation Pursuant to N.C. Gen. Stat. § 97-18.1 |
| Form 25C | Authorization for Rehabilitation Professional to Obtain Medical Records of Current Treatment |
| Form 25D | Dentists' Itemized Statement of Charges for Treatment and Certification of Treatment of Disability |
| Form 25M | Physician's Itemized Statement of Charges for Treatment and Certification of Treatment |
| Form 25N | Notice to the Industrial Commission of Assignment of Rehabilitation Professional |
| Form 25R | Evaluation for Permanent Impairment |
| Form 25T | Itemized Statement of Charges for Travel |
| Form 25P | Itemized Statement of Charges for Drugs |
| Form UB-92 | Hospital Bill |
| Form 26 | Supplemental Agreement as to Payment of Compensation Pursuant to N.C. Gen. Stat. § 97-82 |
| Form 26D | Agreement for Compensation Under N.C. Gen. Stat. § 97-37 |
| Form 28 | Return to Work Report |
| Form 28B | Report of Employer or Carrier/Administrator of Compensation and Medical Compensation Paid and Notice of Right to Additional Medical Compensation |
| Form 28T | Notice of Termination of Compensation by Reason of Trial Return to Work Pursuant to N.C. Gen. Stat. § 97-18.1(b) and N.C. Gen. Stat. § 97-32.1 |

| | |
|---|---|
| Form 28U | Employee's Request that Compensation be Reinstated After Unsuccessful Trial Return to Work Pursuant to N.C. Gen. Stat. § 97-32.1 |
| Form 29 | Supplementary Report for Fatal Accidents |
| Form 30 | Agreement for Compensation for Death |
| Form 30D | Notice of Death Award (Approval of Agreement) |
| Form 31 | Application for Lump Sum Award |
| Form 33 | Request that Claim be Assigned for Hearing |
| Form 33R | Response to Request that Claim be Assigned for Hearing |
| Form 36 | Subpoena for Witness and Subpoena to Produce Items or Documents |
| Form 42 | Application for Appointment of Guardian *Ad Litem* |
| Form 44 | Application for Review |
| Form 50 | Itemized Statement of Charge for Nursing |
| Form 51 | Consolidated Fiscal Annual Report of "Medical Only" and "Lost Time" Cases |
| Form 60 | Employer's Admission of Employee's Right to Compensation Pursuant to N.C. Gen. Stat. § 97-18(b) |
| Form 61 | Denial of Workers' Compensation Claim Pursuant to N.C. Gen. Stat. § 97-18(c) and (d) |
| Form 62 | Notice of Reinstatement of Compensation Pursuant to N.C. Gen. Stat. § 97-32.1 and N.C. Gen. Stat. § 97-18(b) |
| Form 63 | Notice to Employee of Payment of Compensation Without Prejudice to Later Deny the Claim Pursuant to N.C. Gen. Stat. § 97-18(d) |
| Form 90 | Report of Earnings |
| Form IZ-510 | Medical Bill Analysis Used for Approval and Reduction of Medical Bills |
| Form MCS2 | Petition for Order Referring Case to Mediated Settlement Conference |
| Form MCS4 | Designation of Mediator |
| Form MCS5 | Report of Mediator |
| Form MCS6 | Mediator's Declaration of Interest and Qualifications |
| Form MCS7 | Report of Evaluator |

The mailing address for each Industrial Commission Form appears at the bottom right corner of the Form.

(2) The use of any printed forms other than those approved and adopted by the Industrial Commission is prohibited. Insurance carriers, self-insureds, attorneys and other parties may reproduce approved forms for their own use, provided:

(a) No statement, question, or information blank contained on the approved Industrial Commission's form is omitted from the substituted form.

(b) Such substituted form is substantially identical in size and format with the approved Industrial Commission's form.

(3) The following forms may be utilized in preparing routine orders for the signature of a Commissioner or Deputy Commissioner, and are appended at the end of these Rules:

| | |
|---|---|
| Form I | Order for Third Party Recovery Distribution per N.C. Gen. Stat. § 97-10.2 |
| Form IIa | Order Approving Compromise Settlement Agreement (admitted liability, medical paid) and Third Party Distribution |
| Form IIb | Order Approving Compromise Settlement Agreement (denied liability, unpaid medical) and Third Party Distribution |
| Form IIIa | Order for Approving Compromise Settlement Agreements (admitted liability, medical paid) |

Form IIIb Order for Approving Compromise Settlement Agreements (denied liability, unpaid medical)

(4) Copies of rules, forms and Industrial Commission Minutes can be obtained by contacting the Administrator's Office of the Industrial Commission, 4319 Mail Service Center, Raleigh, NC 27699-4319.

**Rule 104. Employer's report of injury.**

An employer shall immediately report to its carrier or administrator any injury or occupational disease, or allegation by an employee of an injury or occupational disease, sustained in the course of employment for which the attention of a physician is needed or actually sought. Within five days of knowledge of the injury or allegation, the employer or carrier/administrator or its successor in interest shall file with the Industrial Commission and provide a copy to the employee of a Form 19, Employer's Report of Employee's Injury to the Industrial Commission, if injury causes the employee to be absent from work for more than one day and the employee's medical compensation is greater than an amount which is established periodically by the Industrial Commission in its Minutes. The employer may record the employee's or another person's description of the injury on the Form 19 without admitting the truth of the information.

In addition to providing the Form 19 to the employee, the employer shall also provide a blank Form 18 for use by the employee. (Amended effective March 1, 2001.)

## ARTICLE II. NOTICE OF ACT

**Rule 201. Notice of employment subject to the act.**

(1) Pursuant to the provisions of N.C. Gen. Stat. § 97-93, all employers subject to the provisions of the Workers' Compensation Act shall post in a conspicuous location in places of employment a Form 17, Workers' Compensation Notice, to give notice to the employees that they are in an employment subject to the provisions of the Workers' Compensation Act and that their employer has obtained workers' compensation coverage or has qualified as self-insured for workers' compensation purposes.

(2) Should the employer allow its workers' compensation coverage to lapse or cease to qualify as a self-insured, the employer shall remove within five working days any Form 17 and any other notice indicating otherwise.

## ARTICLE III. INSURANCE

**Rule 301. Proof of insurance coverage.**

Every employer subject to the provisions of the Act shall file with the Industrial Commission proof that it has obtained workers' compensation insurance pursuant to the insurance provisions of the Act. This requirement may be satisfied by:

(1) A notice from the employer's insurance carrier, through the North Carolina Rate Bureau, certifying that coverage has been received.

(2) A notice from the North Carolina Department of Insurance, through the Rate Bureau, certifying that the employer has qualified as a self-insured employer or as a member of a self-insurance fund pursuant to the Act.

(3) All employers have an affirmative obligation to report to the Rate Bureau any changes in coverage within 30 days.

(4) All employers must notify the Department of Insurance when it becomes a member of a self-insurance fund.

## ARTICLE IV. DISABILITY, COMPENSATION, FEES

### Rule 401. When disability begins for purpose of computing compensation.

(1) If the injured employee is not paid wages for the entire day on which the injury occurred, the seven-day waiting period prescribed by the Act shall include the day of injury regardless of the hour of the injury.

(2) If the injured employee is paid wages for the entire day on which he is injured and fails to return to work on his next regular workday because of the injury, the seven-day waiting period shall begin with the first calendar day following his injury, even though this may or may not be a regularly scheduled workday.

(3) All days, or parts of days, when the injured employee is unable to earn a full day's wages, or is not paid a full day's wages due to injury, shall be counted in computing the waiting period even though the days may not be consecutive, and even though these are not regularly scheduled workdays.

(4) If the permanent disability period, when added to the temporary disability period, exceeds 21 days, there is no waiting period.

### Rule 402. Computation of daily wage.

In all cases involving a fractional part of a week, the daily wage shall be computed on the basis of one-seventh of the average weekly wage.

### Rule 403. Manner of payment of compensation.

(1) All payments of compensation must be made directly to the employee, dependent, guardian or personal representative entitled thereto unless otherwise ordered by the Industrial Commission. At the employee's request, payment of compensation shall be mailed by first class mail, postage pre-paid, to an address specified by the employee, unless otherwise directed by the Industrial Commission.

(2) All payments of compensation must be made in strict accordance with the award issued by the Industrial Commission.

### Rule 404. Termination of compensation.

(1) Payments of compensation undertaken pursuant to an award of the Industrial Commission shall continue until the terms of the award have been fully satisfied. In cases where the award is to pay compensation during disability, there is a rebuttable presumption that disability continues until the employee returns to suitable employment. No application to terminate or suspend compensation shall be approved without a formal hearing if the effect of such approval is to set aside the provisions of an award of the Industrial Commission.

(2) When an employer or carrier/administrator seeks to terminate or suspend compensation being paid pursuant to N.C. Gen. Stat. § 97-29 for a reason other than those specified in N.C. Gen. Stat. § 97-18(d), payment without prejudice, or N.C. Gen. Stat. § 97-18.1(b), trial return to work, the employer or carrier/administrator shall notify the employee and the employee's attorney of record, if any, on Form 24, "Application to Stop Payment of Compensation." The employer or carrier/administrator shall specify the legal grounds and the

alleged facts supporting the application, and shall complete the blank space in the "Important Notice to Employee" portion of Form 24 by inserting a date 17 days from the date the employer or carrier/administrator deposits the completed Form 24 in the mail to the employee and the employee's attorney of record, if any. The original of the Form 24 and the attached documents shall be sent to the Industrial Commission at the same time and by the same method by which a copy of the Form 24 and attached documents are sent to the employee and the employee's attorney of record, if any. The Form 24 shall specify the number of pages of documents attached which are to be considered by the Industrial Commission. Failure to specify the number of pages may result in the refusal of the Industrial Commission to accept the same for filing. If the employee or the employee's attorney of record, if any, objects by the date inserted on the employer's Form 24, or within such additional reasonable time as the Industrial Commission may allow, the Industrial Commission shall set the case for an informal hearing, unless waived by the parties in favor of a formal hearing. A copy of any objection shall be sent, with any supporting documents, to the employer and carrier/administrator. The term "carrier/administrator" also includes any successor in interest.

(3) If an employee does not object within the allowed time, the Industrial Commission shall review the Form 24 and any attached documentation, and an Administrative Decision and Order may be rendered without an informal hearing as to whether compensation shall be terminated or suspended, except as provided in paragraph (6) below. Either party may seek review of the Administrative Decision and Order as provided by Rule 703.

(4) If the employee timely objects to the Form 24, the Industrial Commission shall conduct an informal hearing within 25 days of the receipt by the Industrial Commission of the Form 24, unless the time is extended for good cause shown. The informal hearing may be by telephone conference between the Industrial Commission and the parties or their attorneys of record, if any. When good cause is shown, the informal hearing may be conducted with the parties or their attorneys of record, if any, personally present with the Industrial Commission in Raleigh or such other location as is selected by the Industrial Commission. The Industrial Commission shall make arrangements for the informal hearing with a view towards conducting the hearing in the most expeditious manner under the circumstances. Except for good cause shown, the informal hearing shall be no more than 30 minutes, with each side given 10 minutes to present its case and five minutes for rebuttal. Notwithstanding the above, the employer or carrier/administrator may waive the right to an informal hearing, and proceed to a formal hearing by filing a request for hearing on a Form 33. A decision on the application shall be made within five days after the completion of the informal hearing.

(5) Either party may appeal the Administrative Decision and Order of the Industrial Commission as provided by Rule 703. A Deputy Commissioner shall conduct a hearing which shall be a hearing *de novo*. The hearing shall be peremptorily set and shall not require a Form 33. The employer has the burden of producing evidence on the issue of the employer's application for termination or suspension of compensation. If the Deputy Commissioner reverses an order previously granting a Form 24 motion, the employer or carrier/administrator shall promptly resume compensation or otherwise comply with the Deputy Commissioner's decision, notwithstanding any appeal or application for review to the Full Commission under N.C. Gen. Stat. § 97-85.

(6) In the event the Industrial Commission is unable to reach a decision after an informal hearing, the Industrial Commission shall issue an order to that effect which shall be in lieu of a Form 33 and the case shall be placed on the formal hearing docket. If additional issues are to be addressed, the employer or carrier/administrator shall be required within 30 days of the date

of the Administrative Decision and Order to file a Form 33 or to notify the Industrial Commission that a formal hearing is not currently necessary. The effect of placing the case on the docket shall be the same as if the Form 24 were denied, and compensation shall continue until such time as the case is decided by a Commissioner or a Deputy Commissioner following a formal hearing.

(7) Any Administrative Decision and Order shall be mailed to the non-prevailing party by certified mail.

(8) No order issued as a result of an informal Form 24 hearing shall terminate or suspend compensation retroactively to a date preceding the filing date of the filing of the Form 24. Compensation may be terminated retroactively without a formal hearing where there is agreement by the parties, where allowed by statute, or where the employee is incarcerated. Otherwise, retroactive termination or suspension of compensation to a date preceding the filing of a Form 24 may be ordered as a result of a formal hearing. Additionally, nothing shall impair an employer's right to seek a credit pursuant to N.C. Gen. Stat. § 97-42.

**CASE NOTES**

**The presumption of plaintiff's continued disability was amply rebutted** by defendants through witness testimony, videotaped surveillance of plaintiff, as well as medical evidence and strong evidence of fraud. Johnson v. Lowe's Cos., — N.C. App. —, 546 S.E.2d 616, 2001 N.C. App. LEXIS 296 (2001).

**Cited** in Crouse v. Flowers Baking Co., 123 N.C. App. 555, 473 S.E.2d 372 (1996).

## Rule 404A. Trial return to work.

(1) Except as provided in subparagraph (7), when compensation for total disability being paid pursuant to N.C. Gen. Stat. § 97-29 is terminated because the employee has returned to work for the same or a different employer, such termination is subject to the trial return to work provisions of N.C. Gen. Stat. § 97-32.1. When compensation is terminated under these circumstances, the employer or carrier/administrator shall, within 16 days of the termination of compensation, file a Form 28T with the Industrial Commission and provide a copy of it to the employee and the employee's attorney of record, if any.

(2) If during the trial return to work period, the employee must stop working due to the injury for which compensation had been paid, the employee should complete and file with the Industrial Commission a Form 28U, without regard to whether the employer or carrier/administrator has filed a Form 28T as required by paragraph (1) above, and provide a copy of the completed form to the employer and carrier/administrator. A Form 28U shall contain a section which must be completed by the physician who imposed the restrictions or one of the employee's authorized treating physicians, certifying that the employee's injury for which compensation had been paid prevents the employee from continuing the trial return to work. If the employee returned to work with an employer other than the employer at the time of injury, the employee must complete the "Employee's Release and Request For Employment Information" section of a Form 28U. An employee's failure to provide a Form 28U does not preclude a subsequent finding by the Commission that the trial return to work was unsuccessful.

(3) Upon receipt of a properly completed Form 28U, the employer or carrier/administrator shall promptly resume payment of compensation for total disability. If the employee fails to provide the required certification of an authorized treating physician as specified in subsection 2 above, or if the employee fails to execute the "Employee's Release and Request" section of a Form 28U, if required pursuant to paragraph (2) above, the employer or

carrier/administrator shall not be required to resume payment of compensation. Instead, in such circumstances, the employer or carrier/administrator shall promptly return a Form 28U to the employee and the employee's attorney of record, if any, along with a statement explaining the reason the Form 28U is being returned and the reason compensation is not being reinstated.

(4) The reinstated compensation shall be due and payable and subject to the provisions of N.C. Gen. Stat. § 97-18(g) on the date and for the period commencing on the date the employer or carrier/administrator receives a properly completed Form 28U certifying an unsuccessful return to work. Such resumption of compensation shall not preclude the employee's right to seek, nor the employer's or carrier/administrator's right to contest, the payment of compensation for the period prior or subsequent to such reinstatement. If it is thereafter determined that any temporary total or temporary partial compensation, including the reinstated compensation, was not due and payable, a credit shall be given against any other compensation determined to be owed.

(5) When the employer or carrier/administrator has received a properly completed Form 28U and contests the employee's right to reinstatement of total disability compensation, it may suspend or terminate compensation only as provided in N.C. Gen. Stat. § 97-18.1 and/or pursuant to the provisions of N.C. Gen. Stat. § 97-83 and N.C. Gen. Stat. § 97-84.

(6) Upon resumption of payment of compensation for total disability, the employer or carrier/administrator shall complete and file a Form 62 and/or such other forms as may be required by the Workers' Compensation Act or by Industrial Commission rule. A copy of the Form 62 shall be sent to the employee and the employee's attorney of record, if any.

(7) The trial return to work provisions do not apply to the following:

(a) "Medical only" cases, defined as cases in which the employee is not absent from work more than one day and in which medical expenses are less than the amount periodically established by the Industrial Commission in its Minutes;

(b) Cases in which the employee has missed fewer than eight days from work;

(c) Cases wherein the employee has been released to return to work by an authorized treating physician as specified in subsection 2 above without restriction or limitation except that if the physician, within 45 days of the employee's return to work date, determines that the employee is not able to perform the job duties assigned, then the employer or carrier/administrator must resume benefits. If within the same time period, the physician determines that the employee may work only with restrictions, then the employee is entitled to a resumption of benefits commencing as of the date of the report, unless the employer is able to offer employment consistent with the restrictions, in which case a trial return to work period shall be deemed to have commenced at the time of the employee's initial return to work;

(d) Cases wherein the employee has accepted or agreed to accept compensation for permanent partial disability pursuant to N.C. Gen. Stat. § 97-31, unless the trial return to work follows reinstatement of compensation for total disability under N.C. Gen. Stat. § 97-29; and

(e) Claims pending on or filed after 1 January 1995, when the employer or carrier/administrator contests a claim pursuant to N.C. Gen. Stat. § 97-18(d) within the time allowed thereunder.

(8) This Rule became effective on 15 February 1995, and applies to any employee who leaves work on or after that date due to a compensable injury.

**CASE NOTES**

**Applied** in Jenkins v. Public Serv. Co. of N.C., 134 N.C. App. 405, 518 S.E.2d 6 (1999), cert. granted, 351 N.C. 106, 541 S.E.2d 147 (1999).

**Rule 405. Computation of compensation for amputations.**

(1) Amputation of any portion of the bone of a distal phalange of a finger or toe at or distal to the visible base of the nail will be considered as equivalent to the loss of one-fourth (¼) of such finger or toe.

(2) Amputation of any portion of the bone of the distal phalange of a finger or toe proximal to the visible base of the nail will be considered as equivalent to the loss of one-half (½) of such finger or toe.

(3) Amputation through the forearm at a point so distal to the elbow as to permit satisfactory use of a prosthetic appliance with retention of full natural elbow function shall be considered amputation of the hand. Otherwise, it shall be considered amputation of the arm.

(4) Amputation through the lower leg at a point so distal to the knee as to permit satisfactory use of a prosthetic appliance with retention of full natural knee function shall be considered amputation of the foot. Otherwise, it shall be considered amputation of the leg.

**Rule 406. Discount table to be used in determining commuted values.**

The Industrial Commission in its discretion will designate the interest rate and methods of computation to be used in arriving at the commuted value of unaccrued compensation payments.

**Rule 407. Fees for medical compensation.**

(1) Subject to the provisions of N.C. Gen. Stat. § 97-25.3, "Preauthorization," the Industrial Commission shall adopt and publish a Fee Schedule, pursuant to the provisions of N.C. Gen. Stat. § 97-26(a), fixing maximum fees, except for hospital fees pursuant to N.C. Gen. Stat. § 97-26(b), which may be charged for medical, surgical, nursing, dental, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances. The fees prescribed in the applicable published Fee Schedule shall govern and apply in all cases. However, in special hardship cases where sufficient reason is demonstrated to the Industrial Commission, fees in excess of those so published may be allowed. Persons who disagree with the allowance of such fees in any case may make application for and obtain a full review of the matter before the Industrial Commission as in all other cases provided. Copies of this published Fee Schedule may be obtained from the Industrial Commission's authorized vendor.

(2) A provider of medical compensation shall submit its statement for services within 75 days of the rendition of the service or if treatment is longer, within 30 days after the end of the month during which multiple treatments were provided, or within such other reasonable period of time as allowed by the Industrial Commission. However, in cases where liability is initially denied but subsequently admitted or determined by the Industrial Commission, the time for submission of medical bills shall run from the time the health care provider received notice of the admission or determination of liability. Within 30 days of receipt of the statement, the employer, or carrier, or managed care organization, or administrator on its behalf, shall pay or submit the statement to the Industrial Commission for approval or send the provider written objections to the statement. If an employer, carrier/administrator or managed care organization disputes a portion of the provider's bill, it shall pay the uncontested portion of the bill and shall resolve disputes regarding the balance of the charges through its contractual arrangement or through the Industrial Com-

mission. If any bill for medical compensation services is not paid within 60 days after it has been approved by the Industrial Commission and returned to the responsible party, or, when the employee is receiving treatment through a managed care organization, within 60 days after the bill has been properly submitted to an insurer or managed care organization, there shall be added to such unpaid bill an amount equal to 10%, which shall be paid at the same time as, but in addition to, such bill, unless late payment is excused by the Industrial Commission. When the 10% addition to the bill is uncontested, payment shall be made to the provider without notifying or seeking approval from the Industrial Commission. When the 10% addition to the bill is contested, any party may request a hearing by the Industrial Commission pursuant to N.C. Gen. Stat. § 97-83, and N.C. Gen. Stat. § 97-84.

(3) When the responsible party seeks an audit of hospital charges, and has paid the hospital charges in full, the payee hospital, upon request, shall provide all reasonable access and copies of appropriate records, without charge or fee, to the person(s) chosen by the payor to review and audit the records.

(4) The responsible employer or carrier/administrator shall pay the statements of medical compensation providers to whom the employee has been referred by the authorized treating physician, unless said physician has been requested to obtain authorization for referrals or tests; provided, that compliance with such request does not unreasonably delay the treatment or service to be rendered to the employee.

(5) It is the responsibility of the carrier, self-insured employer, group insured as certified by the North Carolina Department of Insurance, and statutory self-insured (state agency or political subdivision) to submit on a yearly basis a Form 51, Consolidated Fiscal Annual Report of "Medical Only" and "Lost Time" Cases.

(6) Employees shall be entitled to reimbursement for sick travel when the travel is medically necessary and the mileage is 20 or more miles, round trip, at a rate to be established periodically by the Industrial Commission in its Minutes. Employees shall be entitled to lodging and meal expenses, at a rate to be periodically established by the Industrial Commission in its Minutes, when it is medically necessary that the employee stay overnight at a location away from the employee's usual place of residence. An employee shall be entitled to reimbursement for the costs of parking or a vehicle for hire, when the costs are medically necessary, at the actual costs of the expenses, unless the Industrial Commission determines the expenses were not reasonable.

(7) Any employer/carrier/administrator denying a claim in which medical care has previously been authorized shall be responsible for all costs incurred prior to the date notice of denial is provided to each health care provider to whom authorization has been previously given.

**Rule 408. Additional medical compensation.**

(1) The Industrial Commission may enter an order as contemplated by N.C. Gen. Stat. § 97-25.1 providing for additional medical compensation on its own motion or pursuant to a stipulation of the parties or by approval of an agreement of the parties for additional medical compensation reflected in a Form 21 or a Form 26.

(2) If the parties have not reached an agreement regarding additional medical compensation, an employee may file a claim with the Industrial Commission for an order pursuant to the terms of N.C. Gen. Stat. § 97-25.1, for payment of additional medical compensation within two years of the date of the last payment of medical or indemnity compensation, whichever shall last occur. The claim may be made on a Form 18M or by written request to the Industrial Commission. The filing of this claim tolls the time limit contained in

this paragraph and in N.C. Gen. Stat. § 97-25.1. The original and one copy of the claim must be filed with the Industrial Commission's Office of the Executive Secretary, one copy must be provided to the employer or carrier/administrator, and one copy must be provided to the attorney of record, if any.

(3) Upon receipt of the claim, the Industrial Commission will notify the employer or carrier/administrator that the claim has been received by providing a copy of a Form 18M or a written claim. The employer or carrier/administrator shall, within 30 days, send to the Industrial Commission and to the employee and the employee's attorney of record, if any, a written statement as to whether the employee's request is accepted or denied. If the request is denied, the employer or carrier/administrator shall state in writing the grounds for the denial and shall attach any supporting documentation to the statement of denial.

(4) In cases where the employee's right to additional medical compensation is contested, the Form 18M, Request for Additional Medical Compensation, shall be treated as a Motion to the Executive Secretary for future medical compensation. Defendants shall have 30 days to respond. An administrative ruling shall thereafter be made subject to the right of either party to appeal such administrative decision by filing a Form 33, Request for Hearing, pursuant to the 15 day time limitation contained in Rule 703. An appeal of the Administrative Decision shall have the effect of staying the decision, provided that the stay may be dissolved in the discretion of the Commission for good cause shown.

(5) This Rule applies to injuries by accident occurring on or after July 5, 1994.

**Rule 409. Claims for death benefits.**

(1) Report of Fatalities

(a) Any person claiming entitlement to death benefits under the Act shall give written notice to the employer of the occurrence of death allegedly arising out of and in the course of employment in accordance with N.C. Gen. Stat. § 97-22.

(b) An employer shall notify the Commission of the occurrence of a death resulting from an injury or occupational disease allegedly arising out of and in the course of employment by timely filing a Form 19 within five days of knowledge thereof. In addition, an employer or carrier/administrator shall file with the Industrial Commission a Form 29, "Supplementary Report for Fatal Accidents," within 45 days of knowledge of a death or allegation of death resulting from an injury or occupational disease arising out of and in the course of employment.

(2) Identifying Beneficiaries

(a) An employer or carrier/administrator shall make a good faith effort to discover the names and addresses of decedent's beneficiaries under N.C. Gen. Stat. § 97-38 and identify them on the Form 29.

(b) In all cases involving minors or incompetents who are potential beneficiaries, a guardian *ad litem* shall be appointed pursuant to Rule 604.

(c) If an issue exists as to whether a person is a beneficiary under N.C. Gen. Stat. § 97-38, the employer or carrier/administrator and/or any person asserting a claim for benefits may file a Form 33 Request for Hearing for a determination by a Deputy Commissioner.

(3) Liability Accepted by Employer

(a) If the employer or carrier/administrator accepts liability for a claim involving an employee's death and there are no apparent issues necessitating a hearing for determination of beneficiaries and/or their respective rights, the parties shall submit an Agreement for Compensation for Death executed by all

interested parties or their representatives on Industrial Commission Form 30. All agreements must be submitted to the Industrial Commission on a Form 30 as set forth in Rule 501(4), (5) and (6).

(b) Said agreement shall be submitted along with all relevant supporting documents, including death certificate of the employee, any relevant marriage certificate and birth certificates for any dependents.

(4) Liability Denied by Employer

(a) If the employer or carrier/administrator denies liability for a claim involving an employee's death, the employer or carrier/administrator shall send a letter of denial to all potential beneficiaries, their attorneys of record, if any, all heath care providers that have submitted bills to the employer or carrier/administrator, and the Industrial Commission. The denial letter shall specifically state the reasons for the denial and shall further advise of a right to hearing.

(b) Any potential beneficiary or the employer or carrier/administrator may request a hearing as provided in Rule 602.

(5) Payment of Death Benefits

(a) Upon approval of the Industrial Commission of a Form 30, Agreement for Compensation for Death, or the issuance of a final order of the Industrial Commission directing payment of death benefits pursuant to N.C. Gen. Stat. § 97-38, payment may be made by the employer or carrier/administrator directly to the beneficiaries, with the following exceptions: (1) any applicable award of attorney fees shall be paid directly to the attorney; and (2) benefits due to a minor or incompetent.

(b)(i) Subject to the discretion of the Industrial Commission, any benefits due to a minor pursuant to N.C. Gen. Stat. § 97-38 may be paid directly to the parent as natural guardian of the minor for the use and benefit of the minor if the minor remains in the physical custody of the parent as natural guardian. If the minor is not in the physical custody of the parent as natural guardian, the Industrial Commission may order that payment be made through some other proper person appointed by a court of competent jurisdiction.

(ii) In order to protect the interests of an incompetent beneficiary, the Industrial Commission in its discretion may order that benefits be paid to the beneficiary's duly appointed guardian for the beneficiary's exclusive use and benefit, or to the Clerk of Court in the county in which he resides for the beneficiary's exclusive use and benefit as determined by the Clerk of Court.

(iii) Upon a change in circumstances, any interested party may request that the Industrial Commission amend the terms of any award with respect to a minor or incompetent to direct payment to another party on behalf of the minor or incompetent. When a beneficiary reaches the age of 18, any remaining benefits shall be paid directly to the beneficiary.

(c) In the case of commuted benefits, only those sums which have not accrued at the time of the entry of the Order are subject to commutation.

(6) Procedure for Award of Death Benefits Based on Stipulated Facts

(a) Where the parties seek a written opinion and award from the Commission regarding the payment of death benefits in uncontested cases in lieu of presenting testimony at a hearing before a Deputy Commissioner, the parties may make application to the Commission for a written opinion by filing a written request with the Dockets Director.

(b) The parties shall file the following information by joint stipulation, affidavit or certified document:

a. a stipulation regarding all jurisdictional matters;

b. the decedent's name, social security number, employer, insurance carrier or servicing agent, and the date of the injury giving rise to this claim;

c. a Form 22 or stipulation as to average weekly wage;
d. any affidavits regarding dependents;
e. the death certificate;
f. I.C. Form 29;
g. Guardian *ad Litem* forms, if any beneficiary is a minor or incompetent;
h. proof of beneficiary status, such as marriage license, birth certificate, or divorce decree;
i. medical records, if any;
j. a statement of payment of medical expenses incurred, if any; and
k. a funeral bill or stipulation as to payment of the funeral benefit.

(c) Upon receipt of said information and notice to potential beneficiaries, the Deputy Commissioner shall render a written Opinion and Award.

(7) Any attorney seeking fees for the representation of an uncontested claim shall file an affidavit or itemized statement in support of an award of attorney's fees.

## ARTICLE V. AGREEMENTS

### Rule 501. Agreements for payment of compensation.

(1) To facilitate the prompt payment of compensation within the time prescribed in N.C. Gen. Stat. § 97-18, the Industrial Commission will accept memoranda of agreements on Industrial Commission forms. The agreements may be executed by the employer or the carrier/administrator where compensation payable under the agreement does not exceed 52 weeks.

(2) In cases where the compensation payable under the agreement exceeds 52 weeks, the agreement must be executed by the employer as well as the carrier/administrator. For good cause shown, this requirement may be waived by the Industrial Commission.

(3) No agreement for permanent disability will be approved until all relevant medical, vocational and nursing rehabilitation reports known to exist in the case have been filed with the Industrial Commission.

(4) All memoranda of agreements must be submitted to the Industrial Commission in triplicate on Industrial Commission forms, as specified in paragraph (6) below. Agreements in proper form and conforming to the provisions of the Workers' Compensation Act will be approved by the Industrial Commission and a copy returned to the employer or carrier/administrator and a copy sent to the employee, unless amended by award, in which event a copy of the award will be returned with the agreement.

(5) The employer or carrier/administrator, or the attorney of record, if any, shall provide the employee and the employee's attorney of record, if any, a copy of a Form 21, Form 26, Form 26D, and Form 30 when the employee signs said forms, and the employer or carrier/administrator will send a copy of a Form 28B to the employee and the employee's attorney of record, if any, within 16 days after the last payment of compensation for either temporary or permanent disability, pursuant to N.C. Gen. Stat. § 97-18.

(6) All memoranda of agreements for cases which are currently calendared for hearing before a Commissioner or Deputy Commissioner shall be sent directly to that Commissioner or Deputy Commissioner at the Industrial Commission. Before a case is calendared, or once a case has been continued, or removed, or after the filing of an Opinion and Award, all memoranda of agreements shall be directed to the Claims Department of the Industrial Commission.

(7) After the employer or carrier/administrator has received a memorandum of agreement which has been signed by the employee and employee's attorney of record, if any, it shall have 20 days within which to submit the memorandum

of agreement to the Industrial Commission for review and approval or within which to show good cause for not submitting the memorandum of agreement signed only by the employee; provided, however, that for good cause shown the 20 day period may be extended.

**CASE NOTES**

**Cited** in Crouse v. Flowers Baking Co., 123 N.C. App. 555, 473 S.E.2d 372 (1996).

### Rule 502. Compromise settlement agreements.

(1) All compromise settlement agreements must be submitted to the Industrial Commission for approval. Only those agreements deemed fair and just and in the best interest of all parties will be approved.

(2) No compromise agreement will be approved unless it contains the following language or its equivalent:

(a) Where liability is admitted, that the employer or carrier/administrator undertakes to pay all medical expenses to the date of the agreement.

(b) Where liability is denied, that the employer or carrier/administrator undertakes to pay all unpaid medical expenses to the date of the agreement. However, this requirement may be waived in the discretion of the Industrial Commission. When submitting an agreement for approval, the employee or employee's attorney, if any, shall advise the Commission in writing of the amount of the unpaid medical expenses.

(c) That the employee knowingly and intentionally waives the right to further benefits under the Workers' Compensation Act for the injury which is the subject of this agreement.

(d) That the employer or carrier/administrator will pay all costs incurred.

(e) That no rights other than those arising under the provisions of the Workers' Compensation Act are compromised or released.

(f) That the employee has, or has not, returned to a job or position at the same or a greater average weekly wage as was being earned prior to the injury or occupational disease.

(g) Where the employee has not returned to a job or position at the same or a greater wage as was being earned prior to the injury or occupational disease, that the employee has, or has not, returned to some other job or position, and, if so, the description of the particular job or position, the name of the employer and the average weekly wage earned. This subsection of the Rule shall not apply where the employee is represented by counsel or, even if the employee is not represented by counsel, where the employee certifies that partial wage loss due to an injury or occupational disease is not being claimed.

(h) Where the employee has not returned to a job or position at the same or a greater average weekly wage as was being earned prior to the injury or occupational disease, the agreement shall summarize the employee's age, educational level, past vocational training, past work experience, and any impairment, emotional, mental or physical, which predates the current injury or occupational disease. The parties will be relieved of this duty only upon a showing that providing such information creates an unreasonable burden upon them. This subsection of the Rule shall not apply where employee is represented by counsel or, even if the employee is not represented by counsel, where the employee certifies that total wage loss due to an injury or occupational disease is not being claimed.

(3) No compromise agreement will be considered unless the following additional requirements are met:

(a) All medical, vocational, and rehabilitation reports known to exist, including but not limited to those pertinent to the employee's future earning

capacity, must be submitted with the agreement to the Industrial Commission by the employer, the carrier/administrator, or the attorney for the employer.

(b) Parties and all attorneys of record must have signed the agreement.

(4) When a settlement has been reached, the written agreement must be submitted to the Industrial Commission within a reasonable time. All compromise settlement agreements which are currently calendared for hearing before a Commissioner or Deputy Commissioner shall be sent directly to that Commissioner or Deputy Commissioner at the Industrial Commission. Before a case is calendared, or once a case has been continued, or removed, or after the filing of an Opinion and Award, all compromise settlement agreements shall be directed to the Executive Secretary of the Industrial Commission.

(5) Once a compromise settlement agreement has been approved by the Industrial Commission, the employer or carrier/administrator shall furnish an executed copy of said agreement to the employee or his attorney of record, if any.

(6) An attorney seeking fees in connection with a Compromise Settlement Agreement shall submit to the Commission a copy of the fee agreement with the client.

CASE NOTES

**Quoted** in Morris v. L.G. Dewitt Trucking, Inc., 143 N.C. App. 339, 545 S.E.2d 474 (2001).

### Rule 503. Approval of agreement constitutes award.

An agreement for the payment of compensation approved by the Industrial Commission shall thereupon become an award of the Industrial Commission and shall be a part of the record in any further proceedings in the matter.

## ARTICLE VI. CONTESTED CASES

### Rule 601. Denial of liability.

If the employer or insurance carrier denies liability in any case, a detailed statement of the basis of denial must be set forth in a letter of denial or Form 61, which shall be sent to the plaintiff or his attorney of record, if any, all known health care providers which have submitted bills to the employer/carrier, and the Industrial Commission.

The detailed statement of the basis of denial shall set forth a statement of the facts, as alleged by the employer, concerning the injury or any other matter in dispute; a statement identifying the source, by name or date and type of document, of the facts alleged by the employer; and a statement explaining why the facts, as alleged by the employer, do not entitle the employee to workers' compensation benefits.

Upon notice of a claim, the employer must admit or deny compensability of the claim to the Commission within 14 days after the employer has written or actual notice of the claim, or commence payment without prejudice pursuant to N.C. Gen. Stat. § 97-18(d). If, after 90 days from the date of filing of a Form 18, or if no Form 18 is filed, the filing of a Form 33, an employer has neither admitted the claim, filed the notice of denial of the claim with the Commission, or initiated compensation payments without prejudice pursuant to N.C. Gen. Stat. § 97-18(d), the employer may be sanctioned pursuant to Rule 802, in addition to any other sanctions available under the Act. Requests for waivers of this Rule or extensions may be addressed to the Executive Secretary. Defendant is not obligated to repeat grounds for denial previously given.

**Rule 602. Request for hearing.**

Contested claims shall be set on the hearing docket only upon the written request of one of the parties, unless the Industrial Commission orders on its own motion, a hearing or rehearing of the case in dispute. The request for hearing shall contain the following:

(1) The basis of the disagreement between the parties, including a statement of the specific issues raised by the requesting party.

(2) The date of the injury.

(3) The part of the body injured.

(4) The city and county where the injury occurred.

(5) The names and addresses of all doctors and other expert witnesses whose testimony is needed by the requesting party.

(6) The names of all lay witnesses to be called to testify for the requesting party.

(7) An estimate of the time required for the hearing of the case.

(8) The telephone number(s) and address(es) of the party(ies) requesting the hearing.

A Form 33, Request for Hearing, completed in full, shall constitute compliance with this Rule. A copy of the Request for Hearing shall be forwarded to the self-insured employer or insurance carrier if not represented, or to the defendant's attorney, if one has been retained.

**Rule 603. Response to request for hearing.**

No later than 45 days from receipt of the Request for Hearing, the self-insured employer, insurance carrier, or counsel for the defendant(s) shall file with the Industrial Commission a response to the Request for Hearing.

This response shall contain the following:

(1) The basis of the disagreement between the parties, including a statement of the specific issues raised by the plaintiff which are conceded and the specific issues raised by the plaintiff which are denied.

(2) The date of the injury, if it is contended to be different than that alleged by the plaintiff.

(3) The part of the body injured, if it is contended to be different than that alleged by the plaintiff.

(4) The city and county where the injury occurred, if they are contented to be different than that alleged by the plaintiff.

(5) The names and addresses of all doctors and other expert witnesses whose testimony is needed by the defendant(s).

(6) The names of all lay witnesses known by the defendant(s) whose testimony is to be taken.

(7) An estimate of the time required for the hearing of the case.

(8) The telephone number(s) and address(es) of the party(ies) responding to the Request for Hearing.

Utilization of a Form 33R, Response to Request for Hearing, which is completed in full, shall be the sole means of compliance with this Rule. A copy of the Response to Request for Hearing shall be forwarded to all opposing parties or their attorneys, if such have been retained. In the event of a request for hearing by a defendant, the employee shall not be required to respond. Extensions of time within which to file a response shall be granted for good cause shown.

**Rule 604. Appointment of guardian *ad litem.***

(1) In all cases where it is proposed that minors or incompetents shall sue by their guardian *ad litem,* the Industrial Commission shall appoint such

guardian *ad litem* upon the written application of a reputable person closely connected with such minor or incompetent; but if such person will not apply, then, upon the application of some reputable citizen; and the Industrial Commission shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

(2) In no event, however, shall any compensation be paid directly to the guardian *ad litem*. Rather, compensation payable to a minor or incompetent shall be paid as provided in N.C. Gen. Stat. § 97-48 and N.C. Gen. Stat. § 97-49. The use of the word "guardian" in N.C. Gen. Stat. § 97-49 does not mean a guardian *ad litem*.

**Rule 605. Discovery.**

In addition to depositions and production of books and records provided for in N.C. Gen. Stat. § 97-80, parties may obtain discovery by the use of interrogatories as follows:

(1) Any party may serve upon any other parties written interrogatories, up to 30 in number, including subparts thereof, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available from the party interrogated.

Interrogatories may, without leave of the Industrial Commission, be served upon any party after the filing of a Form 18, Form 18B, or Form 33, or after approval of Form 21.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them and the objections signed by the party making them. The party on whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after service of the interrogatories. The parties may stipulate to an extension of time to respond to the interrogatories. A motion to extend the time to respond shall represent that an attempt to reach agreement with the opposing party to informally extend the time for response has been unsuccessful and the opposing parties' position or that there has been a reasonable attempt to contact the opposing party to ascertain its position.

If there is an objection to or other failure to answer an interrogatory, the party submitting the interrogatories may move the Industrial Commission for an order compelling answer. If the Industrial Commission orders answer to an interrogatory within a time certain and no answer is made or the objection is still lodged, the Industrial Commission may issue an order with appropriate sanctions, including but not limited to the sanctions specified in Rule 37 of the North Carolina Rules of Civil Procedure.

(2) Interrogatories may relate to matters which are not privileged which are relevant to an issue presently in dispute or which the requesting party reasonable believes may later be disputed. Signature of a party or attorney serving interrogatories constitutes a certificate by such person that he or she has personally read each of the interrogatories, that no such interrogatory will oppress a party or cause any unnecessary expense or delay, that the information requested is not known or equally available to the requesting party and that the interrogatory relates to an issue presently in dispute or which the requesting party reasonably believes may later be in dispute. A party may serve an interrogatory, however, to obtain verification of facts relating to an issue presently in dispute. Answers to interrogatories may be used to the extent permitted by the rules of evidence.

(3) Additional methods of discovery as provided by the North Carolina Rules of Civil Procedure may be used only upon motion and approval by the Industrial Commission or by agreement of the parties.

(4) Notices of depositions, discovery requests and responses pertinent to a pending motion, responses to discovery following a motion or order to compel, and post-hearing discovery requests and responses shall be filed with the Commission, as well as served on the opposing party. Otherwise, discovery requests and responses, including interrogatories and requests for production of documents, shall not be filed with the Commission.

(5) Sanctions may be imposed under this Rule for failure to comply with a Commission order compelling discovery. A motion by a party or its attorney to compel discovery under this Rule and Rule 607 shall represent that informal means of resolving the discovery dispute have been attempted in good faith and state briefly the opposing parties' position or that there has been a reasonable attempt to contact the opposing party and ascertain its position.

**Rule 606. Discovery — Post hearing.**

Discovery may not be conducted after the initial hearing on the merits of a case unless allowed by order of a Commissioner or Deputy Commissioner.

**Rule 607. Discovery of records and reports.**

Upon written request, any party shall furnish, without cost, the requesting party a copy of any and all medical, vocational and rehabilitation reports, employment records, Industrial Commission forms, and written communications with medical providers in its possession, within 30 days of the request, unless objection is made within that time period. This obligation exists whether or not a request for hearing has been filed. This obligation is a continuing one, and any such reports and records which come into the possession of a party after receipt of a request pursuant to this Rule shall be provided to the requesting party within 15 days from its receipt of these reports and records.

Upon receipt of a request, an insurer or administrator for an employer's workers' compensation program shall inquire of the employer concerning the existence of records encompassed by the request.

**Rule 608. Statement about incident leading to claim.**

(1) At the outset of taking a statement, the employer or his agent shall advise the employee that the statement is being taken to be used in part to determine whether the claim will be paid or denied. Any plaintiff who gives his employer, or its carrier, or any agent either a written or recorded statement of the facts and circumstances surrounding his injury shall be furnished a copy of such statement within 45 days after request. Further, any plaintiff who shall give a written or recorded statement of the facts and circumstances surrounding his injury shall, without request, be furnished a copy no less than 45 days from the filing of a Form 33 Request for Hearing. Such copy shall be furnished at the expense of the person, firm or corporation at whose direction the statement was taken.

(2) If any person, firm or corporation fails to comply with this rule, then an order may be entered by a Commissioner or Deputy Commissioner prohibiting that person, firm or corporation, or its representative, from introducing the statement into evidence or using any part of it.

**Rule 609. Motions practice in contested cases.**

(1) Motions brought before the Commission shall be addressed as follows:

(a) All motions in cases which are currently calendared for hearing before the Full Commission or Deputy Commissioner shall be sent directly to the

Chair of the Full Commission panel or Deputy Commissioner before whom the case is pending.

(b) Motions filed before a case is calendared before a Deputy Commissioner, or once a case has been continued, or removed from a Deputy Commissioner calendar, or after the filing of an Opinion and Award when the time for taking appeal has run, shall be directed to the Executive Secretary of the Industrial Commission. Motions to reconsider or amend an Opinion and Award, made prior to giving notice of appeal to the Full Commission, shall be directed to the Deputy Commissioner who authored the Opinion and Award.

(c) Motions filed after notice of appeal to the Full Commission has been given but prior to the calendaring of the case shall be directed to the Chair of the Industrial Commission.

(d) If a case has been continued from the Full Commission hearing docket, motions shall be directed to the Chair of the panel of Commissioners who ordered the continuance.

(e) Motions filed after the filing of an Opinion and Award by the Full Commission but prior to giving notice of appeal to the Court of Appeals shall be directed to the Commissioner who authored the Opinion and Award.

(2) A motion shall state with particularity the grounds on which it is based, the relief sought, and a brief statement of the opposing party's position, if known. Service shall be made on all opposing attorneys of record, or on all opposing parties, if not represented.

(3) Motions to continue or remove a case from the hearing calendar on which the case is set must be made well in advance of the scheduled hearing and may be made in written or oral form. In all cases the moving party must provide just cause for the motion and state that the other parties have been advised of the motion and relate the position, if known, of the other parties regarding the motion. Oral motions must be followed with a written confirmation from the moving party.

(4) The responding party to a motion shall have 10 days after a motion is served during which to file and serve copies of response in opposition to the motion. The Industrial Commission may shorten or extend the time for responding to any motion.

(5) Notwithstanding the provisions of paragraph (4) above, a motion may be acted upon at any time by the Commission, despite the absence of notice to all parties, and without awaiting a response thereto. A party who has not received actual notice of such a motion or who has not filed a response at the time such action is taken and who is adversely affected by the action may request that it be reconsidered, vacated, or modified. Motions will be determined without oral argument, unless the Industrial Commission orders otherwise.

(6) In all cases where correspondence relative to a case before the Industrial Commission is sent to the Industrial Commission, copies of such correspondence shall be contemporaneously sent by the same method of transmission to the opposing party or, if represented, to opposing counsel. Written communications, whether addressed directly to the Commission or copied to the Commission, may not be used as an opportunity to introduce new evidence or to argue the merits of the case, or to cast the opposing party or counsel in a bad light, with the exception of the following instances:

(a) Written communications, such as a proposed order or legal memorandum, prepared pursuant to the Commission's instructions;

(b) Written communications relative to emergencies, changed circumstances, or scheduling matters that may affect the procedural status of a case such as a request for a continuance due to the health of a litigant or an attorney;

(c) Written communications sent to the tribunal with the consent of the opposing lawyer or opposing party if unrepresented; and

(d) Any other communication permitted by law or the rules or procedures of the Commission.

At no time may written communications, whether addressed directly to the Commission or copied to the Commission, be used as an opportunity to cast the opposing party or counsel in a bad light.

(7) All motions made before the Industrial Commission must include a proposed Order to be considered by the Industrial Commission.

(8) Except as otherwise expressly provided by statute, rule, or by order of the Commission, in computing any period of time prescribed or allowed by the Commission's Rules, by order of the Commission, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation. Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of any document, three days shall be added to the prescribed period.

CASE NOTES

**Stated** in Morris v. L.G. Dewitt Trucking, Inc., 143 N.C. App. 339, 545 S.E.2d 474 (2001).

## Rule 610. Pre-trial conference and Pre-trial order.

(1) A Commissioner or Deputy Commissioner may order the parties to appear at a pre-trial conference to determine specific matters. This conference may be conducted at such place and by such method as the Commissioner or Deputy Commissioner deems appropriate, including conference telephone calls.

(2) Any party may request a pre-trial conference when that party deems that such a conference would aid in settling the case or resolving some issues prior to trial. Requests for such pre-trial conferences shall be directed to the Deputy Commissioner before whom the claim has been calendared, or to the Team Coordinator for the geographical area, if any.

(3) A Commissioner or a Deputy Commissioner may issue a Pre-Trial Order requiring the parties to submit a Pre-trial Agreement. The parties shall have 15 days following the hearing within which to schedule the taking of medical depositions unless otherwise extended by the Commission. Such Agreement shall be prepared in a form which substantially complies with the Order on Final Pre-Trial Conference adopted in the North Carolina Rules of Practice for the Superior and District Courts. Should the parties fail to comply with a Pre-Trial Order, the Commissioner or Deputy Commissioner may remove the case from the hearing docket. Should the parties thereafter comply with the Pre-Trial Order after the removal of the case, the Pre-Trial Agreement must be directed to the Commissioner or Deputy Commissioner who removed the case from the docket; and the Commissioner or Deputy Commissioner will order the case returned to the hearing docket as if a Request for Hearing had been filed on the date of the Order to return the case to the hearing docket. No new Form 33 Request for Hearing is required.

## Rule 611. Hearings before the Industrial Commission.

(1) The Industrial Commission may on its own motion order a hearing or rehearing of any case in dispute.

(2) The Industrial Commission shall set a contested case for hearing in a location deemed convenient to witnesses and the Industrial Commission, and conducive to an early and just resolution of disputed issues.

(3) In setting contested cases for hearing, cases in which the payment of workers' compensation benefits is at issue shall take precedence over those cases in which the payment of workers' compensation benefits is not at issue.

(4) The Industrial Commission will give reasonable notice of hearings in every case. Postponement or continuance of a duly scheduled hearing will rest entirely in the discretion of a Commissioner or Deputy Commissioner. Where a party has not notified the Industrial Commission of the attorney representing the party prior to the mailing of calendars for hearing, notice to that party shall constitute notice to the party's attorney.

(5) The only parts of the Industrial Commission file in a contested case which are a part of the record on which a decision will be rendered are prior Opinion and Awards, form agreements, awards, and orders by the Industrial Commission; provided, however, that if provisions of the Workers' Compensation Act designate other documents as part of the record, such documents shall also be a part of the record. Any other documents which the parties wish to have included in the record must be introduced and received into evidence.

(6) Hearing costs shall be assessed in each case set for hearing, including those cases which are settled after being calendared and notices mailed, and shall be payable upon receipt of a statement from the Industrial Commission.

(7) In the event of inclement weather or natural disaster, hearings shall be cancelled if the proceedings in the General Court of Justice in the county in which the hearings are set are cancelled.

**Rule 612. Depositions and additional hearings.**

(1) When additional testimony is necessary to the disposition of a case, a Commissioner or Deputy Commissioner may order the deposition of witnesses to be taken on or before a day certain not to exceed 60 days from the date of the ruling; provided, the time allowed may be enlarged for good cause shown. The costs of such depositions shall be borne by defendants for those medical witnesses who examined plaintiff at defendants' expense, in those instances in which defendants are requesting the depositions, and in any other case which, in the discretion of the Commissioner or Deputy Commissioner, it is deemed appropriate.

(2) In cases where a party, or an attorney for either party, refuses to stipulate medical reports and the case must be reset or depositions ordered for testimony of medical witnesses, a Commissioner or Deputy Commissioner may in his discretion assess the costs of such hearing or depositions, including reasonable attorney fees, against the party who refused the stipulation.

(3) Except under unusual circumstances, all lay evidence must be offered at the initial hearing. Lay evidence can only be offered after the initial hearing by order of a Commissioner or Deputy Commissioner. The costs of obtaining lay testimony by deposition shall be borne by the party making the request unless otherwise ordered by the Commission.

**Rule 613. Dismissals and removals.**

1. Dismissals

(a) No claim filed under the Workers' Compensation Act shall be dismissed without prejudice at plaintiff's instance except upon order of the Industrial Commission and upon such terms and conditions as justice requires; provided, however, that no voluntary dismissal shall be granted after the record in a case is closed.

(b) Unless otherwise ordered by the Industrial Commission, a plaintiff shall have one year from the date of the Order of Voluntary Dismissal to refile his claim.

(c) Upon proper notice and an opportunity to be heard, any claim may be dismissed with or without prejudice by the Industrial Commission on its own motion or by motion of any party for failure to prosecute or to comply with these Rules or any Order of the Commission.

2. Removals

(a) A claim may be removed from the hearing docket by motion of the party requesting the hearing or by the Industrial Commission upon its own motion.

(b) A removed case may be reinstated by motion of either party; provided that cases wherein the issues have materially changed since the Order of Removal or where the motion to reinstate is filed more than one year after the Order of Removal, a Form 33 Request for Hearing will be required.

(c) When a plaintiff has not requested a hearing within two years of the filing of an Order of Removal requested by the plaintiff or necessitated by the plaintiff's conduct, and not pursued the claim, upon proper notice and an opportunity to be heard, any claim may be dismissed with prejudice by the Industrial Commission on its own motion or by motion of any party.

**Rule 614. Attorneys retained for proceedings.**

(1) Any attorney who is retained by a party in a proceeding before the Industrial Commission shall immediately file a notice of appearance with the Industrial Commission. A copy of this notice shall be served on all other counsel and on all unrepresented parties. Thereafter, all notices required to be served on a party shall be served upon the attorney. No direct contact or communication concerning contested matters may be made with a represented party by the opposing party or any person on its behalf, without the attorney's permission except as permitted by law or Industrial Commission Rules.

(2) Any attorney who wishes to withdraw from representation in a proceeding before the Industrial Commission shall file with the Industrial Commission, in writing:

(a) A Motion to Withdraw which shall contain a statement of reasons for the request and that the request has been served on the client.

(b) A Motion to Withdraw before an award is made shall state whether the withdrawing attorney requests an attorney fee from the represented party once an award of compensation is made or approved.

(3) An attorney may withdraw from representation only by written order of the Industrial Commission. The issuance of an award of the Industrial Commission does not release an attorney as the attorney of record.

**Rule 615. Disqualification of a Commissioner or Deputy Commissioner.**

In their discretion, Commissioners or Deputy Commissioners may recuse themselves from the hearing of any case before the Industrial Commission. For good cause shown, a majority of the Full Commission may remove a Commissioner or Deputy Commissioner from hearing a case.

**Rule 616. Foreign language interpreters.**

(1) *Services of Foreign Language Interpreters Required.* When a person who does not speak or understand the English language is called to testify in a hearing, other than in an informal hearing conducted pursuant to N.C. Gen. Stat. § 97-18.1, the person, whether a party or a witness, shall be assisted by a qualified foreign language interpreter.

(2) *Qualifications of Interpreters.* To qualify as a foreign language interpreter, a person must possess sufficient experience and education, or a combination of experience and education, speaking and understanding English and the foreign language to be interpreted, to qualify as an expert witness pursuant to N.C. Gen. Stat. § 1C-1, Rule 702. A person qualified as an interpreter under this Rule shall not be interested in the claim and must make a declaration under oath or affirmation to interpret accurately, truthfully and without any additions or deletions, all questions propounded to the witness and all responses thereto.

(3) *Notice to Industrial Commission and Opposing Party of Need for Interpreter.* Any party who is unable to speak or understand English, or who intends to call as a witness a person who is unable to speak or understand English, shall so notify the Industrial Commission and the opposing party, in writing, not less than 21 days prior to the date of the hearing. The notice shall state with specificity the language(s) that must be interpreted for the Commission.

(4) *Designation of Interpreter by Employer or Insurer.* Upon receiving or giving the notice required in paragraph (3) of this Rule, the employer or insurer shall retain a qualified, disinterested interpreter, either agreed upon by the parties or approved by the Industrial Commission, to appear at the hearing and interpret the testimony of all persons for whom the notice in paragraph (3) has been given or received.

(5) *Interpreter Fees.* The interpreter's fee shall constitute a cost as contemplated by N.C. Gen. Stat. § 97-80. A qualified interpreter who interprets testimony for the Industrial Commission shall be entitled to payment of the fee agreed upon by the interpreter and employer or insurer that retained the interpreter. Except in cases where a claim for compensation has been prosecuted without reasonable ground, the fee agreed upon by the interpreter and employer or insurer shall be paid by the employer or insurer. Where it is ultimately determined by the Commission that the request for an interpreter was unfounded, attendant costs may be assessed against the movant.

## ARTICLE VII. APPEALS

### Rule 701. Appeal to the Full Commission.

(1) A letter expressing an intent to appeal shall be considered notice of appeal to the Full Commission within the meaning of N.C. Gen. Stat. § 97-85, provided that it clearly specifies the Order or Opinion and Award from which appeal is taken.

(2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds, as provided in paragraph (3). Appellant's completed Form 44 and brief must be filed and served within 25 days of appellant's receipt of the transcript or receipt of notice that there will be no transcript, unless the Industrial Commission, in its discretion, waives the use of the Form 44. The time for filing a notice of appeal from the decision of the Deputy Commissioner under these rules shall be tolled until a timely motion to amend the decision has been ruled upon by the Deputy Commissioner.

(3) Particular grounds for appeal not set forth in the application for review shall be deemed abandoned, and argument thereon shall not be heard before the Full Commission.

(4) Appellant's Form 44 and brief in support of his grounds for appeal shall be filed in triplicate with the Industrial Commission, with a certificate indicating service on appellee by mail or in person, within 25 days after receipt of the transcript, or receipt of notice that there will be no transcript. Thereafter, appellee shall have 25 days from service of appellant's brief within which to file a reply brief in triplicate with the Industrial Commission, with written statement of service of copy by mail or in person on appellant. When an appellant fails to file a brief, appellee shall file his brief within 25 days after appellant's time for filing brief has expired. A party who fails to file a brief will not be allowed oral argument before the Full Commission. If both parties appeal, they shall each file an appellant's and appellee's brief on the schedule set forth herein. The parties may file with the Docket Director a written stipulation to a single extension of time for each party, not to exceed 30 days, if the matter has not been calendared for hearing.

(5) After notice of appeal has been given to the Full Commission, any motions related to the issues before the Full Commission shall be filed in triplicate with the Full Commission, with service on the other parties.

(6) No new evidence will be presented to or heard by the Full Commission unless the Commission in its discretion so permits.

(7) Cases should be cited by North Carolina Reports and, preferably, to Southeastern Reports. Counsel shall not discuss matters outside the record, assert personal opinions or relate personal experiences, or attribute unworthy acts or motives to opposing counsel.

(8) The Industrial Commission or any one of the parties with permission of the Industrial Commission may waive oral argument before the Full Commission. In the event of such waiver, the Full Commission will file a decision, based on the record, assignments of error and briefs.

(9) A plaintiff appealing the amount of a disfigurement award shall personally appear before the Full Commission to permit the Full Commission to view the disfigurement.

CASE NOTES

**Illustrative Cases.** — Since an employee's recovery should be based on his actual loss of wages, the full Industrial Commission erred when it refused to reconsider the amount of the employee's average weekly wages, even though the issue allegedly was not properly preserved, where it was mistakenly stipulated by the parties that the employee's average weekly wage was higher than the amount claimed by the employer in its affidavit. Tucker v. Workable Co., 129 N.C. App. 695, 501 S.E.2d 360 (1998).

Where the motion of the husband of a murdered employee for attorney fees was denied by the deputy commissioner, the issue of entitlement to attorney fees was preserved, although it was not raised as an assignment of error on appeal to the Industrial Commission from the deputy commissioner's denial of benefits. Hauser v. Advanced Plastiform, Inc., 133 N.C. App. 378, 514 S.E.2d 545 (1999).

**Industrial Commission is competent to modify conclusion of Deputy Commissioner** to which no error was assigned by the plaintiff. Timmons v. North Carolina DOT, 132 N.C. App. 377, 511 S.E.2d 659 (1999), rev'd on other grounds, 351 N.C. 177, 522 S.E.2d 62 (1999).

## Rule 702. Appeal to the court of appeals.

(1) Except as otherwise provided in N.C. Gen. Stat. § 97-86, in every case appealed to the North Carolina Court of Appeals, the Rules of Appellate Procedure shall apply. The running of the time for filing and serving a notice of appeal is tolled as to all parties by a timely motion filed by any party to amend, to make additional findings, or to reconsider the decision, and the full time for appeal commences to run and is to be computed from the entry of an Order upon any of these motions, in accordance with Rule 3 of the Rules of Appellate Procedure.

(2) If the parties cannot agree on the record on appeal, appellant shall furnish the Chair of the Industrial Commission, or his designee, one copy of the proposed record on appeal, objections and/or proposed alternative record on appeal along with a timely request to settle the record on appeal. The hearing to settle the record on appeal shall be held at the offices of the Industrial Commission or by telephone conference.

(3) The amount of the appeal bond shall be set by the Chair, or his designee, and may be waived in accordance with N.C. Gen. Stat. § 97-86.

### Rule 703. Review of Administrative Decisions.

(1) Orders, Decisions, and Awards made in a summary manner, without detailed findings of fact, including Decisions on applications to approve agreements to pay compensation and medical bills, applications to approve the termination or suspension of compensation, applications for change in treatment or providers of medical compensation, applications to change the interval of payments, and applications for lump sum payments of compensation may be reviewed by filing a Motion for Reconsideration with the Industrial Commission and addressed to the Administrative Officer who made the Decision or may be appealed by requesting a hearing within 15 days of receipt of the Decision or receipt of the ruling on a Motion to Reconsider. These issues may also be raised and determined at a subsequent hearing.

(2) Motions for Reconsideration shall not stay the effect of the Order, Decision or Award; provided, that the Administrative Officer making the Decision or a Commissioner may enter an Order staying its effect pending the ruling on the Motion for Reconsideration or pending a Decision by a Commissioner or Deputy Commissioner following a formal hearing. In determining whether or not to grant a stay, the Commissioner or Administrative Officer will consider whether granting the stay will frustrate the purposes of the Order, Decision, or Award.

(3) Any review made by requesting a hearing shall be made to the Industrial Commission and filed with the Industrial Commission's Docket Director. The Industrial Commission shall designate a Commissioner or Deputy Commissioner to hear the review. The Commissioner or Deputy Commissioner hearing the matter shall consider all issues *de novo*, and no issue shall be considered moot solely because the Order has been fully executed during the pendency of the hearing.

#### CASE NOTES

**Automatic stay.** — The effect of a deputy commissioner's order to produce documents was not automatically stayed by an appeal from that order. Woody v. Thomasville Upholstery Inc., — N.C. App. —, — S.E.2d —, 2001 N.C. App. LEXIS 857 (Sept. 18, 2001).

**Quoted** in Morris v. L.G. Dewitt Trucking, Inc., 143 N.C. App. 339, 545 S.E.2d 474 (2001).

## ARTICLE VIII. RULES OF THE COMMISSION

### Rule 801. Waiver of the rules.

In the interest of justice, these rules may be waived by the Industrial Commission. The rights of any unrepresented plaintiff will be given special consideration in this regard, to the end that a plaintiff without an attorney shall not be prejudiced by mere failure to strictly comply with any one of these rules.

CASE NOTES

**Commission's Authority.** — The full Industrial Commission had the authority to modify a conclusion of the Deputy Industrial Commissioner, even though the employee did not assign error to that conclusion, where the Commission ordered that the employee was entitled to be provided by the employer with a life care plan, whereas the Deputy had concluded that the employee was not so entitled. Timmons v. North Carolina DOT, 130 N.C. App. 745, 504 S.E.2d 567 (1998), reaff'd on recons., 132 N.C. App. 377, 511 S.E.2d 659 (1999), rev'd on other grounds, 351 N.C. 177, 522 S.E.2d 62 (1999).

**Construction with Other Provisions.** — The Industrial Commission erred by concluding that excusable neglect existed where plaintiff represented himself before the Deputy Commissioner and was unacquainted with the complexities of the Workers' Compensation Act; furthermore, the Commission did not have the authority, under this rule, to excuse plaintiff from complying with § 97-85 and thus disregard the holdings of the appellate court as to what constituted "excusable neglect." Moore v. City of Raleigh, 135 N.C. App. 332, 520 S.E.2d 133 (1999).

### Rule 802. Sanctions.

(1) Upon failure to comply with any of the aforementioned rules, the Industrial Commission may subject the violator to any of the sanctions outlined in Rule 37 of the North Carolina Rules of Civil Procedure, including reasonable attorney fees to be taxed against the party or his counsel whose conduct necessitates the order.

(2) Failure to timely file forms as required by either these Rules or pursuant to the Act may result in fines or other appropriate sanctions.

CASE NOTES

**Quoted** in Hauser v. Advanced Plastiform, Inc., 133 N.C. App. 378, 514 S.E.2d 545 (1999).

### Rule 803. Procedure for Workers' Compensation Rule making by the Industrial Commission.

Prior to adopting, deleting, or amending any Workers' Compensation Rule of the Industrial Commission which affects the substantive rights of parties, the Industrial Commission will give at least 30 days' notice of the proposed change in rules. Such notice will be given by publishing, in a newspaper or newspapers of general circulation in North Carolina, notice of such proposed change. Such notice will include an invitation to any interested party to submit in writing any objection, suggestion or other comment with respect to the proposed rule change or to appear before the Full Commission at a time and place designated in the notice for the purpose of being heard with respect to the proposed rule change.

## ARTICLE IX. REPORT OF EARNINGS

### Rule 901. Check endorsement.

If a self-insured employer, carrier or third party administrator places "check endorsement" language on the back of an employee's check, the following language (or similar language approved by the Industrial Commission) shall be used:

> By endorsing this check, I certify that I have not worked for or earned wages from any business or individual during the period covered by this check, or that I have reported any earnings to the employer/carrier paying me workers' compensation benefits. I understand that making a false

statement by endorsing this benefit check may result in civil or criminal penalties.

**Rule 902. Notice.**

A self-insured employer, carrier or third party administrator shall not use check endorsement language on the back of an employee's workers' compensation benefit check unless the employee has been provided the following Notice sent by certified mail return receipt requested:

Notice to Employee Receiving Workers' Compensation Benefits

This NOTICE is intended to advise you of important information you need to know if you are receiving workers' compensation benefits.

Please TAKE NOTICE of the following:

(1) When you are receiving weekly workers' compensation benefits, you must report any earnings you receive to the insurance company (or employer if the employer is self-insured) that is paying you the benefits. "Earnings" include any cash, wages or salary received from self-employment or from any employment other than the employment where you were injured. Earnings also include commissions, bonuses, and the cash value for all payments received in any form other than cash (e.g., a building custodian receiving a rent-free apartment). Commission bonuses, etc., earned before disability but received during the time you are also receiving workers' compensation benefits do not constitute earnings that must be reported.

(2) You must report any work in any business, even if the business lost money or if profits or income were reinvested or paid to others.

(3) Your endorsement on a benefit check or deposit of the check into an account is your statement that you believe that you are entitled to receive workers' compensation benefits. Your signature on a benefit check is a further affirmation that you have made no material false statement or concealed any material fact regarding your right to receive the benefit check.

(4) Making false statements for purpose of obtaining workers' compensation benefits may result in civil and criminal penalties.

**Rule 903. Employee's obligation to report earnings.**

A self-insured employer, carrier or third party administrator may require the employee to complete a Form 90 Report of Earnings when reasonably necessary but not more than once every six months.

The Form 90 must be sent to the employee by certified mail, return receipt requested, and include a self-addressed stamped envelope for the return of the Form.

The employee shall complete and return the Form 90 Report of Earnings within 15 days after receipt of a Form 90. If the employee fails to complete and return the Report of Earnings within 30 days of receipt of the Form, the self-insured employer, carrier or third party administrator may seek an Order from the Executive Secretary allowing the suspension of benefits. The self-insured employer, carrier or third party administrator shall not suspend benefits without Commission approval. If the Commission suspends benefits for failure to complete and return a Form 90 Report of Earnings, the self-insured employer, carrier or third party administrator shall immediately reinstate benefits to the employee with back payment as soon as the Report of Earnings is submittted by the employee. If benefits are not immediately reinstated, the employee should submit a written request for an Order from the Executive Secretary instructing the self-insured employer, carrier or third party administrator to reinstate benefits. If the employee's earnings report

does not indicate continuing eligibility for partial or total disability compensation, then the self-insured employer, carrier or third party administrator may apply to the Commission to terminate or modify benefits pursuant to Commission procedure, including filing a Form 24, 26 or 33.

## FORMS

**Form I. Distribution of third party funds with attorney.**

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. No. 000000, PLAINTIFF(s) NAME, Employee Plaintiff v. DEFENDANT(s) NAME, Employer and CARRIER NAME, Carrier, Defendants. NAME, THIRD PARTY TORT-FEASOR.

ORDER DIRECTING DISTRIBUTION OF THIRD PARTY RECOVERY.

FILED:

Application for an order directing distribution of third party funds in this case has been submitted to the Industrial Commission.

**APPEARANCES**

Plaintiff:

Defendants:

Third Party Tort-Feasor:

* * * * * * * * *

Pursuant to the provisions of N.C. Gen. Stat. § 97-10.2, the third party funds shall be distributed as follows:

1. The sum of $____ shall be paid the workers' compensation carrier in full settlement of its subrogation interest.
2. The sum of $____ shall be paid plaintiff.
3. An attorney fee not to exceed 33⅓ percent of the third party funds shall be deducted from such funds and paid directly to plaintiff's counsel. This fee shall be paid by the parties in proportion to the amount each receives out of the recovery, as by statute provided.
4. The sum of $_____, to plaintiff's counsel in reimbursement for litigation expenses and costs, from the shares of the parties in proportion to the amount each receives out of the recovery.

The workers' compensation carrier shall pay the costs due the Industrial Commission.

---

**Form IIa. Compromise settlement agreement (admitted liability, medical paid), and distribution of third party funds.**

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. No. 000000, PLAINTIFF(s) NAME, Employee Plaintiff v. DEFENDANT(s) NAME, Employer and CARRIER NAME, Carrier, Defendants. NAME, THIRD PARTY TORT-FEASOR; NAME, THIRD PARTY CARRIER.

ORDER APPROVING COMPROMISE SETTLEMENT AGREEMENT AND DIRECTING DISTRIBUTION OF THIRD PARTY RECOVERY.

FILED:

A compromise settlement agreement and an application for an order directing distribution of third party funds in this case have been submitted to the Industrial Commission.

**APPEARANCES**

Plaintiff:

Defendants:

Third Party Tort-Feasor:

* * * * * * * * *

After giving due consideration to all matters involved in this case, and upon defendants' stated or implied representation that all known medical reports concerning the subject injury have been submitted to the Industrial Commission, per Rule 502(3)(a), the undersigned is of the opinion that the compromise settlement agreement is fair and equitable, probably in the best interest of all parties, and should be APPROVED.

IT IS THEREFORE ORDERED that the third party funds in the amount of $____ be distributed in accordance with N.C. Gen. Stat. § 97-10.2, as follows:

1. The sum of $____, subject to counsel fee, shall be paid the workers' compensation carrier in full settlement of its subrogation interest.
2. The sum of $____, subject to counsel fee, shall be paid plaintiff.
3. An attorney fee in the amount of $____ is hereby approved and shall be deducted from the compensation paid by the parties, in proportion to the amount each receives out of the recovery as by statute provided.
4. The sum of $_____, to plaintiff's counsel in reimbursement for litigation expenses and costs, from the shares of the parties in proportion to the amount each receives out of the recovery.
5. The workers' compensation carrier shall pay the costs due the Industrial Commission.

Compliance with the agreement, together with the foregoing provisions of this Order, shall fully acquit and discharge defendants from any further liability under the Workers' Compensation Act by reason of plaintiff's injury by accident giving rise hereto.

It is to be noted, however, that this Order does not purport to approve, resolve or address any issue or matter over which the Industrial Commission

has no jurisdiction, whether or not such issue or matter is referred to in the compromise settlement agreement executed by the parties in this action.

---

**Form IIb. Compromise settlement agreement (denied liability, unpaid medicals) and distribution of third party funds.**

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. No. 000000, PLAINTIFF(s) NAME, Employee Plaintiff v. DEFENDANT(s) NAME, Employer and CARRIER NAME, Carrier, Defendants. NAME, THIRD PARTY TORT-FEASOR.

ORDER APPROVING COMPROMISE SETTLEMENT AGREEMENT AND DIRECTING DISTRIBUTION OF THIRD PARTY RECOVERY.

FILED:

A compromise settlement agreement and an application for an order directing distribution of third party funds in this case has been submitted to the Industrial Commission.

**APPEARANCES**

Plaintiff:

Defendants:

Third Party Tort-Feasor:

* * * * * * * * *

After giving due consideration to all matters involved in this case, and upon defendants' stated or implied representation that all known medical reports concerning the subject injury have been submitted to the Industrial Commission per Rule 502(3)(a), the undersigned is of the opinion that the compromise settlement agreement is fair and equitable, probably in the best interest of all parties, and should be APPROVED.

It is expressly recognized that plaintiff's claim is strongly contested, that defendants are not by the agreement admitting, nor is the Industrial Commission finding liability and that plaintiff, by accepting the agreement which provides for payment only of unpaid medical bills, is avoiding the risk that the claim will be totally denied by the Industrial Commission.

Pursuant to the provisions of N.C. Gen. Stat. § 97-10.2, the third party funds shall be distributed as follows:

1. The sum of $____, subject to counsel fee, shall be paid the workers' compensation carrier in full settlement of its subrogation interest.
2. The sum of $____, subject to counsel fee, shall be paid plaintiff.
3. An attorney fee in the amount of $____ is hereby approved and shall be deducted from the compensation paid by the parties, in proportion to the amount each receives out of the recovery, as by statute provided.
4. The sum of $_____, to plaintiff's counsel in reimbursement for litigation expenses and costs, from the shares of the parties in proportion to the amount each receives out of the recovery.
5. The workers' compensation carrier shall pay the costs due the Industrial Commission.

Compliance with the agreement, together with the foregoing provisions of this Order, shall fully acquit and discharge defendants from any further

liability under the Workers' Compensation Act by reason of plaintiff's injury by accident giving rise hereto.

It is to be noted, however, that this Order does not purport to approve, resolve or address any issue or matter over which the Industrial Commission has no jurisdiction, whether or not such issue or matter is referred to in the compromise settlement agreement executed by the parties in this action.

---

**Form IIIa. Compromise settlement agreement (admitted liability, medicals paid).**

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. No. 000000, PLAINTIFF(s) NAME, Employee Plaintiff v. DEFENDANT(s) NAME, Employer and CARRIER NAME, Carrier, Defendants.

ORDER APPROVING COMPROMISE SETTLEMENT AGREEMENT.

FILED:

A compromise settlement agreement in this case has been submitted to the Industrial Commission.

**APPEARANCES**

Plaintiff:

Defendants:

* * * * * * * * *

The parties now have executed and submitted for approval a compromise settlement agreement. That agreement is incorporated herein by reference, and is approved in the amount of $____. Compliance with the terms of the agreement shall discharge defendants from further liability under the Workers' Compensation Act by reason of the injury giving rise to this claim.

An attorney's fee of $____ is approved for plaintiff's counsel. This amount shall be deducted from the sum due plaintiff and paid directly to plaintiff's counsel.

It is to be noted, however, that this Order does not purport to approve, resolve or address any issue or matter over which the Industrial Commission has no jurisdiction, whether or not such issue or matter is referred to in the compromise settlement agreement executed by the parties in this action.

Defendants shall pay the costs.

---

**Form IIIb. Compromise settlement agreement (denied liability, unpaid medicals).**

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. No. 000000, PLAINTIFF(s) NAME, Employee Plaintiff v. DEFENDANT(s) NAME, Employer and CARRIER NAME, Carrier, Defendants.

ORDER APPROVING COMPROMISE SETTLEMENT AGREEMENT.

FILED:

A compromise settlement agreement in this case has been submitted to the Industrial Commission.

**APPEARANCES**

Plaintiff:

Defendants:

* * * * * * * * *

The parties now have executed and submitted for approval a compromise settlement agreement. That agreement is incorporated herein by reference, and is approved in the amount of $____. Compliance with the terms of the agreement shall discharge defendants from further liability under the Workers' Compensation Act by reason of the injury giving rise to this claim.

It is expressly recognized that plaintiff's claim is strongly contested, that defendants are not by this agreement admitting, nor is the Industrial Commission finding liability and that plaintiff, by accepting the agreement which provides for payment only of unpaid medical bills, is avoiding the risk that the claim will be totally denied by the Commission.

An attorney's fee of $____ is approved for plaintiff's counsel. This amount shall be deducted from the sum due plaintiff and paid directly to plaintiff's counsel.

It is to be noted, however, that this Order does not purport to approve, resolve or address any issue or matter over which the Industrial Commission has no jurisdiction, whether or not such issue or matter is referred to in the compromise settlement agreement executed by the parties in this action.

Defendants shall pay the costs.

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# RULES FOR MEDIATED SETTLEMENT AND NEUTRAL EVALUATION CONFERENCES OF THE NORTH CAROLINA INDUSTRIAL COMMISSION

Effective June 1, 2000.


Rule
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2. Selection of mediator.
3. The mediated conference.
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## Rule 1. Order for mediated settlement conference.

(a) *Mediation upon agreement of the parties.* If the parties to a workers' compensation claim or state tort claim agree to mediate their claim, they may schedule and proceed with mediation on their own, or they may submit a request for a mediation order pursuant to Rule 1(d). No order from the Commission is necessary if the parties mutually agree to mediate, but the mediator shall file a report of mediation with the Commission as required by Rule 6(b)(4). If the parties proceed with mediation in the absence of an order from the Commission, and the Commission thereafter enters a mediation order, the parties shall timely notify the Commission that they have agreed upon the selection of a mediator or, if the mediation conference has been completed, that they request to be excused from any further mediation obligations pursuant to Rule 1(g).

(b) *Referral Upon Receipt of a Form 33 Request for Hearing.* In any case in which the Commission receives a Form 33 Request for Hearing, the Commission shall order that disputed case to a mediated settlement conference.

(c) *By Order of the Commission.* Commissioners, Deputy Commissioners, the Commission's Dispute Resolution Coordinator, and such other employees as the Commission Chairman may designate from time to time may, by written order, require the parties and their representatives to attend a mediated settlement conference concerning a dispute within the tort and workers' compensation jurisdiction of the Commission. Requests to dispense with or defer a mediation conference shall be addressed to the Dispute Resolution Coordinator. Unless the context otherwise requires, references to the "Commission" in these rules shall mean the Dispute Resolution Coordinator.

(d) *Mediation upon request of a party.* If a case is not otherwise ordered to a mediated settlement conference, a party may move the Commission to order such a conference. Such motion shall state the reasons why the order should be allowed and, if the case is pending on the hearing docket, whether the party prefers for the case to be set for hearing on the next docket, for it to not be heard until further notice from the parties, or for it to not be set before a specified date. The motion shall be served on non-moving parties. Responses may be filed in writing with the Commission within 10 days after the date of the service of the motion. The Commission may require that any motion for a mediation order be submitted on a form provided by the Commission.

(e) *Timing of the order.* The order requiring mediation may be issued whenever it appears that the parties have a dispute arising under the Workers' Compensation Act or Tort Claims Act.

(f) *Content of order.* The Commission's order shall (1) require that the mediated settlement conference be held in the case, that pertinent documents be exchanged and that any specified discovery be completed prior to the conference; (2) establish a deadline for the pre-conference exchange of documents and other discovery, and for the completion of the conference; (3) provide a period within which the parties may select a mediator by mutual agreement (see Rule 2); (4) state the rate of compensation of the Commission-appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the Commission (see Rule 7); and, (6) may specify a date for an Industrial Commission hearing should the parties fail to reach a settlement.

(g) *Motion to dispense with or defer mediated settlement conference.* Mediation may be dispensed with or canceled by the Commission, but may not be dispensed with or canceled by the parties or the mediator, unless the parties have agreed, subject to Commission approval, on a full and complete resolution of all disputed issues set forth in the request for hearing filed in the case, and have given notice of the settlement to the Dispute Resolution Coordinator. As used herein, the terms "dispensed with" and "canceled" shall mean and refer to setting aside or rescinding the mediation order(s) entered in the case, or excusing the parties from their obligations under the order(s) or these rules. Within 55 days of the filing of a Form 33 Request for Hearing, or otherwise within 21 days of the date of the Commission's order entered pursuant to Rules 1(c) and 1(d), a party may move to dispense with or defer the conference. Such motion shall state the reasons the relief is sought, and must be received by the Dispute Resolution Coordinator within the applicable 21 or 55 day deadline. For good cause shown, the Commission may grant the motion. However, failure to file a motion to dispense with mediated settlement conference within the above stated 21 or 55 day deadline and after a mediator has been appointed may result in the moving party or parties, or other responsible person, being required to pay an administrative fee of up to $100.00 to the Commission.

(h) *Exemption from mediated settlement conference.* In order to provide for the most efficacious use of mediation and neutral evaluation procedures, the Commission may specify, by type or kind, those cases to be ordered into or excluded from mediation and neutral evaluation procedures. The State shall not be compelled to participate in a mediation or neutral evaluation procedure with a prison inmate.

(i) *Motion to authorize the use of neutral evaluation procedures.* The parties may move the Commission to authorize the use of a neutral evaluation procedure in lieu of a mediated settlement conference. The Commission may require that such motion be filed on a form provided by the Commission, and such motion shall be filed within 55 days of the filing of a Form 33 Request for Hearing, or otherwise within 21 days of the order requiring a mediated settlement conference entered pursuant to Rules 1(c) and 1(d), and shall state:

(1) that all parties consent to the motion.

(2) that the neutral and the parties have agreed upon the selection and all terms of compensation of the neutral selected;

(3) the name, address and telephone number of the neutral selected by the parties;

(4) the names of all persons and entities the parties have agreed to excuse from attending the proceeding; and

(5) such other information as may be required by the Commission.

If the parties are unable to agree to the selection of a neutral or the persons excused from attending, then the Commission shall deny the motion for authorization to use a neutral evaluation procedure and the parties shall attend the mediated settlement conference as originally ordered by the Commission. If the parties are able to timely agree on the above matters, then the Commission may order the use of a neutral evaluation proceeding. Provided, however, that the Commission will not order the use of a neutral evaluation proceeding in any case in which the plaintiff is not represented by counsel.

(j) *Cases involving plaintiffs not represented by counsel.* Unless an unrepresented plaintiff requests that the plaintiff's case be mediated, the Commission shall enter an order dispensing with mediation. (Effective January 1, 1990; Amended effective August 20, 1998.)

**Rule 2. Selection of mediator.**

(a) *By agreement of parties.* The parties may choose a mediator by agreement within 55 days of the filing of a Form 33 Request for Hearing, or otherwise within 21 days after the Commission's order entered pursuant to Rules 1(c) and 1(d), unless otherwise specified therein, subject to the Commission's authority to remove the mediator selected by the parties for specific reasonable cause. The mediator selected shall either meet the qualifications specified in Rule 8, or be a person who, in the opinion of the parties, is otherwise qualified by training or experience to mediate all or some of the issues in the action. Such stipulation may be transmitted by either party, shall be dated as of the date it is transmitted to the Commission, and the stipulation must be received by the Dispute Resolution Coordinator within 55 days of the filing of a Form 33 Request for Hearing, or otherwise within 21 days of the mediation order entered pursuant to Rules 1(c) and 1(d), and shall include the name, address and telephone number of the mediator selected by agreement, shall state whether the mediator is certified by the Dispute Resolution Commission, and if not, whether the mediator is a member of the Bar and/or has any other certification, training or experience pertinent to his or her ability to mediate a case. The 21 or 55 day deadline may be extended by the Dispute Resolution Coordinator upon request of the parties.

(b) *Appointment by commission.* If the parties fail to notify the Commission of their selection of a mediator within 55 days of the filing of a Form 33 Request for Hearing, or otherwise within 21 days of a mediation order entered pursuant to Rules 1(c) and 1(d), as set forth above, the Commission shall appoint a mediator to hold a mediated settlement conference in that case. The Commission shall appoint mediators from a list of mediators eligible for appointment maintained by the Commission which shall consist of those mediators who attain the qualifications in Rule 8 and request inclusion on such list. In the absence of any suggestions by the parties with regard to the appointment of mediators, mediators shall generally be selected for specific cases by random order or by a system which attempts to assign each mediator to an equal number of cases over a period of time, unless the Commission determines in its discretion that, because of unusual circumstances, a particular mediator should be chosen in a particular case.

If the parties request the approval of a selected mediator after the appointment of another mediator by the Commission, the Commission may require one or more of the parties, or other responsible person(s), to pay a substitution of mediator fee to the Commission of up to $100.00.

(c) *Mediator's list.* To assist parties in the selection of mediators by agreement, the Commission shall maintain a list of mediators eligible for appointment by the Commission in compensation and tort cases, and a list of

mediators who are not eligible for appointment, but who may be selected by the parties and approved by the Commission The Commission shall provide copies of these lists to parties on request, and may charge a reasonable fee for maintaining and distributing these lists.

(d) *Disqualification of mediator.* Any party may move the Commission for an order disqualifying a mediator. For good cause, such order shall be entered. If the mediator is disqualified, an order shall be entered for the selection of a replacement mediator pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves. (Effective January 1, 1990; Amended effective August 20, 1998.)

**Rule 3. The mediated conference.**

(a) *Where conference is to be held.* Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice to all attorneys and unrepresented parties of the time and location of the conference.

(b) *When conference is to be held.* Subject to the Commission's orders, the conference shall be held at the time agreed to by the parties and the mediator, or if the parties do not agree, at the time specified by the mediator.

(c) *Request to extend date of completion.* A party, or the mediator, may request that the Commission extend the deadline for completion of the conference. The Commission may grant the request and extend the completion deadline orally or by written order.

(d) *Recesses.* The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

(e) *The mediated settlement conference is not to delay other proceedings.* A mediated settlement conference shall not be cause for the delay of other proceedings in the case, including completion of discovery, and the filing or hearing of motions except by order of the Commission. However, no depositions shall be taken following a Commission order requiring mediation until mediation is concluded, except by agreement of the parties or order of the Commission.

(f) *Inadmissibility of mediation proceedings.* Evidence of statements made and conduct occurring in a mediation conference shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediation conference.

No mediator shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a settlement proceeding in any civil proceeding for any purpose, except proceedings for sanctions under this section, disciplinary proceedings of the State Bar, disciplinary proceedings of any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse. (Effective January 1, 1990; Amended effective August 20, 1998.)

**Rule 4. Duties of parties, representatives, and attorneys.**

(a) *Attendance.* The following persons shall physically attend a mediated settlement conference:

(1) *Parties.*

(A) All individual parties;

(B) Employers. In a workers' compensation case, a representative of the employer at the time of injury is required to attend only if (1) the employer, instead of or in addition to the insurance company or administrator, has decision-making authority with respect to settlement, or (2) the employer is offering the claimant employment and the suitability of that employment is in issue, or (3) the employer and the claimant have agreed to simultaneously mediate non-compensation issues arising from the injury, or (4) the Commission orders the employer representative to attend the mediation conference.

(C) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action; and

(D) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel or Attorney General's Office counsel responsible for the case and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law, proposed settlement terms can be approved only by a board, the representative shall authority to negotiate on behalf of the party and to make a recommendation to that board.

(2) *Attorneys.* The parties' counsel of record; provided, that appearance by counsel does not dispense with or waive the required attendance of the parties listed above;

(3) *Insurance company representatives.* A representative of each defendant's primary workers' compensation or liability insurance carrier or self-insured which may be obligated to pay all or part of any claim presented in the action. Each such carrier or self-insured shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has the authority to make a decision on behalf of such carrier or self-insured or who has been authorized to negotiate on behalf of such carrier or self-insured and can promptly communicate during the conference with persons who have such decision making authority; and

(4) *Other parties and persons.* By order of the Commission other representatives of parties, employers or, carriers obligated to pay all or part of any claim presented in the action not required to attend the conference pursuant to the above rules may be required to attend the conference if the Commission determines that the person's attendance may be necessary for purposes of resolving the matters in dispute in the subject action. All (i) employers and (ii) carriers who may be obligated to pay all or part of any claim presented in the action and who are not required to attend a mediation conference pursuant to these rules or Commission orders, are nevertheless allowed to attend the mediation conference if they elect to do so. If, during a mediation conference, the mediator determines that the attendance of one or more additional persons is necessary to resolve the matters in dispute in the subject action, the mediator may recess the conference, and then reconvene the conference at a later date and time in order to allow for the attendance of the additional person or persons.

(b) *Waiver of attendance requirement.*

(1) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4(d), or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(A) In the absence of an order by the Dispute Resolution Coordinator, only by agreement of all parties and persons required to attend and the mediator; or

(B) By order of the Dispute Resolution Coordinator, upon motion of a party and notice to all parties and persons required to attend and the mediator

(2) Appearance by telephone: The Dispute Resolution Coordinator or the mediator, with the consent of the parties, may in appropriate cases allow a party or insurance carrier representative who is required to attend a mediated settlement conference under these rules to attend by telephone, conference call or speaker telephone, at the discretion of the mediator, provided that the person(s) so attending shall bear all costs of such telephone calls, that the mediator may communicate directly with the insurance representative with regard to the matters discussed in mediation, and that the mediator may set a subsequent conference at which all persons will be required to physically attend. The failure to properly appear by telephone in accordance with this rule may subject the responsible party to sanctions pursuant to Rule 5.

(c) *Notice of mediation order.* Within seven days after the receipt of an order for Mediated Settlement Conference, the carrier or self-insured named in the order shall provide a copy of the order to the employer and all other carriers which may be obligated to pay all or part of any claim presented in the workers' compensation case or any related third-party tortfeasor claims, and shall provide the mediator and the other parties in the action with the name, address and telephone number of all such carriers.

(d) *Finalizing agreement.* If an agreement is reached in the mediation conference, the parties shall reduce the agreement to writing, specifying all the terms of their agreement bearing on the resolution of the dispute before the Industrial Commission, and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. All agreements for payment of compensation shall be submitted in proper form for Industrial Commission approval, and shall be filed with the Commission within 20 days of the conclusion of the mediation conference.

(e) *Payment of mediator's fee.* The mediator's fee shall be paid at the conclusion of the settlement conference, unless otherwise provided by Rule 7, or by agreement with the Mediator. Sanctions may be assessed if the mediator's fee is not paid in a timely fashion.

(f) *Related cases.* Upon application by any party or person, the Commission may order that an attorney or record, party or representative of an insurance carrier that may be liable for all or any part of a claim pending in an Industrial Commission case shall, upon reasonable notice, attend a mediated settlement conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this rule. Any disputed issuers concerning such an order shall be addressed to the Commission's Dispute Resolution Coordinator. Unless otherwise ordered, any attorney, party or carrier representative that properly attends a mediated settlement conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Requests that a party, attorney of record, or insurance carrier representative in a related case attend a mediated settlement conference in an Indusrial Commission case shall be addressed to the court or agency in which the related case is pending, provided that all parties in the Industrial Commission case consent to the requested attendance. (Effective January 1, 1990; Amended effective August 20, 1998; Amended effective June 1, 2000.)

**Rule 5. Sanctions.**

If a person or party whose attendance is required by Rule 4 fails to attend, or cancels without Commission approval, a duly ordered mediated settlement

conference without good cause, or otherwise violates these rules without good cause, the Commission may impose upon the party or his principal any lawful sanction, including but not limited to the payment of attorneys' fees, mediator fees and expenses incurred by persons attending the conference, contempt, or any other sanction authorized by Rule 37(b) of the Rules of Civil Procedure. Any sanctions that may be assessed against a party under these rules including, but not limited to, mediation conference postponement fees and sanctions for the unauthorized cancellation or failure to appear at a mediation conference, may be assessed against the party or the party's principal or attorney depending on whose conduct necessitated the assessment of sanctions. (Effective January 1, 1990; Amended effective August 20, 1998.)

**Rule 6. Authority and duties of mediators.**

(a) *Authority of mediator.*

(1) *Control of conference.* The mediator shall at all times be in control of the conference and the procedures to be followed. Except as set forth in these rules, there shall be no audio, video, electronic or stenographic record made of the negotiations or discussions that occur at the mediated settlement conference.

(2) *Private consultation.* The mediator may meet and consult privately with any party or parties or their counsel prior to or during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) *Scheduling the conference.* The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the parties, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

(b) *Duties of mediator.*

(1) *Information to the parties.* The mediator shall define and describe the following to the parties at the beginning of the conference:

(A) The process of mediation;

(B) The differences between mediation and other forms of conflict resolution;

(C) The costs of the mediated settlement conference;

(D) The facts that the mediated settlement conference is not a trial or hearing, the mediator is not acting in the capacity of a Commissioner or Deputy Commissioner, the mediator will not act in the capacity of a Commissioner or Deputy Commissioner in the subject case at any time in the future, and the parties retain their right to a hearing if they do not reach a settlement;

(E) The circumstances under which the mediator may meet alone with either of the parties or with any other person;

(F) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(G) The inadmissibility of conduct and statements as provided by Rule 408 of the Evidence Code and Rule 3(f) above;

(H) The duties and responsibilities of the mediator and the parties; and,

(I) The fact that any agreement reached will be reached by mutual consent of the parties.

(2) *Disclosure.* The mediator has a duty to be impartial and to advise all parties of any circumstances bearing on possible bias, prejudice or partiality.

(3) *Declaring impasse.* It is the duty of the mediator to timely determine when mediation is not viable, that an impasse exists, or that mediation should end.

(4) *Reporting results of conference.* In all cases within the Commission's jurisdiction, whether mediated voluntarily or pursuant to an order of the Commission, the mediator shall report the results of the conference on a form

provided by the Commission. If an agreement was reached, the report shall state whether the issue or matter under mediation will be resolved by Industrial Commission form agreement, compromise settlement agreement, other settlement agreement, voluntary dismissal or removal from the hearing docket, and shall identify the persons designated to file or submit for approval such agreement, or dismissal. A copy of the Commission's Report of Mediator form is attached to these rules as Addendum A. The mediator shall not attach a copy of the parties' memorandum of agreement to the mediator's report transmitted to the Commission and, except as set forth above or as may be ordered by the Commission, the mediator shall not disclose the terms of settlement in the mediator's report. The Commission may require the mediator to provide statistical data for evaluation of the mediated settlement conference program on forms provided by the Commission.

(5) *Scheduling and holding the conference.* It is the duty of the mediator to schedule the conference, in consultation with the parties, and conduct it prior to the conference completion deadline set out in the Commission's order, and prior to the date of any hearing before a Deputy Commissioner if the case is scheduled for hearing after the mediator is appointed. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limits are changed by the Commission.

(6) *Standards of Conduct.* All mediators conducting mediation conferences pursuant to these rules shall adhere to the Standards of Conduct for Mediators adopted by the N.C. Dispute Resolution Commission. (Effective January 1, 1990; Amended effective August 20, 1998.)

**Rule 7. Compensation of the mediator.**

(a) *By agreement.* When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(b) *By commission order.* When the mediator is appointed by the Commission, the mediator's compensation shall be as follows.

(1) *Conference Fees.* The mediator shall be paid by the parties at the rate of $125.00 per hour for mediation services at the conference.

(2) *Administrative Fees.* The parties shall pay to the mediator a one time, per case administrative fee of $125.00, unless otherwise ordered by the Commission. The mediator's administrative fee shall be paid in full unless, within 10 days after the date that the mediator has been appointed, written notice is given to the mediator and the Dispute Resolution Coordinator that the issues for which a request for hearing had been filed have been fully resolved or the hearing request has been withdrawn.

(3) *Postponement Fees.* As used herein, the term "postpone" shall mean to reschedule or otherwise not proceed with a scheduled mediation conference after that conference has been scheduled to convene on a specific date. After a conference is scheduled to convene on a specific date it may not be postponed without the requesting party first notifying all other parties concerning the grounds for the requested postponement, or without the consent and approval of the mediator or the Dispute Resolution Coordinator. If a mediation conference is postponed without good cause, or as a result of a settlement, within seven days of a mediation conference, the mediator shall be paid a postponement fee unless, upon application of the party or parties charged with the fee, the fee is waived by the Commission. Unless the Commission otherwise orders, the postponement fee shall be $225.00 if the mediation conference is postponed within three days of the scheduled conference, and $125.00 if the mediation conference is postponed four to seven days prior to a scheduled conference. Postponement fees shall be paid in equal shares by the party or parties requesting the postponement unless otherwise ordered by the Commission.

(c) *Payment by parties.* Payment shall be due upon completion of the conference; provided, that the State shall be billed at the conference and pay within 30 days of receipt of the billing, and insurance companies or carriers whose written procedures do not provide for payment of the mediator at the conference may pay within 15 days of the conference. Unless otherwise agreed to by the parties or ordered by the Commission, costs of the mediated settlement conference shall be allocated to the parties, as follows: one share by plaintiff(s); one share by the workers' compensation defendant-employer or its insurer, or if more than one employer or carrier is involved, or if there is a dispute between employer(s) or carrier(s), one share by each separately represented entity; one share by participating third-party tort defendants or their carrier, or if there are conflicting interests among them, one share from each such defendant or group of defendants having shared interests; and, one share by the defendant State agency in a State Tort Claims Act case. Parties obligated to pay a share of the costs shall be responsible for equal shares; provided, however, that in workers' compensation claims the defendant shall pay the plaintiff's share, as well as its own, and the defendant shall be reimbursed for the plaintiff's share when the case is concluded from benefits that may be determined to be due to the plaintiff, and the defendant may withhold funds from any award for this purpose. (Effective January 1, 1990; Amended effective August 20, 1998; Amended effective June 1, 2000.)

**Rule 8. Mediator certification and decertification.**

(a) *Party selection.* The parties may select any person as their mediator by mutual consent, with or without the qualifications in (b); provided, that the Commission may, for good cause, bar any persons from holding themselves out as a mediator of cases within its jurisdiction or from receiving a fee for mediation of such cases.

(b) *Appointment of mediators.* If parties have agreed or been ordered to mediate, and cannot agree on the selection of a mediator, the Commission shall appoint a mediator from a list of persons who hold current certification from the Dispute Resolution Commission that they are qualified to carry out mandatory mediations in the Superior Courts of the State, and who have filed a declaration with the Commission, on forms provided by it, stating that:

(1) If an attorney, that declarant remains a member in good standing of the North Carolina State Bar;

(2) The declarant agrees to accept and perform mediations of disputes before the Commission with reasonable frequency when called upon for the fees and at the rates of payment specified by the Commission;

(3) If the declarant desires to be appointed by the Commission to mediate workers' compensation cases, that he or she has completed N.C. State Bar approved continuing legal education course(s) on workers' compensation law during the previous two years totalling not less than six hours.

A mediator making such declaration shall immediately notify the Commission when any of the facts declared are no longer accurate. The Commission may require a new declaration on a periodic or intermittent basis. The Commission shall delete from such lists any mediator whose certification from the Dispute Resolution Commission has expired or been revoked. The Commission may charge an administrative fee to defray the costs of maintaining said lists and referring cases to mediators.

(c) *Mediator lists.* The Commission may maintain and provide to parties separate lists of mediators who have successfully completed mediation training certified by the Dispute Resolution Commission, and who desire to hold mediations in disputes arising under the Workers' Compensation Act and the State Tort Claims Act.

(d) *Failure of Mediator to Appear at Conference.* In the event that a mediator fails to appear at a scheduled mediation conference without good cause the mediator shall not be entitled to the administrative fee for the case and may be deleted from the Commission's list of mediators qualified for appointments for a period of six months. (Effective January 1, 1990; Amended effective August 20, 1998; Amended effective June 1, 2000.)

**Rule 9. Rules for neutral evaluation.**

(a) *Nature of neutral evaluation.* Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of liability, settlement value, and a dollar value or range of potential awards if the case proceeds to a hearing. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

(b) *When conference is to be held.* The provisions applicable to the scheduling of mediation conferences set forth in Rule 3(b) shall also be applicable to neutral evaluation proceedings.

(c) *Pre-conference submissions.* No later than 15 days prior to the date established for the neutral evaluation conference to begin, each party may, but is not required to, furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, shall not be more than 10 pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Commission.

(d) *Replies to pre-conference submissions.* No later than five days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information not exceeding five pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Commission.

(e) *Conference procedure.* Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

(f) *Modification of procedure.* Subject to the approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation, or such procedures may be modified by order of the Commission. The modified procedures may include the presentation of submissions in writing or by telephone in lieu of the physical appearance at a neutral evaluation conference, and may also include revisions to the time periods and page limitations concerning the parties' submissions.

(g) *Evaluator's duties.*

(1) *Evaluator's opening statement.* At the beginning of the conference the evaluator shall define and describe the following points to the parties:

(A) The facts that the neutral evaluation conference is not a hearing, the evaluator is not acting in the capacity of a Commissioner or Deputy Commissioner, the neutral will not act in the capacity of a Commissioner or Deputy Commissioner in the subject case at any time in the future, the evaluator's

opinions are not binding on any party, and the parties retain their right to a hearing if they do not reach a settlement.

(B) The fact that any settlement reached will be only by mutual consent of the parties.

(C) The process of the proceeding;

(D) The differences between the proceeding and other forms of conflict resolution;

(E) The costs of the proceeding;

(F) The inadmissibility of conduct and statements as provided by Rule 408 of the Evidence Code and Rule 3(f) above; and

(G) The duties and responsibilities of the neutral and the participants.

(2) *Oral report to parties by evaluator.* In addition to the written report to the Commission required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of liability, estimated settlement values and options, the strengths and weaknesses of the parties claims and defenses if the case proceeds to a hearing. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing, and shall not inform the Commission thereof.

(3) *Report of evaluator to Commission.* Within 10 days after the completion of the neutral evaluation conference, the evaluator shall submit to the Dispute Resolution Coordinator a written report using a form prepared and distributed by the Commission, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties, whether the issue or matter will be resolved by Industrial Commission form agreement, compromise settlement agreement, other settlement agreement, voluntary dismissal or removal from the hearing docket, and shall identify the persons designated to file or submit for approval such agreement, or dismissal. The Commission may require the neutral to provide statistical data for evaluation of the settlement conference programs on forms provided by the Commission.

(h) *Evaluator's authority to assist negotiations.* If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the Commission as if such settlement discussions had not occurred.

(i) *Finalizing agreement.* If before the conclusion of the neutral evaluation conference and the evaluator's report to the Commission the parties are able to reach an agreement, the parties shall reduce the agreement to writing, specifying all the terms of their agreement bearing on the resolution of the dispute before the Commission, and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. All agreements for payment of compensation shall be submitted in proper form for Commission approval, and shall be filed with the Commission within 20 days of the conclusion of the mediation conference.

(j) *Applicability of mediation rules and duties.* All provisions and duties applicable to mediation settlement conferences set forth in Rules 3 through 7 of these rules which are not in conflict with the provisions and duties of Rule 9 herein shall be incorporated by reference and shall be applicable to neutral evaluation conferences conducted under these rules.

(k) *Ex parte communications prohibited.* Unless all parties agree otherwise, there shall be no ex parte communication prior to the conclusion of the

proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(l) *Adherence to standards of conduct for neutrals.* All neutrals conducting neutral evaluation conferences pursuant to these rules shall adhere to any applicable standards of conduct which may be adopted by the N.C. Dispute Resolution Commission. (Effective January 1, 1990; Amended effective August 20, 1998; Amended effective June 1, 2000.)

**Rule 10. Waiver of rules.**

In the interest of justice, or to comply with the law from time to time as it may be amended or declared, the Commission may waive any requirement of these rules. (Effective January 1, 1990; Amended effective August 20, 1998.)

**Rule 11. Motions.**

Unless otherwise indicated, motions pursuant to these rules shall be addressed to the Commission's Dispute Resolution Coordinator (unless the applicable order provides otherwise) and served on all parties to the claim and the settlement procedure. Responses may be filed with the Commission within 10 days after the date of receipt of the motion. Notwithstanding the Commission may act upon oral motions, or act upon motions prior to the expiration of the 10 day response period. Motions will be decided without oral argument unless otherwise ordered. Any appeals from orders issued pursuant to a motion under these rules shall be addressed to the attention of the Commission Chair or the Chair's designee for appropriate action. (Effective January 1, 1990; Amended effective August 20, 1998; Amended effective June 1, 2000.)

**Rule 12. Miscellaneous.**

Throughout these rules any reference to the number of days within which any act may be performed shall mean and refer to calendar days, and shall include Saturdays, Sundays and legal holidays. Provided, however, that if the last day (a) to file a motion, (b) to give notice of the selection of a mediator, or (c) for a pro se plaintiff to give notice that the plaintiff requests mediation is a Saturday, Sunday or legal holiday, the motion or notice may be filed or given on the next day that is not a Saturday, Sunday or legal holiday. (Effective January 1, 1990; Amended effective August 20, 1998.)

**Form A. Addendum A — I.C. Form MSC5.**

**NORTH CAROLINA INDUSTRIAL COMMISSION**

John C. Schafer
Dispute Resolution Coordinator
430 North Salisbury Street
Raleigh, NC 27611

I.C. File No. _____
Carrier No. _____
_____ County

_____, Plaintiff

v.

REPORT OF MEDIATOR

_____, Defendant

_____, Carrier

Mediator _____ telephone _____ fax _____

Address _____

The undersigned mediator reports the following results of a mediated settlement conference in this case:

Conference _____ was held. _____ was not held. If not held, the reasons were: _____. Number of sessions held: _____ Date conference was completed: _____

Names of parties, attorneys, insurance representatives or others who were absent: _____
The parties reached: _____ agreement on all issues. _____ an impasse. _____ agreement on the following issues: _____
If this case was not settled in mediation, the parties estimate that the length of the hearing in this case will be _____.
Issues settled to be disposed by : _____ clincher _____ other agmt. _____ voluntary dismissal _____ removal from hearing docket
The person who will submit the agreement/clincher/dismissal to the Commission is _____
_____, who will submit it by _____ (date).

**Mediator's Fee**

PREPARATION FEE: $ _____

($100.00 for appointed mediator unless settled and cancelled more than seven days before the conference date.)

MEDIATION FEE: $ _____
Total time spent in Mediation Settlement Conference: _____ hours
($100.00 per hour for appointed mediator, billed in quarter hour segments.)

OTHER FEE (Postponement fee, etc., if any) $ _____

TOTAL FEE $ _____
**Mediator's Federal Tax ID No.** _____

All fees to the mediator have been paid except as follows:
Party owing fee Amount owed Address of party

_____

I have mailed this report to the Commission within seven days of the conclusion of the mediated settlement conference.

This the _____ day of _____, _____, _____
Mediator

**This report is to be returned to the Commission in all cases, whatever the mediation results.**

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# RULES OF THE INDUSTRIAL COMMISSION RELATING TO THE LAW-ENFORCEMENT OFFICERS', FIREMEN'S, RESCUE SQUAD WORKERS' AND CIVIL AIR PATROL MEMBERS' DEATH BENEFITS ACT

(Pursuant to authority contained in G.S. 143-166.4, the North Carolina Industrial Commission hereby adopts the following rules:)


Rule
I. Location of offices and hours of business.
II. Transaction of business by the Commission.
III. Determination of claims by the Industrial Commission.

Form
IV. Appeal to the Full Commission.
V. Amendment of rules.

Index follows Rules.


## Rule I. Location of offices and hours of business.

The offices of the Industrial Commission are located in the Dobbs Building, 430 North Salisbury Street, in Raleigh, North Carolina. The same office hours as are or may be observed by other State offices in Raleigh will be observed by the Industrial Commission.

(The effective date of this rule is November 1, 1977.)

## Rule II. Transaction of business by the Commission.

The Commission will remain in continuous session subject to the call of the Chairman to meet as a body for the purpose of transacting such business as may come before it.

## Rule III. Determination of claims by the Industrial Commission.

1. Upon application or request to the Industrial Commission for an award under the provisions of the Law-Enforcement Officers', Firemen's, Rescue Squad Workers' and Civil Air Patrol Members' Death Benefits Act, the Full Commission will determine whether sufficient information or evidence is contained in the Commission's workers' compensation or other files upon which to base an Order for the payment of benefits. If the Full Commission is satisfied that such an Order should be issued, it will, without conducting a formal hearing, file an appropriate Award directing the payment of benefits.

The Full Commission, on joint request of the interested parties or for good cause shown, may in its discretion, order or approve a settlement for less than the maximum amount set forth in G.S. 143-166.3.

2. If the Full Commission is of the opinion that it has insufficient information or evidence before it upon which basis an award for the payment of benefits should be issued, the Full Commission will place the case upon the Commission's hearing docket in the county where the incident giving rise to the death is alleged to have occurred. The case will thereafter be set for hearing before a Hearing Commissioner or Hearing Deputy Commissioner in such county or in such other county as the Full Commission may direct, due notice of the hearing being given to all parties and to the Attorney General of the State of North Carolina who may appear as amicus curiae.

3. The Hearing Commissioner or Hearing Deputy Commissioner before whom the case is set for hearing, in his discretion, may order the parties to appear at a reasonable time and place for a pre-trial hearing to determine such matters as he deems necessary. The Hearing Commissioner or Deputy Commissioner will, having received all evidence pertinent to the case, thereafter proceed to file a Decision and Award in the case in which benefits are awarded or denied. Such Decision will be sent to all parties.

4. The Commission may, of its own motion, order a rehearing of any case.

5. The Commission will give reasonable notice of hearing in every case. Postponement or continuance of a scheduled hearing will rest entirely in the discretion of the Commission.

6. In all cases where it is suitable that infants or incompetents sue by their guardian ad litem, the Commission will appoint such guardian ad litem upon the written application of a reputable disinterested person closely connected with such infant or incompetent. But, if such person will not apply, then, upon the like application of some reputable citizen; and the Commission will make such appointment only after due inquiry as to the fitness of the person to be appointed.

7. Any claimant who gives to the opposing party or an agent of that party a written or recorded statement of the facts and circumstances surrounding his claim shall be furnished by the opposing party a copy of such statement within ten days upon request. Further, any claimant who has given such a statement shall, without request, be furnished by the opposing party a copy thereof immediately following a denial of his claim or no less than ten days prior to a pending hearing.

Such copy shall be furnished at the expense of the party to whom the statement was given.

If any party fails to comply with this rule, then an Order may be entered by the hearing officer prohibiting that party from introducing designated matters into evidence.

8. In the absence of written notice of appeal from the Decision and Award filed in such a case by the Hearing Commissioner or Hearing Deputy Commissioner within fifteen days from receipt of such award, the award as filed will be binding on the parties.

(The effective date of this rule is August 1, 1979.)

**Rule IV. Appeal to the Full Commission.**

1. In any case in which Decision is filed by Hearing Commissioner or Hearing Deputy Commissioner, appeal may be made to the Full Commission by giving written notice of appeal to the Commission within fifteen days from receipt of the Decision, with written statement of service of copy by mail or in person on opposing party or parties.

2. Upon receipt of notice of appeal, the Commission will supply to the appellant and to appellee a transcript of the record upon which is based the Decision and Award from which appeal is being taken to the Full Commission. The appellant shall, within ten days of receipt of transcript of the record, file with the Commission a written statement of the particular grounds for the appeal, with written statement of service of copy by mail or in person on opposing party or parties, unless such statement of grounds, in the discretion of the Commission, is waived.

Particular grounds for appeal not set forth will be deemed to be abandoned and argument thereon will not be heard before the Full Commission.

A nonappealing party is not required to file conditional assignments of error in order to preserve his rights for possible further appeals.

3. When an appeal is made to the Full Commission, appellant's brief, if any, in support of his ground for appeal shall be filed in triplicate with the

Commission, with written statement of service of copy by mail or in person on appellee no less than 25 days after receipt of the transcript of the hearing. Appellee shall have 25 days in which to file reply brief, if any, in triplicate with the Commission, with written statement of service of copy by mail or in person on opposing party or parties.

Any motions by either party shall be filed in triplicate with the Full Commission, with written statement of service of copy by mail or in person on opposing party or parties.

4. No new evidence will be presented to or heard by the Full Commission.

5. Ruling on a motion for a new hearing to take additional evidence will be governed by the general law of the State for the granting of new trials on the grounds of newly discovered evidence. Such motion must be written, supported by affidavit, and may be argued before the Full Commission at the time of the hearing on appeal.

6. The parties, or either of them, may waive oral argument before the Full Commission. In the event of such waiver, a Decision based on the record, exceptions, and briefs, if any, will be given by the Full Commission.

(The effective date of this rule is August 1, 1979.)

**Rule V. Amendment of rules.**

The Commission reserves the right, in its discretion, to amend its Rules at any time, with or without notice. Copies of the Rules are on file at the Office of the Secretary of State and at the Office of the Attorney General, and may be obtained therefrom in the usual manner.

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# NORTH CAROLINA INDUSTRIAL COMMISSION RULES FOR MANAGED CARE ORGANIZATIONS

Effective January 1, 1996.


Rule
I. Purpose.
II. Definitions.
III. Qualification by Department of Insurance.
IV. Qualification and revocation.
V. Notice to Commission.
VI. Contract provisions.
VII. Information for employee/patient.
VIII. Inclusive provider panels.
IX. Quality assurance and utilization review.
X. Waiver.

Index follows Rules.


## Rule I. Purpose.

These rules are intended to facilitate the timely and cost-effective delivery of appropriate medical compensation services to fulfill the employer's duty to provide such services as are reasonably necessary to effect a cure, give relief, or shorten the period of disability resulting from compensable injuries through the use of Managed Care Organizations (MCOs). These rules do not affect existing, informal lists or "employer networks" of providers assembled by employers or insurers for their own referrals. *N.C. Gen. Stat. §§ 97-2(19), (20) and (21); 97-25; 97-25.2; 97-25.3(e); 97-26(b), (c), and (g); and 97-25.4(a).*

## Rule II. Definitions.

As used in these rules, unless context otherwise dictates:

(1) *Managed care organization (MCO).* A preferred provider organization (PPO) or a health maintenance organization (HMO) regulated under Chapter 58 of the General Statutes. *N.C. Gen. Stat. §§ 97-2(21) and 58-50-50.*

(2) *Health care provider (provider).* Any medical doctor, chiropractor, other physician, hospital, pharmacy, nurse, dentist, podiatrist, physical therapist, rehabilitation specialist, psychologist and any other person or firm providing medical care pursuant to the Workers' Compensation Act. Payment for services rendered for a workers' compensation patient shall be controlled by contract between the provider and MCO, or if none, by the Commission's Medical Fee Schedules. *N.C. Gen. Stat. §§ 97-2(20); 97-26(b) and (c).*

(3) *Employer.* Any person, firm, corporation, or governmental entity obligated by the Workers' Compensation Act to pay or provide indemnity or medical compensation, **including any insurance carrier**, self-insurance fund, third party administrator or other person, firm or corporation undertaking to pay or adjust claims on behalf of the employer's employees. *N.C. Gen. Stat. §§ 97-2(3) and 97-25.2.*

(4) *Commission.* The North Carolina Industrial Commission and its employees acting on its behalf. *N.C. Gen. Stat. §§ 97-77 and 97-79.*

(5) *Workers' compensation act.* The North Carolina Workers' Compensation Act, Chapter 97, Article 1 *(N.C. Gen. Stat. §§ 97-1 — 97-101)*, as interpreted and applied by the rules and decisions of the Commission and the courts of North Carolina and the United States.

(6) *Employer network.* As used in Rule I., means any group of providers assembled by or for an entity liable for medical compensation which agrees to accept the referrals of that entity's workers' compensation patients, and from among whom an adjuster, officer, employee, or insured patient of the entity chooses the initial provider; provided, the entity has no right to sell the services of the providers to a third party. *N.C. Gen. Stat. § 97-25.*

**Rule III. Qualification by Department of Insurance.**

Prior to provision of any service for workers' compensation patients pursuant to an MCO contract with any employer, an MCO shall comply with the applicable requirements of N.C. Gen. Stat. Chapter 58, Insurance, and the regulations promulgated pursuant thereto, in addition to these rules, except as they may be interpreted to specifically conflict with the Workers' Compensation Act and these rules; provided, that MCOs with such existing contracts on the effective date of these rules shall comply with this rule on or before February 1, 1996. In the absence of effective and binding regulations administered by the N.C. Department of Insurance setting appropriate and sufficient requirements and standards for health care provider contracts, accessibility of providers, financial ability to meet contract commitments, quality management or quality assurance programs, health care provider credentialing, conflicts of interest, records and examinations, internal auditing, confidentiality and other appropriate matters, every MCO offering medical compensation services shall comply with temporary orders or provisional regulations issued by the Commission, consonant with the Workers Compensation Act, pending further formal rulemaking by the Commission or the Department of Insurance. *N.C. Gen. Stat. §§ 7-2(21) and 97-25.2.*

**Rule IV. Qualification and revocation.**

Upon receipt of documents complying with Rule V., nothing otherwise appearing, the Commission will issue a letter to the MCO acknowledging receipt and stating that the MCO is qualified to contract to serve workers compensation patients while it holds an MCO certificate from the Department of Insurance, subject to renewal at a specified time, not exceeding three (3) years. For good cause, including, but not limited to, ineffective delivery of medical services, failure to comply with applicable laws, rules or regulations, and failure to timely respond to lawful orders of the Commission or other regulatory authorities, the Commission may suspend or revoke an MCO's permission to deal with any particular workers' compensation patients, employers or providers, groups or classes of them, or all of them. *N.C. Gen. Stat. § 97-25.2.*

**Rule V. Notice to Commission.**

Upon contracting with an employer to provide medical compensation services, the MCO shall provide to the Commission (1) a copy of that portion of the contract containing the provisions specified in Rule VI, and the method for determining payment to the MCO, excluding those of its terms kept confidential by the N.C. Department of Insurance, initialed by the employer; (2) a copy of its current certificate(s) issued annually by the N.C. Department of Insurance pursuant to N.C. Gen. Stat. Chapter 58; (3) the name and address of all owners or shareholders, or related groups of owners or shareholders, holding more than 10% interest in the MCO, and whether they are or have any relationship with a provider. Persons or firms are related, for the purposes of this rule, if either has a financial interest in the other; shares officers, agents, or employees; or, if natural persons, are first cousins or closer in kinship. An MCO subject to these rules shall report its medical compensation expenditures annually on I.C. Form 51. *N.C. Gen. Stat. § 97-25.2.*

**Rule VI. Contract provisions.**

An MCO's contract with an employer subject to these rules shall include these provisions: (1) the principal place(s) of employment of the covered

employees, including address(es) and phone number(s) of the workplace(s); (2) the name, title, mailing address, phone number, fax number, and e-mail address, if any, of an officer or responsible employee of the MCO empowered to assent to the treatment or referral of covered employees, capable of obtaining and providing complete business, administrative and medical records generated pursuant to the contract, and empowered to resolve routine disputes with patients, employers and providers under the Commission's jurisdiction; (3) the name, title, mailing address, phone number, fax number, and e-mail address, if any, of an adjuster, officer, agent or employee of the employer empowered to negotiate the resolution of routine medical compensation disputes, and receive orders of the Commission on behalf of the employer; (4) an acknowledgment that the MCO is bound by applicable requirements of N.C. Gen. Stat. Chapters 58 and 97 and these rules, and subject to orders of the Commission to the same extent as the employer; (5) the agreement of the employer that it will cooperate and actively assist in furnishing its employees and supervisors with a phone number and instructions for obtaining emergency treatment and/or contacting the MCO upon injury to any employee during the workday or on the employer's premises requiring physician attention, and with furnishing to its injured employees the information and card hereinafter required in Rule VII; (6) specify a dispute resolution plan in accordance with N.C. Gen. Stat. § 97-25.2 and 11 N.C. Admin. Code 12.0914, including provisions for notice of decision in appeals within 30 days, or within 72 hours of appeal when the regular appeals process would cause a delay in the rendering of health care that would be detrimental to the health of the employee; (7) describe physician panels, including specialties represented, and the employee's right to select his or her attending physician from the appropriate panel, and to subsequently change attending physicians once within the members of the panel; (8) whether the MCO or employer will be responsible for securing the services of "out of network" providers when needed. *N.C. Gen. Stat. § 97-25.2.*

**Rule VII. Information for employee/patient.**

The employer shall inform employees of its arrangements with an MCO for providing medical compensation through its usual means of communicating company policies and benefit information, and provide a wallet-size card bearing a phone number to be contacted in case of a work-related injury, and otherwise complying with Department of Insurance regulations. As soon as reasonably possible following the injury, the employer or MCO shall provide to the employee a printed explanation of the system being utilized for his care, suitable for sharing with emergency, "out-of-network", and referral physicians, which shall be filed with any Form 19 submitted to the Commission; provided, that electronic filers may otherwise notify the Commission of the identity of the MCO. This statement shall include the following information: (1) The offices to contact concerning medical treatment for the injury, including a telephone number; (2) if known at that time, the employee's chosen treating physician, including a phone number for seeking medical assistance outside normal business hours if the injury might cause such a need; (3) the applicable methods for choosing and changing treating physicians and resolving disputes concerning physicians or treatment pursuant to N.C. Gen. Stat. § 97-25.2; (4) that the MCO can make available physicians in all the fields and specialties licensed by the State of North Carolina; (5) the employer's obligation to pay for treatment for which the employee/patient is referred to the MCO, whether or not the employer admits liability for the injury per N.C. Gen. Stat. § 97-90(e); (6) the employee's duty to cooperate in treatment, and right to secure treatment at his or her own expense that does not interfere with the treating physician's treatment; and, (7) the I.C. File Number, if known when filed. Information for providers concerning billing may be included, labeled as such.

**Rule VIII. Inclusive provider panels.**

As soon as reasonably possible following onset or injury, and upon a patient's first request to change attending physician, the MCO shall provide the patient with a list of reasonably accessible and available panel physicians qualified to treat or manage the primary condition for which the employer has accepted liability or authorized treatment from which the employee may select the attending physician. The employer and MCO shall provide for reasonable access and availability to all medical compensation services, and include in its panels, or otherwise make available for the employee's choice, one or more physicians representing all specialties available in the community that are licensed to provide foreseeably necessary treatment for the patient's primary compensable condition, if a physician of that specialty meets the MCO's reasonable credentialing criteria for that specialty and is willing to contract to provide their services on a non-discriminatory basis. *N.C. Gen. Stat. §§ 97-2(19), 97-2(20), 97-25 and 97-25.2.*

**Rule IX. Quality assurance and utilization review.**

An MCO subject to these rules shall comply with the requirements of the N.C. Department of Insurance for quality assurance and utilization review plans, and upon request, provide the Commission with copies of records generated by, or utilized in, the operation of those programs, and copies of plans or amendments to plans not yet filed with the Department of Insurance.

**Rule X. Waiver.**

For good cause, and in its discretion, subject to statutory requirements, the Commission may waive adherence to any of these Rules. *N.C. Gen. Stat. § 97-80(a).*

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## Preamble to Medico-Legal Guidelines

History Leading to the Proposed Revision of the NC Medico-Legal Code

Since the adoption of the original Medico-Legal Code by the North Carolina Bar Association and North Carolina Medical Society in 1956, the environment in which the physician and lawyer interact has changed radically. With the introduction of standard rules of civil procedure and evidence, the broad bounds of contact between attorney, witnesses, and parties were defined. Adoption and subsequent revision of Rules of Professional Conduct further defined the lawyer's ethical conduct and served as a guide in contact with physicians. Physicians, largely unfamiliar with these legal rules and guides, reacted only within the boundaries of professional respect, dignity, decorum, and the ethical principles of their health care profession. With the rise in importance and frequency of medical litigation, the professions have scrutinized attorney and physician conduct and have reached a consensus that there is a need to revise their inter-professional code. The Code was previously revised in 1972, 1986, and 1991 in attempts to update the original 1956 Code. The 1991 version was called "The Medico-Legal Guidelines of North Carolina" (the term "Guidelines" as used hereafter refers to all such versions as well as this document).

## Current Revision

The Joint Committee of the North Carolina Medical Society and North Carolina Bar Association decided the Guidelines should be updated for two reasons.[1] First, the practices of medicine and law have changed dramatically since 1991.[2] Second, the Guidelines have not been effective in resolving certain recurring disputes between physicians and attorneys.[3]

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1 The Joint Committee delegated this task to the Bar Association Medico-Legal Liaison Committee.

2 Other health care professionals are now licensed to perform medical services which were traditionally provided only by physicians. Major changes in the health insurance industry have altered traditional health care delivery systems. Alternative Dispute Resolution is now employed to resolve many claims involving physicians which were previously resolved in litigation. Technological advances challenge medical and legal attempts to protect confidential medical information and patient/client rights to privacy.

3 Despite the presence of the Guidelines, recurring disputes persist between physicians and lawyers in the litigation context. Some of these disputes have been addressed to the Joint Committee of the North Carolina Medical Society and North Carolina Bar Association for dispute resolution. Other disputes have been explored by the North Carolina Bar Association Medico-Legal Liaison Committee, which conducted public hearings prior to preparing a new draft version of the North Carolina Medico-Legal Guidelines. The Committee invited speakers to the hearings who had experienced difficulty with the implementation of the Guidelines, and believed that the Guidelines needed change.

### Physician Complaints

Physicians complain about attorney misuse of subpoena power and failure to pay expert witness fees of both treating and retained medical expert witnesses. In the case of treating physicians, this complaint arises often when the physician testifies pursuant to subpoena and without a fee agreement with the subpoenaing attorney, and the subpoenaing party does not prevail at trial.[4]

Physicians complain that they are uncertain of their legal duties in certain areas. Physicians are frequently confused about the duties attendant to their release of confidential medical information. They are not certain as to when they may, may not, and when they must release confidential medical records or speak with an attorney about a patient. They are often unsure about what services to bill for, whom to bill, and how to ensure payment resulting from services rendered in legal cases involving medical issues. They complain that they receive conflicting responses from lawyers regarding their duties and rights.[5]

Treating physicians, who may be potential defendants in professional liability litigation, complain that attorneys investigating those claims mislead them. The climate of inter-professional mistrust created in the professional liability context invades all areas of litigation.

### Attorney Complaints

Attorneys complain that physicians fail to comply with subpoenas for their records or presence as a witness, that they fail to provide complete medical records, and that they bill excessively for medical records, consultation and testimony. Attorneys also complain that treating physicians refuse or are reluctant to consult with their patient's attorney or to provide live testimony on behalf of their patient. These areas of conflict cause problems for patients and attorneys, who of necessity rely on medical evidence in cases involving medical factual issues.

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4 N.C. Gen. Stat. § 7A-314 (2000) addresses the discretionary award of expert witness fees as costs in civil cases, but does not compel parties to seek a judicial determination of expert witness fees or who is to pay them. N.C. Gen. Stat. § 7A-454 (2000) addresses under what circumstances a court may order payment of expert witnesses who testify on behalf of indigent criminal defendants. NC R. Evid. 706 governs who shall pay, and what amount, shall be paid to expert witnesses appointed by the Court in civil and criminal actions. N.C. Gen. Stat. §15-7 (2000) governs the payment of physicians appointed to conduct post-mortem examinations of homicide victims. In cases before the Industrial Commission, expert witness fees are set by the Commissioner or Deputy Commissioner hearing the case. See N.C. Gen. Stat. §§ 97-90(c) and 97-26.1 (2000).

5 This occurs, in part, because the law is unclear in certain areas and uncertain in others. See Footnote 45 regarding the subpoena of medical records by way of example.

### Scope

Throughout its history, the scope of various versions of the Guidelines was limited to physician-attorney interactions. The Guidelines did not apply to other health care professionals, and also did not apply to a physician who was a party-defendant in a malpractice action. The Guidelines did not distinguish between treating and non-treating medical expert witnesses. The Guidelines did not complement and did not reference specific rules of conduct required by laws or regulations in areas such as workers' compensation, criminal prosecutions, or cases involving drug and alcohol abuse medical records. The newly adopted Guidelines have made some changes in these areas.

### Professional Liability

Historically, the Guidelines have not addressed the interaction between attorneys and physicians who are defendants in professional liability actions. This relationship is governed by mandatory statutes, rules of ethics, and rules of procedure, and is not appropriately a subject of these Guidelines. However, these Guidelines seek to clarify duties arising in those situations where the physician is not a party-defendant but the legal action is based on a claim of professional negligence made by a person treated or evaluated by the physician.[6] The Guidelines address some of the recurring concerns in this difficult area.

### Treating Versus Non-Treating Witnesses

In earlier editions, the Guidelines did not always distinguish between physicians who were retained expert medical opinion witnesses and those medical witnesses who were fact witnesses by virtue of treating the attorney's client as a patient. The relationship between a physician who is a retained expert and an attorney is voluntary and reciprocal, and fee arrangements between them are business agreements restricted only by prevailing law and their professional guidelines of ethics. By contrast, interactions between treating physicians and patient's attorneys are not chosen, arising instead from their respective connections and duties to their mutual patient/client. The Guidelines, recognizing this distinction, preclude retained experts and attorneys from invoking the assistance of the Joint Committee in fee disputes arising between them.

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6 In such situations, the health care provider may be a potential defendant and/or may be required to provide expert testimony affecting defendant(s) who are co-workers and colleagues.

## I. INTRODUCTION

The North Carolina Medico-Legal Guidelines are the product of collaboration between the North Carolina Medical Society and North Carolina Bar Association. The Guidelines are the end-product of decades of cooperation between physicians and lawyers aimed at improving their inter-professional interactions in medical litigation.

The relationship between a physician and an attorney should be based upon mutual respect, courtesy, and understanding. Medical testimony is generally indispensable in legal cases to prove or disprove the nature or extent of injuries or other legally relevant medical conditions. Therefore, when accepting a patient, a physician also accepts the incidental obligation to cooperate in any legal proceedings in which the patient may become involved.[7] When attorneys make inappropriate or inconsiderate demands on physicians, they cause animosity between the professions. Without mutual cooperation by physicians and attorneys, their patients/clients become the unfortunate victim of professional ill will.

To promote inter-professional cooperation and courtesy, the particular responsibilities of physicians and attorneys should be more clearly defined. These Guidelines set out these responsibilities, citing legal and/or medical authority where applicable. These Guidelines are not exclusive, nor do they cover all situations or seek to define the outer limits of professional interrelationships. The Guidelines establish minimum standards for those relationships and encourage civility between the professions.

## II. SPECIFIC REGULATIONS

These Guidelines are not intended to supplant any mandatory rules, laws or regulations. Mandatory rules (for example the Rules of Professional Conduct governing attorney behavior, the North Carolina Rules of Civil Procedure governing court procedure, and the North Carolina Rules of Evidence governing the admissibility of evidence in court proceedings), statutes, and regulations take precedence over these Guidelines. Some relevant citation to applicable rules, laws, professional codes and position statements, and/or regulations are contained in the text of these Guidelines.

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7 See AMA Code of Medical Ethics § 9.07 "Medical Testimony" (2000-2001 ed.) (regarding ethical duty to testify if patient requests "in order to secure the patient's legal rights."). AMA Code of Medical Ethics provisions are aspirational rather than mandatory.

## III. DEFINITIONS

The following definitions apply throughout these Guidelines:

A. **"Physician" Defined**: A physician is a person licensed to practice medicine by the North Carolina Medical Board as that term has historically been understood, i.e., medical and osteopathic physicians.[8] The Guidelines also cover a physician assistant licensed by the North Carolina Medical Board.

B. **"Medical Record" Defined**: The medical record is the confidential information, documents and materials (including correspondence and notes) collected and contained by or at the direction of a physician in connection with a patient's treatment or evaluation of a physical or mental health condition.[9] Medical record information is inherently sensitive and personal and includes information about the patient's history, diagnosis, treatment, and the bill for any services provided to the patient,[10] as well as related information which identifies the patient, such as the patient's name, address, social security number, or unique identifier established by State or federal law.[11]

C. **"Medical Report" Defined**: A medical report is a report generated by a physician at the request of an attorney in order to assist the attorney in preparing for litigation which involves a patient's medical condition, treatment, or prognosis. A medical report may be a narrative summary of the medical record, or it may be a response to requests for expert opinions regarding the patient's condition, treatment, or prognosis not contained in the medical record. The preparation of a medical report may, in some instances, require the physician to obtain a current evaluation of the patient.[12]

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8 N.C. Gen. Stat. § 90, Art. 1 (2000) governs the licensure of medical and osteopathic physicians in North Carolina. N.C. Gen. Stat. § 90-18.1 (2000) governs the licensure of physician assistants in North Carolina. Other health care professionals are encouraged to follow the Guidelines but are not required to do so unless their licensing and disciplinary authorities require them to do so. Attorneys should follow the provisions of the Guidelines in dealings with all health care professionals.

9 Medical Records are defined by the following North Carolina statutory and regulatory provisions: N.C. Gen. Stat. §§ 8-44.1, 90-410(2), 58-39-15(18), 130A-372(2), N.C. Admin. Code 3J.2301(25) and 3J.3901(19). Other provisions of North Carolina and federal law refer to information about patients' medical services using terms other than "Medical Records." See N.C. Gen. Stat. § 122C-3(9) and 42 C.F.R. §§ 2.11 and 2.13. See these Guidelines, Part IV(A)(4) (regarding records of patients receiving services for drug or alcohol abuse) and Appendix A "Pertinent NC Statutes and Regulations regarding Medical Records."

10 See NC Medical Board Position Statement, "Documentation of the Physician-Patient Relationship." (adopted 5/91, amended 5/96) (establishing "a record of billings" as a part of the minimum a medical record should contain).

11 See, AMA Code of Medical Ethics § 5.07 "Confidentiality: Computers" and Sec. 5.075 Confidentiality: Disclosure of Records to Data Collection Companies" (2000-2001 ed.) (regarding confidentiality and computerized data bases).

12 See N.C. Gen. Stat. § 90-411 (2000) regarding reasonable fees for the preparation of medical

D. **"Independent Medical Examination" Defined**: An independent medical examination is a medical examination in which a person is required or agrees to submit to a medical examination by a physician selected or approved by a court, administrative agency or other adjudicatory body or by the mutual agreement of the parties.[13]

E. **"Medical Witness" Defined**: A medical witness is a physician who provides testimony concerning one or more medical issues involved in a lawsuit or claim.[14] Three types of medical witnesses are recognized by the NC Medico-Legal Guidelines.[15] They are:

1. **"Retained Expert Witness" Defined**: A retained expert witness is a physician who has been retained by one of the parties to litigation to provide expert opinion testimony or evidence concerning one or more medical issues involved in the lawsuit or claim.

2. **"Fact Expert Witness" Defined:** A fact expert witness is a physician who is called upon to testify or provide evidence because they have treated a patient who is a party or witness in a lawsuit or claim.

3. **"Independent Expert Witness" Defined:** An independent expert witness is a physician who has been selected or approved by a court, administrative agency or other adjudicatory body or by the mutual agreement of the parties to perform an independent medical examination.

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reports.

13 Independent medical examinations occur in a number of contexts. For civil actions in North Carolina's state courts, see N.C. R. Civ. P. 35. In workers' compensation cases, independent medical examinations can occur upon agreement of the parties, order of the Industrial Commission, or pursuant to N.C. Gen. Stat. § 97-27 (2000). Reference should be made to any Rules adopted by the Industrial Commission for guidance regarding communications with independent medical witnesses in workers' compensation cases. See, with regard to social security disability claims, 20 C.F.R. §§ 404.1517 and 416.917 (2000), which discuss when the Social Security Administration will purchase a consultative examination of a disability claimant. The reports generated from these examinations are kept in the claimant's file and are available for review by the claimant and/or the claimant's representative by going to the office that has the file. The reports are not automatically sent to the claimant or the claimant's representative. The claimant may direct the Social Security Administration to release the report to his or her own doctor. See also 20 C.F.R. §§ 404.1519, 416.919, 409.152, and 416.927 (2000) (regarding Social Security Administration Medical Advisors).

14 "Medical witnesses should have recent and substantive experience in the area in which they testify and should limit testimony to their sphere of medical expertise." AMA Code of Medical Ethics § 9.07 "Medical Testimony" (2000-2001 ed.).

15 The obligations of medical witnesses under the Guidelines may differ, depending upon which type of medical witness they are.

## IV. SPECIFIC SITUATIONS

### A. Medical Records

#### 1. Ownership of Medical Records

Usually, records made or collected by or at the direction of a physician in connection with the treatment and evaluation of a patient are maintained and retained by the physician, hospital or other individual or institutional care giver. The original record is deemed to be the property of the physician, hospital, or other individual or institutional care giver. The patient has a qualified right to say what may be done with information contained in the record.[16]

#### 2. Inspection and Copying of Medical Records

##### a. Required Authorization

An original medical record should not be removed from the possession of a physician, hospital, or other individual or institutional care giver except upon court order, but the original should be available for inspection or copying with proper written authorization. Proper written authorization is to be provided by the patient, an individual empowered by law to act in the patient's behalf regarding disclosure of medical records, or by order of a court or administrative agency having jurisdiction and authority to mandate such disclosure.[17]

##### b. Permissible Charges for Copying Medical Records

In personal injury liability cases, permissible charges for copies of medical records are governed by N.C. Gen. Stat. 90-411. Further, in personal injury liability cases, a physician may not charge for copies of medical records requested by a patient's attorney if they wish to preserve a lien for their medical services against the patient's recovery of monetary damages for personal

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16 See AMA Code of Medical Ethics "Fundamental Elements of the Physician-Patient Relationship" (2000-2001 ed.) ("The patient has the right to receive information from physicians. . . and [patients] are also entitled to obtain copies or summaries of their medical records [and] to have their questions answered"); See also NC Medical Board "Access to Physician Records" (Position Statement adopted 11/93, amended 5/96 and 9/97) ("Each physician has the duty on the request of a patient to release a copy of the record in a timely manner to the patient or anyone the patient designates"). Complex rules govern the disclosure of medical information about an individual's substance abuse, diagnosis or treatment, and the disclosure of such information is excluded from the scope of these Guidelines. See Part IV(A)(4), infra, and N.C. Gen. Stat. § 122C-3(9) (2000).

17 In workers' compensation cases, "an employer paying medical compensation to a provider rendering treatment. . .may obtain records of the treatment without the express authorization of [the] employee." N.C. Gen. Stat. § 97-25 (2000). Reference should be made to the Rules of the Industrial Commission or contact made with the Industrial Commission regarding the right of the employer or others acting on its behalf to obtain medical records without the express consent of the employee. See also AMA Code of Medical Ethics § 5.09 "Confidentiality: Industry Employed Physicians and Independent Medical Examiners" (2000-2001 ed.) (Finding no physician patient relationship where "a physician's services are limited to pre-employment physical examinations or examinations to determine if an employee who has been ill or injured is able to return to work" but finding a physician-patient relationship where "a physician renders treatment to an employee, even though the physician is paid by the employer" and noting that release of such information is governed by workers' compensation laws.)

injury from a third party.[18] In workers' compensation cases, permissible charges for copies of medical records are governed by N.C. Gen. Stat. § 97-26.1. In social security disability cases, see 20 C.F.R. §§ 404.1514 and 416.94. In other circumstances, a physician may charge a reasonable fee for copies of medical records.[19]

#### c. Withholding Records where Patient Account for Medical Services Not Paid

A physician may not refuse to provide copies of medical records (including the bill for services provided to the patient) on the ground that the patient has not paid the amount due on his account for medical services.[20]

### 3. Requesting Medical Records or a Medical Report From a Treating Physicians

#### a. Notice

An attorney should give a patient's treating physician reasonable notice of the need for inspection and copying of medical records, or of the need for preparation of a medical report. The notice should clearly specify the information requested. Notice may be provided by written correspondence, or by a subpoena, and should be accompanied by appropriate authorization to release the information requested.

#### b. Authorization

Proper authorization is necessary before a physician can release medical information. No attorney should request and no physician should furnish any medical information concerning the history, physical or mental examination, condition, diagnosis or prognosis of a patient except with the written consent of the patient, the patient's authorized representative, a judicial or administrative order, or in conformity with other applicable legal authority.[21] The scope of the

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18 See N.C. Gen. Stat. §§ 44-49 and 44-50 (2000). See also N.C. Prof. Cond. Rule 1.15-1 (1997) and N.C. RPC 69 ("Payment of Client Funds to Medical Provider" (1989)) and N.C. RPC 125 ("Disbursement of Settlement Proceeds" (1992)) (requiring lawyer to obey client's instruction not to pay medical providers from the proceeds of settlement in the absence of a valid physician's lien).

19 See N.C. Gen. Stat. § 90-411 (2000) and NC Medical Board "Access to Physician Records" (Position Statement adopted 11/93, amended 5/96 and 9/97).

20 See NC Medical Board "Access to Physician Records" (Position Statement, adopted 11/93, amended 5/96, amended 9/97) ("Materials should not be held because an account is overdue or a bill is owed."). An attorney may not pay client bills for treatment, although they may advance medical litigation expenses on behalf of a client. See N.C. Prof. Cond. Rule 1.8(e) (1997), RPC 80 "Lending Money to a Client," (1990), and CPR 157 (attorney may advance cost of medical examination if same is litigation expense).

21 See N.C. Gen. Stat. §§ 8-53, 8-53.1, 8-44.1 and 130A-143 (2000); N.C. R. Civ. P. 45(c); the Rules of the Industrial Commission. See RPC 162 "Communications with Opposing party's Physicians" (1994) (prohibiting attorney from communicating with opposing party's non-party treating physicians unless the opposing party consents, in non-workers' compensation setting); RPC 180 "Communications with Opposing Party's Physicians" (1994) (extending that prohibition to passive listening); RPC 224 (1997) (extending prohibition to

authorization determines the scope of the inspection, release, copying or report: If the requesting attorney wants information beyond what is authorized to be released, the attorney must obtain additional authorization.[22]

#### c. Promptness

The physician, with proper authorization from the patient or the patient's authorized representative, should promptly furnish the attorney with a complete medical record or medical report. Delay in providing the medical record or medical information may prejudice the opportunity of the patient to settle their claim or lawsuit, may delay the trial of a case, or may cause additional expense or the loss of important testimony.[23]

### 4. Special Considerations for Substance Abuse Diagnosis and Treatment Records

Information about an individual's substance abuse, diagnosis or treatment can be a trap for the unwary litigator seeking this information, as well as for the physician or health care facility holding the information. Disclosure—and subsequent re-disclosure—of records generated at a federally-assisted drug or alcohol abuse facility is strictly prohibited by complex federal rules, with criminal penalties for violation.[24] A subpoena alone is never sufficient to compel disclosure; the party seeking disclosure must provide either highly specific written consent from the patient which meets the requirements of the rules, or a court order framed in precise accord with the rules.[25] Protected information includes any information about an individual, whether or not the information is in writing or recorded in some other form, and includes the patient's identity, address, medical or treatment information, and all

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employer's attorney in workers' compensation setting). See also RPC 184 "Communications with Physicians Performing Autopsy" (1994) (allowing opposing counsel to communicate with pathologist performing autopsy without decedent's personal representative's consent). See also AMA Code of Medical Ethics §§ 5.05 "Confidentiality" ("The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law"); § 5.055 "Confidential Care for Minors" and § 5.06 "Confidentiality: Physician-Attorney Relation" (2000-2001 ed.).

22 Note that some physicians do not release medical records from other physicians regarding the patient's former or current care which are contained in their medical files even when they fall within the scope of release authorized by the patient or their authorized representative. If a physician observes this practice, he or she should notify any patient's attorney requesting the record of that fact and of ways those materials might be obtained. See NC Medical Board "Access to Physician Records" (Position Statement, adopted 11/93, amended 5/96, amended 9/97).

23 NC Medical Board "Medical Record Documentation" (Position Statement, adopted 5/94, amended 5/96) (medical record "provides a legal document to verify the delivery of care").

24 See 42 U.S.C. 290dd-3 (2000); 42 C.F.R. § 2.1 et seq. (2000). Examples of federal assistance triggering coverage of the rules include tax exemption and participation in Medicare or Medicaid. 42 C.F.R. § 2.12(b) (2000).

25 See 42 C.F.R. §§ 2.31, 2.33 (2000) (written consent); 42 C.F.R. § 2.61 et seq. (2000) (court orders).

communications by the patient to program staff.[26] The facility is prohibited from even acknowledging whether the individual is or ever was a patient at the facility.[27] Because of the complexity of the rules, the process for securing drug and alcohol abuse records and related testimony is excluded from the scope of these Guidelines.

### B. Consultation and Testimony

#### 1. Consultations

It is professional courtesy for physicians and lawyers to cooperate with one another and to abide by applicable statutes and rules so that the medical questions involved in controversies are fairly and adequately explored and presented. Where appropriate, a frank discussion between the patient's physician and the patient's attorney is helpful to give each a complete understanding of the medical and legal issues involved. When such a discussion occurs, their mutual patient/client benefits: time is saved, confusion is minimized (making settlement more likely), and inter-professional understanding is enhanced. To that end, the patient's physician(s) and attorney(s) should attempt, when appropriate, to discuss the medical questions prior to mediation, deposition, or trial.

However, patients' physicians may not communicate with an attorney or any other person about a patient's treatment, evaluation, or condition without the written consent of the patient or the patient's authorized representative, or a court order, or other lawful authority.[28]

A physician has an obligation to consult with a patient's attorney if the patient has given them written consent to do so.[29] However, this obligation to consult may be limited if the patient has, or may have, a potential malpractice claim against the physician. If a physician is unclear whether the obligation to consult with a patient's attorney may be limited, the physician is encouraged to consult with legal counsel for the North Carolina Medical Society, their own attorney, or ask the advice of their professional liability insurer.

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26 42 C.F.R. § 2.11 (2000).

27 42 C.F.R. § 2.13 (2000).

28 In workers' compensation cases, there may be circumstances under which the employer or its representative may communicate with physicians. Reference should be made to the Rules of the Industrial Commission or contact may be made to the Industrial Commission.

29 See AMA Code of Medical Ethics §§ 9.07 "Medical Testimony," ("If a patient who has a legal claim requests a physician's assistance, the physician should furnish medical evidence, with the patient's consent, in order to secure the patient's legal rights. The attorney for the party who calls the physician as a witness should be informed of all favorable and unfavorable information developed by the physician's evaluation of the case)" and 8.12 "Patient Information" (requiring physicians to be honest and open in their dealings with patients even in situations where "a patient suffers significant medical complications that may have resulted from the physician's mistake or judgment. In these situations, the physician is ethically required to inform the patient of all the facts necessary to ensure understanding of what has occurred. . . .Concern regarding legal liability which might result following truthful disclosure should not affect the physician's honesty with a patient") (2000-2001 ed.).

An attorney investigating a potential professional liability claim should avoid misleading the physician regarding the physician's potential malpractice liability. Where the patient's attorney is investigating a specific physician's potential professional liability or reasonably foresees that the physician's actions may be the basis of a claim, the attorney has an obligation to so advise that physician.[30]

### 2. Physician Deposition Testimony

Deposition testimony of a physician is sometimes necessary and is preferably arranged at a scheduled time in the physician's office.[31] Depositions are necessary for one or more reasons: for discovery;[32] to perpetuate testimony;[33] or for later use instead of the physician's appearance at trial.[34] Physicians' appearance in court is usually the most effective way to present testimony. However, physicians cannot always be present in court, and sometimes their personal testimony may be of secondary value. Physicians should agree to videotaped depositions when requested. North Carolina Rules of Evidence and of Civil Procedure sometimes prohibit an attorney from using a deposition in state civil court. In those instances, the physician must appear in court to testify.[35]

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30 See N.C. Prof. Cond. Rule 4.3 (1997).

31 In criminal cases in North Carolina state courts, medical witnesses must testify at the trial because medical testimony is never taken by deposition.

32 A deposition is a discovery tool which allows one side of a lawsuit to discover the information known to witnesses for the other side. Typically, the attorney opposing the patient's claim is prohibited from communicating with the patient's physician prior to trial except at a deposition. The deposition is usually that attorney's only opportunity to discern the physician's opinion regarding the patient's medical condition. The opposing attorney is frequently in need of the physician's deposition testimony in order to defend against the patient's claim.

33 This occurs when the witness may be legally unavailable at the time of a subsequent trial.

34 This occurs to accommodate the physician's schedule notwithstanding that live medical testimony is considered to be more effective than deposition medical testimony.

35 For example, absent the consent of the opposing party, witness depositions may not be used in lieu of live testimony unless the court finds certain exceptions to apply, such as that the witness is dead, or is more than one hundred miles from trial, or is an expert witness who has testified at a videotaped deposition. N.C. R. Civ. P. 32(a)(4); Absent consent, N.C. Gen. Stat. § 8-83 (2000) precludes the use of a non-videotaped deposition by an expert physician witness unless the witness resides or has his office outside the county where the action is pending.

## V. TRIAL SITUATIONS

### A. Subpoenas[36]

#### 1. Witness Subpoenas

##### a. North Carolina State Courts

Under North Carolina law, physicians, acting as medical witnesses are required to be subpoenaed before the Court may award them an expert witness fee after they have testified at a deposition or trial.[37] Physicians should not attempt to avoid service of subpoenas.[38]

In issuing trial subpoenas to physicians, attorneys must be aware of the physician's patient scheduling needs. For that reason, the attorney should notify the physician by letter of the intent to subpoena the physician to trial. The trial subpoena itself should be issued as soon as practical, but in no event should a subpoena be issued later than seven days before trial. Only a rare emergency calls for later issuance of the subpoena.[39] Where appropriate, the subpoena for attendance at the trial as a witness should reflect the actual time for the physician to appear and/or "will call when needed" or "on standby," if the actual time is uncertain. If the actual time is uncertain, the attorney or someone in the attorney's office should keep the physician informed

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36 See Section III(E) above defining the types of medical witnesses recognized under the Guidelines. Where the Guidelines refer to a physician as a 'medical witness' the statement refers to all types of medical witnesses defined therein.

37 N.C. Gen. Stat. § 7A-314(d) (2000) allows the Court in its discretion to authorize payment of expert witness fees and allowances, but only when the witness has testified (either at trial or deposition) after having been served with a subpoena. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972); Town of Chapel Hill v. Fox, 120 N.C. App. 630, 463 S.E.2d 421 (1995). N.C. Gen. Stat. § 7A-314 does not compel parties to seek a judicial determination of expert witness fees or who is to pay them. N.C. Gen. Stat. § 7A-454 (2000) addresses under what circumstances a court may order payment of expert witnesses who testify on behalf of indigent criminal defendants. N.C. R. Evid. 706 governs who shall pay, and what amount, shall be paid to expert witnesses appointed by the Court in civil and criminal actions. N.C. Gen. Stat. § 15-7 (2000) governs the payment of physicians appointed to conduct post-mortem examinations of homicide victims. In cases before the Industrial Commission, expert witness fees are set by the Commissioner or Deputy Commissioner hearing the case. See N.C. Gen. Stat. §§ 97-90(c) and 97-26.1 (2000).

38 See AMA Code of Medical Ethics § 9.07 "Medical Testimony" (2000-2001 edition) (" As a citizen and as a professional with special training and experience, the physician has an ethical obligation to assist in the administration of justice. If a patient who has a legal claim requests a physician's assistance, the physician should furnish medical evidence, with the patient's consent, in order to secure the patient's legal rights. . .Medical witnesses should be adequately prepared and should testify honestly and truthfully to the best of their medical knowledge"). See also N.C. Medical Board Position Statement "The Physician-Patient Relationship" (adopted 7/95, amended 7/98 and 1/00): ("[I]t is the position of the North Carolina Medical Board that any act by a physician that violates or may violate the trust a patient places in the physician places the relationship between the physician and patient at risk.") Finally, N.C. Gen. Stat. § 90-154(a)(6) (2000), regulating physician and physician assistant conduct finds impermissibly unprofessional conduct "contrary to honesty, justice, or morals."

39 A specific example of a "rare emergency" arises pursuant to the statutory provisions of N.C. Gen. Stat. §50B-2 (2000) which permits a party alleging acts of domestic violence to seek a hearing on an ex parte or expedited basis.

on a daily basis as to the status of the trial. An attorney has little or no control over scheduling a case.[40] Accordingly, physicians should not necessarily alter the office schedule but should bear in mind the possibility of being called to court. At the same time, the attorney or someone in the attorney's office should keep the physician informed on a daily basis as to the status of the calendar. When a case is postponed or not reached during a court session, the attorney should immediately notify the physician. Physicians have continuing and often unpredictable responsibilities to their patients and, insofar as they are able, attorneys should make arrangements with a minimum of inconvenience or delay.

Court calendaring systems vary between judicial districts[41] in North Carolina. Under court calendaring rules in some judicial districts, a case will automatically reappear on a trial calendar if it has previously been postponed or not reached. The new trial session, and the case's position on the trial calendar, if known, should be relayed to the physician by letter as soon as possible. If for some reason the new trial week is inconvenient for the physician, they should notify the attorney immediately and in no event later than one week after notice of the new trial date.[42]

#### b. Workers' Compensation Cases[43]

In workers' compensation cases, medical witnesses typically testify by deposition scheduled after lay testimony has been received. A party to a workers' compensation case must obtain permission from the Industrial Commission before a medical witness can offer live testimony. In those rare instances when physicians are subpoenaed, they will be on telephone standby until notified.

### 2. Subpoenas for Medical Records

Often parties to a lawsuit will subpoena medical records to a trial without requesting the presence of the physician who made them. As in the case of trial subpoenas to physicians (see Section V.A.1. above), subpoenas for medical records should be issued as soon as possible, but in no event should a subpoena be issued later than seven days before trial. Only a rare emergency calls for later issuance of the subpoena.[44] A physician's options in responding to a

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40 Each time a case is scheduled for trial, an attorney must prepare the case fully and subpoena all the witnesses. Most cases are scheduled for trial several times before they are actually called for trial by the Court.

41 Judicial Districts in North Carolina typically include one or more counties, depending upon whether the district is primarily urban or rural.

42 This is because attorneys do not have power to postpone scheduled trials and must apply to a Judge for a continuance. The later the application for a continuance, the less likely it is that the Court will grant the requested postponement.

43 In workers' compensation hearings, physicians may testify in hearings before the Industrial Commission regarding facts communicated or learned by physicians while attending or examining the employee patient without the specific consent of the employee.

44 As noted in Section V.A.1.a., a "rare emergency" may arise pursuant to the statutory provisions of N.C. Gen. Stat. § 50B-2 (2000) which permits a party alleging acts of domestic violence to seek a hearing on an ex parte or expedited basis.

subpoena for medical records depends in part on who is subpoenaing the records, and on what authorization that person has to view the records.

### a. Records Subpoenaed With Authorization and/or Pursuant to Court Order or Other Authority

If the party subpoenaing the medical record has the written consent of the patient or the patient's authorized representative to inspect the records, or if the subpoena is accompanied by a judicial or administrative order, or is issued in conformity with other applicable legal authority the subpoena may be complied with in one of several ways. The custodian of the records may bring them to court and testify to their authenticity and completeness, or the records may be mailed to the presiding judge or their designee accompanied by an affidavit authenticating them signed by the medical record custodian.[45]

### b. Records Subpoenaed Without Authorization and Without Court Order or Other Authority

Medical records are often subpoenaed to North Carolina state courts by parties without authorization to inspect the records and without a court order requiring their disclosure.[46] This happens often in personal injury cases, where defense attorneys routinely subpoena plaintiffs' medical records for a variety of legitimate reasons.[47] The method of subpoenaing such records varies widely across the state. A party may properly subpoena medical records they lack authorization to inspect by stating in writing on the subpoena that the records are being subpoenaed by one without legal authority to inspect them, and who will not inspect them absent the written consent of the patient or the patient's authorized representative or judicial or administrative order, or in conformity with other applicable legal authority.[48]

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45 See N.C. R. Civ. P. 45(c). Although Rule 45(c) specifically authorizes the "custodian of hospital medical records" to respond to a subpoena for "hospital medical records as defined in N.C. Gen. Stat. § 8-44.1" by certified mailing of the records, it has become common practice in North Carolina state courts for all types of medical records to be sent by certified mail unless an issue arises as to the authorization of the subpoenaing party to inspect the records. N.C. Gen. Stat. § 8-44.1 (2000) broadly defines "hospital medical records."

46 N.C. Gen. Stat. § 8-53 (2000) authorizes a resident or presiding judge, in the trial division where the case is pending, or the Industrial Commission pursuant to law, to order the disclosure of the records without authorization at or before trial where to do so is necessary to a proper administration of justice.

47 Defense counsel may subpoena to a court proceeding the records of current and/or prior treating physicians they have no authority to inspect. In this situation, the attorneys involved expect that, if the patient's attorney objects to disclosure of the records to the defense counsel, the presiding judge at the trial of the action will examine the records in camera (privately) to determine whether the records should be ordered released for the inspection of the subpoenaing party. See N.C. Prof. Cond. Rule 1.2(c) and RPC 236 "Misuse of Subpoena Process" (1997) (prohibiting abuse of the subpoena process by subpoenaing medical records to a lawyer's office where no legal proceeding is occurring).

48 See Appendix B, Sample Subpoena for Medical Records without Authorization and without Court Order or Other Authority to Inspect.

Records subpoenaed without authority may properly be placed in a sealed envelope addressed to the Judge presiding at the session of court to which the records have been subpoenaed, and marked "To remain sealed until otherwise ordered after in camera inspection by the presiding Judge."[49]

In no event should an attorney subpoena medical records to a deposition of one other than the physician who made them or caused them to be made unless the attorney has authorization to inspect the records or has a court order requiring their disclosure.[50]

### B. Notice for Trial

#### 1. Initial Trial Settings

It is imperative both from the standpoint of the efficient administration of justice and the physician's scheduling needs that fact expert witnesses receive as much notice as possible in the setting of a particular case for trial. Under present calendaring procedures in North Carolina state court civil actions, only the week for trial can be designated specifically. There can be no assurances as to when or if the case will be reached that particular week.

#### 2. Fact Expert Witness Availability

Once an attorney has first received notification that a trial is to be scheduled, they should contact their fact expert witnesses regarding availability for trial. At that time, the fact expert witness should inform the attorney of those weeks when they will not be available to testify. Once the case has received a definite trial setting, the attorney should immediately confirm the fact expert witness' availability for that particular week by letter.

#### 3. Final Trial Calendar

When a case appears on the final trial calendar for a particular week, the attorney should notify the fact expert witness regarding the calendaring of the case, its status on the calendar, and an estimate as to the day when the case will be reached. This should be confirmed in writing to the witness. If the fact expert witness has not already been subpoenaed, that should be done at this time.

#### 4. Court Appearance

The business of the courts cannot be governed by the convenience of witnesses, whomever they may be. However, court appearances interrupt medical witness' professional schedule and attorneys should make every reasonable effort to minimize that interruption. The attorney should not require medical witnesses to come in court and sit for long periods of time waiting to be put on the witness stand. The attorney should give the medical witness as much

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49 See Appendix C, Sample Letter to Accompany Records sent to Court in Response to Sample Subpoena for Medical Records without Authorization and without Court Order or Other Authority to Inspect.

50 See Footnote 48.

advance notice as is reasonably possible, so that their patient schedule may be rearranged with a minimum of disruption. The medical witness should be alerted by telephone a reasonable time before he or she is actually needed in court.

Medical witnesses are obligated to be in court at the time requested, and should notify the attorney of their arrival. Timing is important not only for the orderly presentation of the case, but also for the convenience of everyone involved in the proceedings. Physicians have ongoing and often unpredictable responsibilities to patients. In such instances, courtroom procedure should permit medical witnesses to testify out of order or at another time. When a medical emergency arises, attorneys should be notified immediately in order to make alternative arrangements and, if appropriate, to seek the court's release of the medical witness or postponement of the medical witness' appearance until the emergency has passed.

### C. Medical Witnesses

#### 1. Generally

##### a. Expert Status

As a medical witness, the physician's role is to provide information, not to advocate a position. The attorneys serve as the advocates. The medical witnesses, the court, and the attorneys should show mutual respect and consideration to each other.

In general, there are two types of witnesses—fact and expert. Expert witnesses, because they possess knowledge not generally known to the jury, are allowed to express opinions. In order to be an expert, it is necessary to know more than the jury knows and to have an opinion about the subject under inquiry. Evolving but unsettled law may require a more stringent standard.

Because medical witnesses virtually always testify as experts, even when they may also be fact witnesses, the Guidelines treat all medical witnesses as expert witnesses, and differentiate between the types of expert medical witnesses.[51] In order to be accepted as an expert in a trial in North Carolina state courts, the presiding judge must find that the witness has expertise.[52]

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51 See II (E) above for definition of the three types of medical expert witnesses.

52 If a medical witness is not tendered to and accepted by the presiding judge as an expert, they may not express expert medical opinions and the judge will not have authority to award them an expert witness fee.

Treating physicians typically testify as hybrid fact-expert witnesses, because of their training and knowledge and by virtue of their treatment of a patient whose medical condition is at issue. They may testify about medical observations,[53] or to observations of facts unrelated to their medical expertise. They may also testify about their expert opinions within the scope of their medical expertise. These witnesses are referred to as fact expert witnesses in the. Guidelines.

It is not necessary that a medical witness have treated or examined a patient in order to testify as an expert. Expert medical testimony may be based upon a review of the medical chart or a hypothetical set of facts. Witnesses who testify in this fashion typically have been retained by one of the parties for the purpose of providing expert opinion testimony, and do not have a physician-patient relationship with the party whose medical condition is at issue. These witnesses are referred to as retained expert witnesses in the Guidelines.

**b. Preparation**

Proper preparation for conferences, depositions, and trial testimony includes a review of the relevant medical records. The physician's office staff should cooperate in scheduling preparatory conferences and depositions at a mutually convenient time, when they are least likely to be interrupted by patient problems, other appointments or operating times.

**c. Independent Medical Examinations**

Attorneys should provide independent medical witnesses with the ground rules of the independent medical examination submitted to them in writing, including who is to get a report, where copies should be sent, who is to pay for the examination, and the purpose and extent of the examination. Where the examination has been ordered selected or approved by a court, administrative agency or other adjudicatory body, attorneys should also provide the independent medical witness with a copy of the order approving or selecting them.

**2. Fees**

**a. General Considerations**

Medical witness charges for assisting attorneys in legal matters should be reasonable, reflecting the physician's experience, the level of specialization, the environment in which the physician practices, and the demand for his or her services.

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53 Medical observations will often be based on medical expertise and therefore be based on expert opinion. For example, when testifying to their medical diagnosis of a patient, the fact witness is expressing an expert medical opinion.

The recommended fee for a medical witness' court appearance should be measured from the time the medical witness leaves their office to go to court until they return to their office from court, and should also include compensation for time spent preparing to testify. Under certain circumstances, the presiding judge will set a fee for the physician.[54]

**b. Fees in Workers' Compensation Cases**

In workers' compensation cases, all expert witness fees, and attorney fees, must be approved by the Industrial Commission. Receipt of a fee without the approval of the Industrial Commission is a Class 1 misdemeanor prohibited by N.C. Gen. Stat. § 97-90(b)(2000).

**c. Prohibition Against Contingent Fees**

Attorneys are prohibited from offering and physicians are prohibited from accepting fees wholly or partially contingent upon the outcome of the matter in which medical testimony is offered.[55] A fee shall not be deemed contingent for the reason that the patient's financial condition may render collection difficult in the event that the patient does not prevail in a legal action.

**d. Fees for Fact Expert Witnesses**

In civil cases in North Carolina state courts, fact expert witnesses are entitled to reasonable compensation for time spent in conferences, preparation of medical reports, depositions, time spent out of the office for court or other appearances, and for travel costs.

An attorney is ethically prohibited from having an economic interest in a client's claim. Therefore, while an attorney may advance fees which are incurred in pursuing claims,[56] all such fees are ultimately the responsibility of the patient/client.[57]

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54 This only occurs on motion of the party prevailing in a matter, if they have called the medical witness, the witness has testified pursuant to subpoena, and has been received by the court as an expert witness. In this instance, the prevailing party seeks to have the fee set and taxed against the losing party as a court cost. See N.C. Gen. Stat. § 7A-314 (2000). This fee may not necessarily represent the entire fee owed a 'retained medical witness' or a 'fact medical witness' (as defined in these Guidelines) by virtue of their contractual relationship with the attorney and/or their patient or client. Nothing compels a party to move for expert witness fees to be taxed as costs.

55 See AMA Code of Medical Ethics §§ 6.01 "Contingent Physician Fees" (prohibiting the same) and 8-10 "Lien Laws" (allowing liens only where "the fee is fixed in amount and not contingent on the amount of settlement of the patient's claim against a third party) (2000-2001 ed). Cf. N.C. Gen. Stat. §§ 44-49 through 44-51 (2000) (NC lien laws allocating fees based on pro rata share of percentage of recovery).

56 Such fees are called 'litigation expenses' and are to be distinguished from charges for treatment, which may not be ethically advanced by attorneys. See footnote 21 supra.

57 Where the attorney incurring the fee does not represent the patient, the fee is nonetheless a litigation expense to be borne by his or her client. This typically happens when the defense attorney takes the deposition of a treating expert witness, and is responsible for their fees for testifying.

An attorney should not place an undue burden on fact medical witnesses for services rendered at an attorney's request on behalf of a patient/client. No attorney should request a fact medical witness to consult with them or prepare a medical report for them where the client is unable to pay for the same, unless they are willing to advance the cost of such litigation expenses or they have informed the medical witness that the client is unable to pay for their services. If the client is unwilling to ultimately pay for the same, the attorney should not request such services.

The fact expert witness may require payment for depositions, conferences, and consultations at the time of the service. For some patients and clients, prepayment is not feasible and alternative methods of payment must be considered. The fact expert witness, attorney, and the patient may agree to any lawful method of payment.

### e. Fees for Retained Expert Witnesses

All services and fees of retained expert witnesses are subject to negotiation between the physician and the contracting party. Also, unless agreed to between the parties, any such service rendered does not create a physician/patient relationship.

Retained expert witnesses are permitted to charge a reasonable fee if their court appearance is canceled without sufficient time for the physician to reschedule patients, surgery, and consultations. However, retained expert witnesses should make a reasonable effort to profitably reschedule their time in order to minimize expense or loss.

### f. Fees for Independent Medical Witnesses

Independent medical witness fees may either be established by the court, administrative agency or other adjudicatory body selecting or approving them, or by the party seeking their appointment, or by the parties by agreement. Independent medical witnesses should determine how they will be paid, and by whom, prior to conducting the independent medical examination.

### g. Pro Bono/Criminal Cases

When an attorney stipulates in writing that they are handling a client's case without charge or expectation of payment from any recovery, then a treating physician should consider providing medical reports and testimony free of charge. Should an attorney be awarded payment unexpectedly, the physician should be notified promptly by the attorney so that a charge may be made by the physician if appropriate.

If the patient is a victim in a criminal prosecution case, then the physician should provide a medical report to the investigating law enforcement agency free of charge.

## VI. JOINT COMMITTEE OF NC MEDICAL SOCIETY AND NC BAR ASSOCIATION

The Joint Committee of the NC Medical Society and the NC Bar Association shall be comprised of the Chair of the NC Bar Association Medico-Legal Liaison Committee and one or more NC Bar Association members designated by the Chair, and the Legal Counsel for the NC Medical Society and one or more NC Medical Society members designated by the Executive Director of the NC Medical Society. The purpose of the Joint Committee is to create a better understanding, a closer relationship, and unity between the medical and legal professions, so that each may better serve the other and the public. In order to fulfill that purpose, the Joint Committee shall meet at least annually to:

Promulgate revisions to these Guidelines as necessary to keep them legally current and effective.

Report annually to the NC Medical Society and NC Bar Association about the work of the Committee and make any appropriate recommendations.

Accept and mediate reported complaints of attorneys and physicians who experience problems related to a failure to comply with these Guidelines[58] and, where appropriate, forward such reports to the proper disciplinary authorities.

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58 However, the Joint Committee will not mediate fee disputes between retained expert witnesses and attorneys, or between independent medical witnesses and attorneys.

## VIII. APPENDICIES

Appendix A: Pertinent North Carolina Statutes and Regulations Regarding Medical Records

Appendix B: Sample Subpoena for Medical Records Without Authorization and Without Court Order or Other Authority to Inspect

Appendix C: Sample Letter to Accompany Records Sent to Court in Response to Sample Subpoena for Medical Records Without Authorization and Without Court Order or Other Authority to Inspect

Appendix D Affidavit of Medical Records Custodian

Appendix E Sample Letter Requesting Medical Records

Appendix F: Selected Position Statements of the North Carolina Medical Board

Appendix G-1: Medical Records Release Authorization

Appendix G-2: Authorization for Release of Medical Records by Next of Kin of Decedent with Unadministered Estate

Appendix G-3: Authorization for Release of Medical Records of Decedent with Administered Estate

**DISCLAIMER: The sample forms included in these appendices are for general reference only. They are not intended to be representative or inclusive of every instance for which medical records can be requested. Neither are they intended to advise or prescribe a mandatory format for any situation. Requests for medical information should be made with consideration of the case at hand, the information needed, local custom, and other factors.**

## APPENDIX A: PERTINENT NORTH CAROLINA STATUTES AND REGULATIONS REGARDING MEDICAL RECORDS

"Medical records" are defined by the following North Carolina statutory or regulatory provisions:

- N.C. Gen. Stat. §8-44.1[1]
- N.C. Gen. Stat. §90-410(2)[2]
- N.C. Gen. Stat. §58-39-15(18)[3]
- N.C. Gen. Stat. §130A-372
- 10 N.C. Admin. Code §3J.2301(25)[4]
- 10 N.C. Admin. Code §3J.3901(19)[5]

Other provisions of North Carolina law refer to information about patients' medical services using terms other than "medical record":

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[1] "Hospital medical records" are defined as "records made in connection with the diagnosis, care and treatment of any patient or the charges for such services except that records covered by G.S. 122-8.1, G.S. 90-109.1 and federal statutory or regulatory provisions regarding alcohol and drug abuse, are subject to the requirements of said statutes." (§ 122-8.1, referred to in this section, was repealed. See now Chapter 122C (2000)).

[2] Medical records are defined as "personal information that relates to an individual's physical or mental condition, medical history, or medical treatment, excluding X-rays and fetal monitor records."

[3] Information about patients is subject to three definitions under N.C. Gen. Stat. § 58-39-15 (2000) of the North Carolina insurance statutes:

(18) "Medical-record information" means personal information that:
  a. Relates to an individual's physical or mental condition, medical history, or medical treatment; and
  b. Is obtained from a medical professional or medical-care institution, from the individual or from the individual's spouse, parent, or legal guardian.

(19) "Personal information" means any individually identifiable information gathered in connection with an insurance transaction from which judgements can be made about an individual's character, habits, avocations, finances, occupation, general reputation, credit, health, or any other personal characteristics. "Personal information" includes an individual's name and address and medical record information, but does not include privileged information.

(22) Privileged information" means any individually identifiable information that (I) relates to a claim for insurance benefits or a civil or criminal proceeding involving an individual, and (ii) is collected in connection with or in reasonable anticipation of a claim for insurance benefits or civil or criminal proceedings involving an individual: Provided, however, information otherwise meeting the requirements of this subsections shall nevertheless be considered personal information under this Article if it is disclosed in violation of N.C. Gen. Stat. § 58-39-75 (2000).

[4] The medical record of an inmate of a local confinement facility is defined as "a record of medical problems, examinations, diagnoses and treatments."

[5] The definition in footnote 4 also applies to inmates in municipal lock-up facilities.

- Individuals receiving services for mental health, substance abuse, or mental retardation are referred to as "clients," and information about their treatment is called "confidential information," defined in N.C. Gen. Stat. § 122C-3(9).[6] Compilations of such information are sometimes called the "client record."[7] Note that substance abuse information also is likely subject to the strict provisions of the federal drug and alcohol abuse facility law.[8]

- Both N.C. Gen. Stat. §130A-45.8,[9] concerning patient information held by public health authorities, and §131E-97,[10] addressing patient information held by "health

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[6] "Confidential information" is defined in N.C. Gen. Stat. § 122C-3(9) (2000) as:

> ...any information, whether recorded or not, relating to an individual served by a facility that was received in connection with the performance of any function of the facility. 'Confidential information' does not include statistical information from reports and records or information regarding treatment or services which is shared for training, treatment, habilitation, or monitoring purposes that does not identify clients either directly or by reference to publicly known or available information.

10 N.C. Admin. Code 18D.0119(b)(3) (2000) further provides that confidential information defined in N.C. Gen. Stat. § 122C-3 (2000) "includes but is not limited to photographs, videotapes, audiotapes, client records, reimbursement records, verbal information relative to clients served, client information stored in automated files, and clinical staff member client files."

[7] The Administrative Code has several slightly differing definitions for this information. 10 N.C. Admin. Code 14G.0102(b)(3) (2000) defines "client record" as "any record made of confidential information." 10 N.C. Admin. Code 14U.0103(8) (2000) defines "client record" as "a written account of all mental health and mental retardation services provided to an inmate from the time of acceptance of the inmate as the client until termination of services. This information is documented on standard forms which are filed in a standard order in an identifiable folder." 10 N.C. Admin. Code 14V.0103(b)(12) (2000) defines "client record" as "a documented account of all services provided to a client." 10 N.C. Admin. Code 50A.0201(22) (2000) contains this definition: "client information' or 'client record' means any information, including information stored in computer data banks or computer files relating to a client, which was received in connection with the performance of any function of the agency." 10 N.C. Admin. Code 18D.0119(b)(1) (2000) defines "client record" as any documentation made of confidential information.

[8] See suggested insert to guidelines and notes 1-4, above.

[9] N.C. Gen. Stat. §130A-45.8 (2000) provides:

> (a) Medical records compiled and maintained by public health authorities in connection with the admission, treatment, and discharge of individual patients are not public records as defined by Chapter 132 of the General Statutes.
>
> (b) Charges, accounts, credit histories, and other personal financial records compiled and maintained by public health authorities in connection with the admission, treatment and discharge of individual patients are not public records as defined by Chapter 132 of the General Statutes.

[10] N.C. Gen. Stat. § 131E-97 (2000) provides:

> (a) Medical records compiled and maintained by health care facilities in connection with the admission, treatment, and discharge of individual patients are not public records as defined by N.C. Gen. Stat. § 132 (2000).
>
> (b) Charges, accounts, credit histories, and other personal financial records compiled and maintained by health care facilities in connection with the admission, treatment, and

care facilities," draw a distinction between the patient's medical records and financial records.

- N.C. Gen. Stat. § 131E-214.1 (2000) defines both "patient data" and "patient identifying information".[11]

- Medical information governed by the Division of Aging and the Division of Social Services is considered "client information." [12]

- 15A N.C. Admin. Code 26B.0102 (2000) defines "identifying information" with respect to cancer patients.[13]

- 11 N.C. Admin. Code 15.0002(20) (2000) defines "raw data" based on patient records.[14]

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discharge of individual patients are not public records as defined by Chapter 132 of the General Statutes.

[11] N.C. Gen. Stat § 131E-214.1 (2000) concerning statewide data processing of certain information about patients, includes the following definitions:

(4) "Patient data" means data that includes a patient's age, sex, zip code, third-party coverage, principal and other diagnosis, date of admission, procedure and discharge date, principal and other procedures, total charges and components of the total charges, attending physician identification number, and hospital or freestanding ambulatory surgical facility identification number.

(5) "Patient identifying information" means the name, address, social security number, or similar information by which the identity of a patient can be determined with reasonable accuracy and speed either directly or by reference to other publicly available information. The term does not include a number assigned to a patient by a health care provider if that number does not consist of or contain numbers, including social security or drivers license numbers, that could be used to identify a patient with reasonable accuracy and speed from sources external to the health care provider.

[12] Both 10 N.C. Admin. Code 22N.0101(3) (2000) and 10 N.C. Admin. Code 24B.0102(3) (2000) provide that "client information' or 'client record' means any information, whether recorded or note, including information stored in computer data banks or files, relating to a client which was received in connection with the performance of any function of the agency."

[13] Medical records of cancer patients are abstracted and reported to the cancer registry. The pertinent regulation defines "identifying information" as "any portion of any abstract or incidence report that might reveal the personal identity of a cancer patient." N.C. Gen. Stat. §130A-209 (2000).

[14] "Raw data" used by the Medical Database Commission (now operated through the State Center for Health Statistics) is defined as "patient specific records including those which have been stripped of all patient identifying information."

Appendix B: Sample Subpoena for Medical Records Without Authorization and Without Court Order or Other Authority to Inspect.

**STATE OF NORTH CAROLINA**

File No.

Any County

In The General Court Of Justice
☐ District ☐ Superior Court Division

| | |
|---|---|
| John Doe | *Additional File Numbers* |
| **VERSUS** | |
| Jane Roe | **SUBPOENA** G.S. 1A-1, Rule 45 |

*Party Requesting Subpoena*
☐ *State/Plaintiff* ☑ *Defendant* ☐ *Other (specify)*

TO

*Name Of Person Subpoenaed*
Medical Records Custodian

*Name Of Second Person Subpoenaed*

*Name Of Third Person Subpoenaed*

(**Note:** *A single subpoena may be used for as many as three persons if all have the same address. If documents are subpoenaed, only one person may be named.*)

| *Address* | *Alternate Address* |
|---|---|
| *City, State, Zip* / *Telephone No.* | *City, State, Zip* / *Telephone No.* |

**YOU ARE COMMANDED TO:**

*(check all that apply):*

☐ appear and testify, in the above entitled action, before the court at the place, date and time indicated below.

☑ produce for the court the following items, at the place, date and time indicated below.

THE COMPLETE MEDICAL RECORDS OF PATIENT, WHICH ARE BEING SUBPOENAED BY ONE WITHOUT LEGAL AUTHORITY TO INSPECT THEM. NO PERSON WILL INSPECT THEM WITHOUT THE WRITTEN CONSENT OF THE PATIENT OR THE PATIENT'S REPRESENTATIVE, OR BY JUDICIAL ORDER. THE PATIENT'S CONSENT IS NOT REQUIRED TO COMPLY WITH THIS SUBPOENA.

| *Name And Location Of Court* | *Date To Appear/Produce* |
|---|---|
| to receive records: | 2/22/01 and until released by the Court. |
| Anytown USA | *Time To Appear/Produce* 09:30 ☑ AM ☐ PM |
| *Name And Address Of Applicant's Attorney* | *Date* |
| Jim Smith, Attorney for Jane Roe | *Signature* |
| *Telephone No.* | ☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court* ☐ *Magistrate* ☑ *Attorney* ☐ *Party* |

Instructions:

1. Place the subpoenaed records and an affidavit certifying their authenticity in a sealed envelope. Mark the outside of the envelope: "To remain sealed until otherwise ordered after in camera inspection by the presiding Judge at the trial of this matter."

2. Mail the sealed records in a separate envelope addressed to"'Presiding Judge" in care of the Clerk of Superior Court for the county in which the case is scheduled for trial.

AOC-G-100, Rev. 3/98
1998 Administrative Office of the Courts

(Please See Reverse Side)

## RETURN OF SERVICE

I certify that this Subpoena was received and served as follows:

*Date Received*

**For The First Person Named On Front**

☐ by delivering a copy of this Subpoena to the first person named on the front.

☐ this Subpoena WAS NOT served for the following reasons:

☐ by telephone communication with the first person named on the front *(use only with subpoena to appear and testify).*

☐ by registered or certified mail return, receipt requested and attached, on the first person named on the front.

| *Service Fee* | | *Date Served* | *Signature of Authorized Server* |
|---|---|---|---|
| $ | ☐ *Paid* ☐ *Due* | | |

**For The Second Person Named On Front**

☐ by delivering a copy of this Subpoena to the second person named on the front.

☐ this Subpoena WAS NOT served for the following reasons:

☐ by telephone communication with the second person named on the front *(use only with subpoena to appear and testify).*

☐ by registered or certified mail return, receipt requested and attached, on the second person named on the front.

| *Service Fee* | | *Date Served* | *Signature of Authorized Server* |
|---|---|---|---|
| $ | ☐ *Paid* ☐ *Due* | | |

**For The Third Person Named On Front**

☐ by delivering a copy of this Subpoena to the third person named on the front.

☐ this Subpoena WAS NOT served for the following reasons:

☐ by telephone communication with the third person named on the front *(use only with subpoena to appear and testify).*

☐ by registered or certified mail return, receipt requested and attached, on the third person named on the front.

| *Service Fee* | | *Date Served* | *Signature of Authorized Server* |
|---|---|---|---|
| $ | ☐ *Paid* ☐ *Due* | | |

## INFORMATION FOR WITNESS

### The Subpoena

The subpoena is a court order requiring you to appear in court on the day and at the time stated. You have been called (subpoenaed) to court to be a witness in a case.

### Duties Of A Witness

- Unless you are a custodian of medical or public records, you must attend court on the day and at the time stated in the subpoena.
- Unless otherwise directed by the presiding judge, you must answer all questions asked when you are on the stand giving testimony.
- Your answers to questions must be truthful.
- If you are commanded to produce any items, you must bring them with you to court.
- You must continue to attend court until released by the Court.

If you have any questions about being subpoenaed as a witness, you should contact the attorney or official who had the subpoena issued. The name of that person is on the other side of this Subpoena form.

### Understand The Question And Speak Out

When you are on the witness stand, listen carefully to any question, and make sure that you understand the question before you try to answer it. If necessary, ask that the question be repeated.

In answering questions, speak out clearly and loudly enough to be heard. If you are testifying before a jury, speak out so that all of the jurors can hear you.

### Bribing Or Threatening A Witness

It is a violation of state law for anyone to attempt to bribe, threaten, harass, or intimidate a witness. If anyone attempts to do any of these things concerning your involvement as a witness in a case, you should promptly report that to the district attorney or the presiding judge.

### Witness Fee

A witness is entitled to a small daily fee, and to travel expense reimbursement if it is necessary to travel from outside the county in order to testify. (The fee for an "expert witness" will be set by the presiding judge.) After you have been discharged as a witness, if you desire to collect the statutory fee, you should immediately contact the Clerk's office and certify to your attendance as a witness so that you will be paid any amount due you.

AOC-G-100, Side Two, Rev. 3/98

1998 Administrative Office of the Courts

## APPENDIX C: SAMPLE LETTER TO ACCOMPANY RECORDS SENT TO COURT IN RESPONSE TO SAMPLE SUBPOENA FOR MEDICAL RECORDS WITHOUT AUTHORIZATION AND WITHOUT COURT ORDER OR OTHER AUTHORITY TO INSPECT

**INSTRUCTIONS:**

1. ***Place the subpoenaed records and an affidavit certifying their authenticity in a sealed envelope. Mark the outside of the sealed envelope: "To remain sealed until otherwise ordered after in camera inspection by the presiding Judge at the trial of [Case name and file name]".***
2. ***Attach the following letter to the exterior of the sealed envelope containing the records and the authenticating affidavit.***
3. ***Place the sealed envelope and attached letter in a separate envelope addressed to 'Presiding Judge' in care of the Clerk of Superior Court for the County in which the action is pending.***

---

*Date*

Superior of District Court Judge Presiding over Trial
Clerk of Superior Court, Civil or Criminal Division
Address

Re: Case Caption
Name of Patient:

Dear Presiding Judge:

The records of our patient, (name), have been subpoenaed to the trial above-captioned by, (name of subpoenaing, attorney or party), who has not presented us with legal authority to inspect or copy these records. Therefore, we are sending these records to you sealed, and marked "To remain sealed until otherwise ordered after in camera inspection by the presiding Judge at the trial above-captioned." We ask that these remain sealed from inspection until and unless the records are inspected in camera and it is judicially determined that the subpoenaing party may lawfully unseal and inspect them. Thank you for your attention to this request.

Sincerely yours,

Medical Records Custodian

Enclosure (sealed records)

See Medico-Legal Guidelines, Section V.A.2.b.

## APPENDIX D: AFFIDAVIT OF MEDICAL RECORD CUSTODIAN

| | |
|---|---|
| NORTH CAROLINA<br>COUNTY NAME COUNTY | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR OR DISTRICT COURT<br>COURT DIVISION |
| NAME OF PLAINTIFF<br>Plaintiff<br><br>v.<br><br>NAME OF DEFENDANT<br>Defendant | CIVIL ACTION NO.<br><br>**AFFIDAVIT OF MEDICAL RECORD CUSTODIAN** |

_____, being first duly sworn, deposes and says that I am a custodian of records for NAME OF FACILITY and the attached records are:

1. A true and accurate copy of the medical records **or** charges incurred for the medical treatment of NAME OF PATIENT,
2. These records were made and kept in the regular course of business at or near the time of the acts, conditions, or events recorded, and
3. They were made by persons having knowledge of the information set forth in those records.

_____
AFFIANT

Subscribed and sworn to before me, this_____day of _____, YEAR.

_____
NOTARY PUBLIC

My commission expires:_____

## APPENDIX E: SAMPLE LETTER REQUESTING MEDICAL RECORDS

**Date**

**Health Care Provider or Facility Name and Address**
**Attn.: Medical Records Custodian**

**Re: NAME: John Patient**
**DOB:**
**SS#:**

Dear Medical Records Custodian:

Please be advised that this law firm has been authorized to obtain the medical records of John Patient. Enclosed is an authorization for the release of his medical records.1

*[Optional] If the case involves a personal injury liability claim, the letter must so indicate and should reference the statutory charges permitted at the time:*

These records are sought with regard to a personal injury liability claim. **N.C. Gen. Stat § 90-411 (2000) sets the maximum charges permissible for medical records requested in personal injury liability claims as follows:** "The maximum fee for each request shall be seventy-five cents (75 ) per page for the first 25 pages, fifty cents (50 ) per page for pages 26 through 100, and twenty-five cents (25 ) for each page in excess of 100 pages, provided that the health care provider may impose a minimum fee of up to ten dollars ($10.00), inclusive of copying costs."

Please forward to the office of the undersigned counsel the following items:

1. A complete copy of all medical records, laboratory reports, x-ray interpretations, and every piece of paper in your possession regarding John Patient.

2. All billing information, including ledger cards, insurance claim forms, etc. as the same pertains to medical services rendered to John Patient. Please note that the NC Medical Board Position Statement "Documentation of the Physician-Patient Relationship" identifies "a record of billings" as a part of the minimum a medical record should contain.

---

1. See N.C. Gen. Stat. § 8-53 to determine who should execute authorizations regarding decedents or incompetents.

3. All correspondence to and from any other person or entity concerning John Patient.

*[Optional]* Our firm's check will be forwarded to you upon receipt of your bill for any copying costs consistent with fees set out in North Carolina General Statute § 90-411, a copy of which is attached for your information.

*[Optional]* Please note that, in the event that you wish to preserve the provider's lien created by N.C.G.S.§ 44-49 and 44-50, you must provide bill consistent with the fees set out in North Carolina General Statute § 90-411, for providing these records.

Thank you for your assistance.

Law & Jones, PLLC
1 Lawyers Drive§§
Anytown, North Carolina

PLEASE NOTE FOR WORKERS' COMPENSATION CASES SPECIAL RULES APPLY: This form is suggested for personal injury cases pending in the Courts. Special rules apply to Workers' Compensation cases. When a health care provider bills an employer's compensation insurance carrier or third-party administrator (adjusting agency), one free copy of medical records associated with the services must be provided, unless arrangements have been made to provide the free copy to a rehabilitation nurse. Fees for additional copies to these or other parties are set by the N.C. Industrial Commission (as an exception to N.C.Gen.Stat. and 90-411, codified at § 97-26.1) at a maximum of $.50 per page for the first 40 pages, and $.20 per page for additional pages, with an allowable minimum fee of $10.00 (inclusive of per page charges). (See January 12, 1995 *Minutes* of the N.C. Industrial Commission.) Industrial Commission Rule 607 provides that, if requested, parties must provide each other with copies of medical and rehabilitation records in their possession within 30 days, and with copies of additional records they obtain thereafter within 15 days after they come into the party's possession.

## APPENDIX F: SELECTED POSITION STATEMENTS OF THE NORTH CAROLINA MEDICAL BOARD

- The Physician-Patient Relationship
- Documentation of the Physician-Patient Relationship
- Medical Record Documentation
- Access to Physician Records
- Retention of Medical Records

### THE PHYSICIAN-PATIENT RELATIONSHIP

The North Carolina Medical Board recognizes the movement toward restructuring the delivery of health care and the significant needs that motivate that movement. The resulting changes are providing a wider range and variety of health care delivery options to the public. Notwithstanding these developments in health care delivery, the duty of the physician remains the same: to provide competent, compassionate, and economically prudent care to all his or her patients. Whatever the health care setting, the Board holds that the physician's fundamental relationship is always with the patient, just as the Board's relationship is always with the individual physician. Having assumed care of a patient, the physician may not neglect that patient nor fail for any reason to prescribe the full care that patient requires in accord with the standards of acceptable medical practice. Further, it is the Board's position that it is unethical for a physician to allow financial incentives or contractual ties of any kind to adversely effect his or her medical judgement or patient care.

Therefore, it is the position of the North Carolina Medical Board that any act by a physician that violates or may violate the trust a patient places in the physician places the relationship between physician and patient at risk. This is true whether such an act is entirely self-determined or the result of the physician's contractual association with a health care entity. The Board believes the interests and health of the people of North Carolina are best served when the physician-patient relationship remains inviolate. The physician who puts the physician-patient relationship at risk also puts his or her relationship with the Board in jeopardy.

*Elements of the Physician-Patient Relationship*

The North Carolina Medical Board licenses physicians as a part of regulating the practice of medicine in this state. Receiving a license to practice medicine grants the physician privileges and imposes great responsibilities. The people of North Carolina expect a licensed physician to be competent and worthy of their trust. As patients, they come to the physician in a vulnerable condition, believing the physician has knowledge and skill that will be used for their benefit.

Patient trust is fundamental to the relationship thus established. It requires that

- there be adequate communication between the physician and the patient;
- there be no conflict of interest between the patient and the physician or third parties;
- intimate details of the patient's life shared with the physician be held in confidence;
- the physician maintain professional knowledge and skills;
- there be respect for the patient's autonomy;
- the physician be compassionate;
- the physician be an advocate for needed medical care, even at the expense of the physician's personal interest; and
- the physician provide neither more nor less than the medical problem requires.

The Board believes the interests and health of the people of North Carolina are best served when the physician-patient relationship, founded on patient trust, is considered sacred, and when the elements crucial to that relationship and to that trust–communication, patient primacy, confidentiality, competence, patient autonomy, compassion, selflessness, and appropriate care–are foremost in the hearts, minds, and actions of the physicians licensed by the Board.

This same fundamental physician-patient relationship also applies to mid-level health care providers such as physician assistants and nurse practitioners in all practice settings.

*Termination of the Physician-Patient Relationship*

The Board recognizes the physician's right to choose patients and to terminate the professional relationship with them when he or she believes it is best to do so. That being understood, the Board maintains that termination of the physician-patient relationship must be done in compliance with the physician's obligation to support continuity of care for the patient. The decision to terminate the relationship must be made by the physician personally. Further, termination must be accomplished by appropriate written notice given by the physician to the patient, their relatives, or the legally responsible parties sufficiently far in advance (at least 30 days) to allow other medical care to be secured. Should the physician be a member of a group, the notice of termination must state clearly whether the termination involves only the individual physician or includes other members of the group. In the latter case, those members of the group joining in the termination must be designated.

(Adopted 7/95)
(Amended 7/98, 1/00)

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## DOCUMENTATION OF THE PHYSICIAN-PATIENT RELATIONSHIP

It is the position of the North Carolina Medical Board that when a physician-patient relationship is established, it should be documented by medical records, which should contain, at a minimum, the following:

14. an appropriate history and physical and /or mental examination for the patient's chief complaint relevant to the physician's specialty;
15. results of diagnostic tests (when indicated);
16. a working diagnosis;
17. notes on treatment(s) undertaken;
18. a record by date of all prescriptions for drugs, with names of medications, strengths, dosages, quantity, and number of refills; and
19. a record of billings.

* See also position statement on Medical Record Documentation.

(Adopted 5/91)
(Adopted 5/96)

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## MEDICAL RECORD DOCUMENTATION

North Carolina Medical Board takes the position that physicians and physician extenders should maintain accurate patient care records of history, physical findings, assessments of findings, and the plan for treatment. The Board recommends the Problem Oriented Medical Record method known as SOAP (developed by Lawrence Weed).

SOAP charting is a schematic recording of facts and information. The S refers to "subjective information" (patient history and testimony about feelings). The O refers to objective material and measurable data (height, weight, respiration rate, temperature, and all examination findings). The A is the assessment of the subjective and objective material that can be the diagnosis but is always the total impression formed by the care provided after review of all materials gathered. And finally, the P is the treatment plan presented in sufficient detail to allow another care provider to follow the plan to completion. The plan should include a follow-up schedule.

Such a chronological document

- records pertinent facts about an individual's health and wellness;
- enables the treating care provider to plan and evaluate treatments or interventions;
- enhances communication between professionals, assuring the patient optimum continuity of care;
- assists both patient and physician to communicate to third party participants;
- allows the physician to develop an ongoing quality assurance program;
- provides a legal document to verify the delivery of care; and
- is available as a source of clinical data for research and education.

Certain items should appear in the medical record as a matter of course:

- the purpose of the patient encounter;
- the assessment of patient condition;
- the services delivered–in full detail;
- the rationale for the requirement of any support services;
- the results of therapies or treatments;
- the plan for continued care;
- whether or not informed consent was obtained; and finally,
- that the delivered services were appropriate for the condition of the patient.

The record should be legible. When the care giver will not write legibly, notes should be dictated, transcribed, reviewed, and signed within reasonable time. Signature, date, and time should also be legible. All therapies should be documented as to indications, method of delivery, and response of the patient. Special instructions given to other care givers or the patient should be documented: Who received the instructions and did they appear to understand them?

All drug therapies should be named, with dosage instructions and indication of refill limits. All medications a patient receives from all sources should be inventoried and listed to include the method by which the patient understands they are to be taken. Any refill prescription by phone should be recorded in full detail.

The physician needs and the patient deserves clear and complete documentation.

(Adopted 5/94)
(Amended 5/96)

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## ACCESS TO PHYSICIAN RECORDS

A physician's policies and practices relating to medical records should be designed to benefit the health and welfare of patients, whether current or past, and should facilitate the transfer of clear and reliable information about a patient's care when such a transfer is requested by the patient or anyone authorized by law to act on the patient's behalf.

It is the position of the North Carolina Medical Board that notes made by a physician in the course of diagnosing and treating patients are primarily for the physician's use and are therefore the property of that physician. Moreover, the resulting record is a confidential document and should only be released with proper written consent of the patient. Each physician has a duty on the request of a patient to release a copy or a summary of the record in a timely manner to the patient or anyone the patient designates. If a summary is provided, it should include all the information and data necessary to allow continuity of care by another physician.

The physician may charge a reasonable fee for the preparation and/or the photocopying of the materials. To assist in avoiding misunderstandings, and for a reasonable fee, the physician should be willing to review the materials with the patient at the patient's request. Materials should not be held because an account is overdue or a bill is owed.

Should it be the physician's policy not to include in either the copied or the summarized record those materials that were provided by other physicians regarding the patient's former or current care, he or she should advise the patient of that fact and of ways those materials might be obtained.

Should it be the physician's policy to complete insurance or other forms for established patients, it is the position of the Board that the physician should complete those forms in a timely manner. If a form is simple, the physician should perform this task for no fee. If a form is complex, the physician may charge a reasonable fee.

To prevent misunderstandings, the physician's policies about providing copies or summaries of the patient records and about completing forms should be made available in writing to patients when the physician-patient relationship begins.

(Adopted 11/93)
(Amended 5/96)
(Amended 9/97)

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## RETENTION OF MEDICAL RECORDS

The North Carolina Medical Board supports and adopts the following language of Section 7.05 of the American Medical Association's current Code of Medical Ethics regarding the retention of medical records by physicians.

7.05: Retention of Medical Records

Physicians have an obligation to retain patient records which may reasonably be of value to a patient. The following guidelines are offered to assist physicians in meeting their ethical and legal obligations:

16. Medical considerations are the primary basis for deciding how long to retain medical records. For example, operative notes and chemotherapy records should always be part of the patient's chart. In deciding whether to keep certain parts of the record, an appropriate criterion is whether a physician would want the information if he or she were seeing the patient for the first time.
17. If a particular record no longer needs to be kept for medical reasons, the physician should check state laws to see if there is a requirement that records be kept for a minimum length of time. Most states will not have such a provision. If they do, it

will be part of the statutory code or state licensing board.

18. In all cases, medical records should be kept for at least as long as the length of time of the statue of limitations for medical malpractice claims. The statute of limitations may be three or more years, depending on the state law. State medical associations and insurance carriers are the best resources for this information.
19. Whatever the statute of limitations, a physician should measure time from the last professional contact with the patient.
20. If a patient is a minor, the statute of limitations for medical malpractice claims may not apply until the patient reaches the age of majority.
21. Immunization records always must be kept.
22. The records of any patient covered by Medicare or Medicaid must be kept at least five years.
23. In order to preserve confidentiality when discarding old records, all documents should be destroyed.
24. Before discarding old records, patients should be given an opportunity to claim the records or have them sent to another physician, if it is feasible to give them the opportunity.

.....

Please Note:

a. North Carolina has no statute relating specifically to the retention of medical records.
b. Several North Carolina statutes relate to time limitations for the filing of malpractice actions. Legal advise should be sought regarding such limitations.

(Adopted 5/98)

The Position Statements of the North Carolina Medical Board can be found at the North Carolina Medical Board's website, www.docboard.org

## APPENDIX G-1: MEDICAL RECORDS RELEASE AUTHORIZATION

TO:_____

PATIENT: _____

Please furnish and release to my Attorney, ***[Name and Address]***, or to any employee or agent of my attorney, all information and records requested concerning observations, findings, treatment rendered, and opinions as to physical or mental condition concerning the above-named patient. This authorization specifically includes permitting the examination of all hospital records, x-ray files, physician notes and summaries, nursing notes, correspondence or other records contained in her chart. This authorization also extends to any future examinations, x-rays, and/or treatment which may be conducted subsequent to the date of this authorization

If you have a policy of withholding documentation generated by another health care provider from the records furnished and released pursuant to this Authorization, please identify all such documents and indicate how and from whom they may be obtained. (See N.C. Medical Board Position Statement 'Access to Physician Records' Amended 9/97).

**PLEASE DO NOT DISCLOSE ANY INFORMATION TO OTHER PERSONS WITHOUT WRITTEN AUTHORITY FROM THE UNDERSIGNED PATIENT OR THEIR PERSONAL REPRESENTATIVE**

The foregoing authority given to my attorney, ***[Name]***, shall continue in force until revoked by me in writing. **ALL PRIOR AUTHORIZATIONS ARE HEREBY CANCELLED.**

A photocopy of this Release shall serve as effectively as the original.

_____ _____

Date Patient's Signature

_____

Patient's Date of Birth

_____

Patient's Social Security Number

***[OPTIONAL]*** **VERIFICATION**

Sworn to and subscribed before me
this the ____ day of _____, 2000.

_____

Notary Public
My commission expires: _____

_____

## APPENDIX G-2: AUTHORIZATION FOR RELEASE OF MEDICAL RECORDS BY NEXT OF KIN OF DECEDENT WITH UNADMINISTERED ESTATE

Re: ***[Decedent's Name, Social Security #, and Date of Birth]***

Please furnish and release to my Attorney, ***[Name and Address],*** or to any employee or agent of my attorney, all information and records requested concerning observations, findings, treatment rendered, and opinions as to physical or mental condition concerning the above-named patient. This authorization specifically includes permitting the examination of all hospital records, x-ray files, physician notes and summaries, nursing notes, correspondence or other records contained in her chart

If you have a policy of withholding documentation generated by another health care provider from the records furnished and released pursuant to this Authorization, please identify all such documents and indicate how and from whom they may be obtained. (See N.C. Medical Board Position Statement 'Access to Physician Records' Amended 9/97).

**All prior authorizations for release of these records are hereby revoked.** A **photostatic copy** of this authorization shall be considered as effective and valid as the original.

_____
Next of Kin

### VERIFICATION

I, _____, being first duly sworn, depose and say that [decedent's name]'s estate is unadministered and I am her next of kin, entitled under N.C. Gen. Stat § 8-53 to inspect and copy her medical records.

***Signature and relationship of next of kin***

_____
***Name and Relationship of Next of Kin***

Sworn to and subscribed before me this
the ____ day of _____, 20___.

_____
NOTARY PUBLIC
My Commission Expires: _____

## APPENDIX G-3: AUTHORIZATION FOR RELEASE OF MEDICAL RECORDS OF DECEDENT WITH ADMINISTERED ESTATE

Re: ***[Decedent's Name, Social Security #, and Date of Birth]***

Please furnish and release to my Attorney, ***[Name and Address],*** or to any employee or agent of my attorney, all information and records requested concerning observations, findings, treatment rendered, and opinions as to physical or mental condition concerning the above-named patient. This authorization specifically includes permitting the examination of all hospital records, x-ray files, physician notes and summaries, nursing notes, correspondence or other records contained in her chart

If you have a policy of withholding documentation generated by another health care provider from the records furnished and released pursuant to this Authorization, please identify all such documents and indicate how and from whom they may be obtained. (See N.C. Medical Board Position Statement 'Access to Physician Records' Amended 9/97).

**All prior authorizations for release of these records are hereby revoked.** A **photostatic copy** of this authorization shall be considered as effective and valid as the original.

Dated: _____

_____
Personal Representative

### VERIFICATION

I, _____, being first duly sworn, depose and say that am the Personal Representative of the decedent , _____.

_____
Personal Representative

Sworn to and subscribed before me this
the ____ day of _____, 20___.

_____
NOTARY PUBLIC
My Commission Expires: _____

## APPENDIX E: SAMPLE LETTER REQUESTING MEDICAL RECORDS

**Date**

**Health Care Provider or Facility Name and Address**
**Attn.: Medical Records Custodian**

**Re: NAME: John Patient**
**DOB:**
**SS#:**

Dear Medical Records Custodian:

Please be advised that this law firm has been authorized to obtain the medical records of John Patient. Enclosed is an authorization for the release of his medical records.1

*[Optional] If the case involves a personal injury liability claim, the letter must so indicate and should reference the statutory charges permitted at the time:*

These records are sought with regard to a personal injury liability claim. **N.C. Gen. Stat § 90-411 (2000) sets the maximum charges permissible for medical records requested in personal injury liability claims as follows:** "The maximum fee for each request shall be seventy-five cents (75 ) per page for the first 25 pages, fifty cents (50 ) per page for pages 26 through 100, and twenty-five cents (25 ) for each page in excess of 100 pages, provided that the health care provider may impose a minimum fee of up to ten dollars ($10.00), inclusive of copying costs."

Please forward to the office of the undersigned counsel the following items:

1. A complete copy of all medical records, laboratory reports, x-ray interpretations, and every piece of paper in your possession regarding John Patient.

2. All billing information, including ledger cards, insurance claim forms, etc. as the same pertains to medical services rendered to John Patient. Please note that the NC Medical Board Position Statement "Documentation of the Physician-Patient Relationship" identifies "a record of billings" as a part of the minimum a medical record should contain.

---

1. See N.C. Gen. Stat. § 8-53 to determine who should execute authorizations regarding decedents or incompetents.

3. All correspondence to and from any other person or entity concerning John Patient.

*[Optional]* Our firm's check will be forwarded to you upon receipt of your bill for any copying costs consistent with fees set out in North Carolina General Statute § 90-411, a copy of which is attached for your information.

*[Optional]* Please note that, in the event that you wish to preserve the provider's lien created by N.C.G.S.§ 44-49 and 44-50, you must provide bill consistent with the fees set out in North Carolina General Statute § 90-411, for providing these records.

Thank you for your assistance.

Law & Jones, PLLC
1 Lawyers Drive§§
Anytown, North Carolina

PLEASE NOTE FOR WORKERS' COMPENSATION CASES SPECIAL RULES APPLY: This form is suggested for personal injury cases pending in the Courts. Special rules apply to Workers' Compensation cases. When a health care provider bills an employer's compensation insurance carrier or third-party administrator (adjusting agency), one free copy of medical records associated with the services must be provided, unless arrangements have been made to provide the free copy to a rehabilitation nurse. Fees for additional copies to these or other parties are set by the N.C. Industrial Commission (as an exception to N.C.Gen.Stat. and 90-411, codified at § 97-26.1) at a maximum of $.50 per page for the first 40 pages, and $.20 per page for additional pages, with an allowable minimum fee of $10.00 (inclusive of per page charges). (See January 12, 1995 *Minutes* of the N.C. Industrial Commission.) Industrial Commission Rule 607 provides that, if requested, parties must provide each other with copies of medical and rehabilitation records in their possession within 30 days, and with copies of additional records they obtain thereafter within 15 days after they come into the party's possession.

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# NORTH CAROLINA INDUSTRIAL COMMISSION RULES FOR UTILIZATION OF REHABILITATION PROFESSIONALS IN WORKERS' COMPENSATION CLAIMS

Effective June 1, 2000.


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II. Purpose of the rules.
III. Definitions; Description of rehabilitation services.
IV. Qualifications required.
V. Professional responsibility of the rehabilitation professional in workers' compensation claims.
VI. Communication.
VII. Interaction with physicians.
VIII. Return to work.
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Index follows Rules.


## Rule I. Application of the rules.

A. These rules apply to:

1. All cases in which the employer is obligated to provide or is providing and the injured worker is obligated to accept medical compensation under the Act, or in which such compensation is provided by agreement, and during any period when the employer is paying temporary total disability benefits "without prejudice," and

2. Any Rehabilitation Professional (hereinafter RP) assigned under the Workers' Compensation Act and approved by the Commission pursuant to Section VI. E.

B. Any RP who is not assigned under the Act and approved by the Commission must disclose his or her role to (1) the medical provider at the time of the initial contact and (2) any other person from whom the non-approved RP seeks information about the case.

### CASE NOTES

**Quoted** in Jenkins v. Public Serv. Co. of N.C., 134 N.C. App. 405, 518 S.E.2d 6 (1999), cert. granted, 351 N.C. 106, 541 S.E.2d 147 (1999).

## Rule II. Purpose of the rules.

A. The purpose of these rules is to foster professionalism in the provision of rehabilitation services in Industrial Commission cases, such that in all cases the primary concern and commitment of the RP is to the medical and vocational rehabilitation of the injured worker rather than to the personal or pecuniary interests of the parties.

B. To this end, these rules are to be interpreted to promote frank and open cooperation among parties in the rehabilitation process, and to discourage the pursuit of plans or purposes which impede or conflict with the parties' progress toward that goal.

## Rule III. Definitions; Description of rehabilitation services.

A. RPs are case managers and coordinators of medical rehabilitation

services and/or vocational rehabilitation services, including but not limited to, state, private, or carrier based, whether on site, telephonic, or in or out of state. RPs do not include direct care providers, e.g., physical therapists, occupational therapists, or speech therapists.

B. The "parties" are the worker, the worker's attorney, the employer, the workers' compensation carrier (including claims administrator, third party administrator), and the employer or carrier's attorney(s).

C. "Physician" means medical doctor, chiropractor, other physician, and, where the context requires, other health care providers.

D. "Medical rehabilitation" refers to the planning and coordination of health care services. The goal of medical rehabilitation is to assist in the restoration of injured workers as nearly as possible to the workers' pre-injury level of physical function. Medical case management may include but is not limited to case assessment, including a personal interview with the injured worker; development, implementation and coordination of a care plan with health care providers and with the worker and family; evaluation of treatment results; planning for community re-entry; return to work with the employer of injury and/or referral for further vocational rehabilitation services.

E. "Vocational Rehabilitation" refers to the delivery and coordination of services under an individualized plan, with the goal of assisting injured workers to return to suitable employment.

(1) Specific vocational rehabilitation services may include, but are not limited to: vocational assessment, vocational exploration, counseling, job analysis, job modification, job development and placement, labor market survey, vocational or psychometric testing, analysis of transferable skills, work adjustment counseling, job-seeking skills training, on-the-job training and retraining, and follow-up after re-employment.

(2) The vocational assessment is based on the RP's evaluation of the worker's social, medical, and vocational standing, along with other information significant to employment potential and on a face-to-face interview between the worker and the RP, to determine whether the worker can benefit from vocational rehabilitation services, and, if so, to identify the specific type and sequence of appropriate services. It should include an evaluation of the worker's expectations in the rehabilitation process, an evaluation of any specific requests by the worker for medical treatment or vocational training, and a statement of the RP's conclusion regarding the worker's need for rehabilitation services, benefits expected from services, and a description of the proposed rehabilitation plan.

(3) Job placement activities may be commenced after completion of a vocational assessment and formulation of an individualized plan for vocational services which specifies its goals and the priority for return-to-work options in each case. Placement shall only be directed toward prospective employers offering the opportunity for suitable employment, as defined herein.

F. "Return to work" means placement of the injured worker into suitable employment, as defined herein. Return-to-work options generally should be considered in the following priority:

(1) Current job, current employer
(2) New job, current employer
(3) On-the-job training, current employer
(4) New job, new employer
(5) On-the-job training, new employer
(6) Formal vocational training to prepare worker for job with current or new employer.
(7) Due to the high risk of small business failure, self-employment should be considered only when its feasibility is documented with reference to worker's aptitudes and training, adequate capitalization, and market conditions.

G. "Suitable employment" means employment in the local labor market or self-employment which is reasonably attainable and which offers an opportunity to restore the worker as soon as possible and as nearly as practicable to pre-injury wage, while giving due consideration to the worker's qualifications (age, education, work experience, physical and mental capacities), impairment, vocational interests, and aptitudes. No one factor shall be considered solely in determining suitable employment.

**Rule IV. Qualifications required.**

A. RPs in cases subject to these rules shall follow the Code of Ethics specific to their certification (i.e. CRC, CDMS, CVE, CRRN, COHN, ONC, and CCM) as well as any status specific to their occupation.

B. RPs who are Registered Nurses must have a North Carolina license to practice and are subject to the requirements of the North Carolina Nursing Practice Act.

C. RPs who are Licensed Professional Counselors are subject to the requirements of the North Carolina Licensed Professional Counselor's Act.

D. RPs rendering services in cases subject to these rules shall meet the following criteria, and shall upon request provide a resume of their qualifications and credentials during initial meetings with parties and health care providers.

(1) Requirements for Qualified Rehabilitation Professionals (QRPs):

a. Two years of full-time work experience, or its equivalent in workers' compensation case management, where a minimum of (30) percent of the time was spent in managing medical and/or vocational rehabilitation services to persons with disabling conditions or diseases. This experience should have been within the past 15 years; AND one of the following credentials, or a similar credential determined by the Industrial Commission as a substantial equivalent thereto:

Certified Rehabilitation Counselor (CRC)
Certified Registered Rehabilitation Nurse (CRRN)
Certified Disability Management Specialist (CDMS)
Certified Vocational Evaluator (CVE)
Certified Occupational Health Nurse (COHN)
Orthopedic Nurse Certified (ONC)
Certified Case Manager (CCM); OR

b. Employed within the North Carolina Department of Human Resources as a Vocational Rehabilitation Provider;

c. The Commission may, through its Minutes, modify the list of credentials contained in subsection (a) above to add or delete appropriate credentials.

(2) Requirements for Conditional Rehabilitation Professionals (CRPs):

a. A CRP is defined as a person who does not meet the requirements for QRP and who wishes to work as an RP in cases subject to this rule, including the following:

i. CRC, CRRN, CDMS, CVE, COHN, ONC, or CCM without the workers' compensation case management experience required;

ii. A post-baccalaureate degree in a health-related field from an accredited institution, plus one year of experience in the provision of rehabilitation services to persons with disabling conditions or diseases,

iii. A baccalaureate degree in a health-related field from an accredited institution, plus two years experience in the provision of rehabilitation services to individuals with disabling conditions or diseases, or

iv. Current North Carolina licensure as a registered nurse and three years experience in clinical nursing providing care for adults with disabling conditions and diseases.

b. In order to work as an RP, a CRP will work under the direct supervision of a QRP until qualifications for a QRP are fulfilled. The supervisor must meet the requirements for providing workers' compensation case management services in North Carolina. Supervision shall include regular case staffing between the CRP and the QRP supervisor, detailed review by the QRP supervisor of all reports, and periodic meetings no less frequently than quarterly. The name, address and telephone number of the supervisor shall be on all documents identifying the CRP. The QRP is responsible to assure that the work of the CRP shall meet all requirements including those of this rule.

c. Once an RP meets certification eligibility requirements, an RP may maintain CRP status for a period of two years only.

**CASE NOTES**

**Stated** in Jenkins v. Public Serv. Co. of N.C., 134 N.C. App. 405, 518 S.E.2d 6 (1999), cert. granted, 351 N.C. 106, 541 S.E.2d 147 (1999).

## Rule V. Professional responsibility of the rehabilitation professional in workers' compensation claims.

A. The RP shall exercise independent professional judgment in making and documenting recommendations for medical and vocational rehabilitation for the injured worker, including any alternatives for medical treatment and cost-effective return-to-work options including retraining or retirement. The RP shall realize that the attending physician directs the medical care of an injured worker.

B. The RP shall inform the parties of his or her assignment and proposed role in the case. At the outset of the case, the RP shall disclose to health care providers and the parties any possible conflict of interest, including any compensation carrier's or employer's ownership of or affiliation with the RP.

C. Subject to the provisions for medical care and treatment set forth in the Workers' Compensation Act, the medical RP may explain the medical information to the worker, and shall discuss with the worker all treatment options appropriate to the worker's conditions, but shall not advocate any one specific source for treatment or change in treatment.

D. As case consultants or expert witnesses, RPs have an obligation to provide unbiased, objective opinions. The limits of their relationships shall be clearly defined through written or oral means in accordance with CRCC Code of Professional Ethics, Canon 2, Rule 2.4, or through similar provisions in the applicable code of ethics, if any.

E. There may be parts of the rehabilitation process for which an RP may not be qualified. The RP has the responsibility to refrain from those activities which do not fall within his or her qualifications. RPs shall practice only within the boundaries of their competence, based on their education, training, appropriate professional experience, and other professional credentials.

F. Prohibited Conduct:

(1) RPs shall not conduct or assist any party in claims negotiation, investigative activities, or perform any other non-rehabilitation activity;

(2) RPs shall not advise the worker as to any legal matter including claims settlement options or procedures, monetary evaluation of claims, or the applicability to the worker of benefits of any kind under the Workers' Compensation Act. RPs shall advise the nonrepresented worker to direct such questions to the Industrial Commission, and the represented worker to direct questions to his or her attorney.

(3) RPs shall not accept any compensation or reward from any source as a result of settlement.

**CASE NOTES**

**Quoted** in Jenkins v. Public Serv. Co. of N.C., 134 N.C. App. 405, 518 S.E.2d 6 (1999), cert. granted, 351 N.C. 106, 541 S.E.2d 147 (1999).

## Rule VI. Communication.

A. At their first meeting, RPs shall provide the injured worker with a copy of these rules or a summary of the rules approved by the Commission.

B. RPs shall timely inform injured workers that the RP will share relevant and material information with the employer and insurance carrier and that the RP may be compelled to testify regarding any information obtained.

C. In cases where the employer is paying medical compensation to a provider rendering treatment under the Workers' Compensation Act, the injured worker, if requested by an RP, shall sign a Form 25C Consent authorizing the RP to obtain records of such current treatment. Refusal to sign the consent may be deemed by the Commission to be noncompliance with rehabilitation and may result in the suspension of benefits.

D. In preparing written and oral reports, the RP shall present only information relevant and material to the worker's medical and/or vocational rehabilitation and shall make every effort to avoid undue invasion of privacy.

E. The carrier shall promptly notify the Industrial Commission and all parties on a Form 25N when an RP is assigned to a case and identify the purpose of the rehabilitation involvement.

F. The RP shall provide copies of all correspondence simultaneously to all parties to the extent possible, making every effort to effect prompt service.

G. The RP shall make periodic written reports documenting accurately and completely the substance of all significant activity in the case, including the rehabilitation activity defined above, which reports shall be provided to all parties at the same time. A worker not represented by counsel shall be furnished with a copy of each periodic report, or, in the alternative, the RP shall advise orally or in writing (at least as often as reports are produced) as to the plan for and progress of the case, and shall advise the worker that he or she has the right to request a copy of the reports under Industrial Commission Rule 607.

H. Frequency and timing of periodic reports will be determined at the time of referral and will depend upon the type of service provided. However, prompt communication of significant activity to all parties by telephone, telecopier, electronic media, or letter should occur when information pertinent to the rehabilitation process is obtained, when changes or revisions are recommended or occur in medical or vocational treatment plans, or on any other occasion when the worker's understanding and cooperation is important to the implementation of the rehabilitation plan.

I. Communication with worker's attorney.

(1) The first meeting of the worker and RP shall, if requested, take place at the office of the worker's attorney. If this location is requested, it shall not delay the meeting more than (20) calendar days.

(2) To promote cooperation among the parties, the RP shall coordinate activities with the injured worker's attorney, and, at the employer or carrier's discretion, with the defense attorney. If the RP believes that the worker is not cooperating with the provision of rehabilitation services, the RP shall advise all parties and shall describe what cooperative action on the part of the worker is sought.

**CASE NOTES**

**Communications Between Physician and Rehabilitation Professional.** — The fact that a treating physician and a rehabilitation professional have communicated outside the plaintiff's presence without the plaintiff's consent, without more, does not violate the Industrial Commission's rules. Jenkins v. Public Serv. Co. of N.C., 134 N.C. App. 405, 518 S.E.2d 6 (1999), cert. granted, 351 N.C. 106, 541 S.E.2d 147 (1999).

## Rule VII. Interaction with physicians.

A. At the initial visit with a physician the RP shall provide professional identification and shall explain the RP's role in the case.

B. In all cases, the RP shall advise the worker that he or she has the right to a private examination by the medical provider outside of the presence of the RP. If the worker prefers, he or she may request that the RP accompany him or her during the examination. However, if the worker or the worker's attorney notifies the RP in writing that the worker desires a private examination, no subsequent waiver of that right shall be effective unless the waiver is revoked in writing by the worker or, if represented, by the worker's attorney.

C. If the RP wishes to have a personal conference with the physician following an examination, the RP should reserve with the physician sufficient appointment time for a conference. The worker must be offered the opportunity to attend this conference with the physician. If the worker or the physician does not consent to a joint conference, or if in the physician's opinion it is medically contraindicated for the worker to participate in the conference, the RP will note this in his or her report and may in such case communicate directly with the physician and shall report the substance of the communication.

D. When the RP determines that it is necessary to communicate with a physician other than at a joint meeting, the RP shall first notify the injured worker, or his/her attorney if represented, of the RP's intent to communicate and the reasons therefor. The RP need not obtain the injured worker's or attorney's prior consent for the following types of communication:

1. The communication is limited to scheduling issues or requests for time-sensitive medical records;
2. A medical emergency is involved;
3. The injured worker's health or medical treatment would either be adversely affected by a delay or benefited by immediate action;
4. The communication is limited to advising the physician of the employer or carrier approval for recommended testing or treatment;
5. The injured worker or attorney has consented to such communications through a valid, current authorization;
6. The communication is initiated by the physician; or
7. The injured worker failed to show up for a scheduled appointment or arrived at a time other than the scheduled appointment time.

Whenever an RP communicates with a physician without the prior consent or presence of the injured worker, the RP must promptly document the reasons for and the substance of the communication and promptly report such to the injured worker or attorney, if represented, pursuant to Rule VI.

E. The RP may assist in scheduling second opinions requested by the treating physician, as well as supporting treatment. In such case, the worker shall receive at least 10 calendar days notice of an appointment for a second opinion unless otherwise agreed by the parties or required by statute.

F. The RP may assist in obtaining from the treating physician an opinion as to the degree of permanent partial impairment retained by the worker at maximum medical improvement. The decision to obtain a second physician's opinion on the degree of impairment is not within the practice of rehabilitation.

However, if requested by the party who desires a second opinion, the RP may assemble information, schedule, coordinate, and, with the worker's consent, attend the appointment with that physician.

G. If a party requests a second opinion or an independent medical examination, the RP's involvement is limited to assembling and forwarding medical records and information, and scheduling, coordinating, and, with the worker's consent, attending the appointment with that physician.

H. The RP shall simultaneously send copies to the parties of all written communications to medical care providers, and shall accurately and completely record and report all oral communications.

**Rule VIII. Return to work.**

A. The RP shall obtain from the medical provider work restrictions which fairly address the demands of any proposed employment. If ordered by a physician, the RP should obtain a Functional Capacity Evaluation (FCE) or Physical Capacity Evaluation (PCE). Any FCE or PCE obtained should measure the worker's capacities and impairments.

B. The RP shall refer the worker only to opportunities for suitable employment, as defined herein.

C. If the RP intends to utilize written or videotaped job descriptions in the return-to-work process, the RP shall provide a copy of the description to all parties for review before the job description is provided to the doctor. The worker or the worker's attorney shall have seven business days from mailing of the description, to notify the RP, all parties, and the physician of any objections or amendments to the job description. The job description and the objections or amendments, if any, shall be submitted to the physician simultaneously. This process may be expedited on occasions when job availability is critical. This waiting period does not apply if the worker or the worker's attorney has pre-approved the job description.

D. In preparing written job descriptions, the RP shall utilize recognized standards which may include but not be limited to the Dictionary of Occupational Titles and/or the Handbook for Analyzing Jobs published by the U.S. Department of Labor, which are recognized as national standard references for use in vocational rehabilitation.

E. In identifying proposed employment for the injured worker, the RP should consider the worker's transportation requirements.

F. Follow-up after placement may be carried out to verify the appropriateness of the job placement.

G. The RP shall not initiate or continue placement activities which do not appear reasonably likely to result in placement of the injured worker in suitable employment. The RP shall report to the parties when efforts to place the worker in suitable employment do not appear reasonably likely to result in placement of the injured worker in suitable employment.

**Rule IX. Motion for change of RP; Sanctions.**

A. An RP may be removed from a case upon motion by either party for good cause shown or by the Industrial Commission in its own discretion. The motion shall be filed with the Executive Secretary's Office and served upon all parties and the RP. Any party or the RP may file a response to the motion within (10) days. The Industrial Commission shall then determine whether to remove the RP from the case. The parties are referred to Industrial Commission Rule 609.

B. If the employer/carrier chooses to do so and the worker consents, the employer/carrier may replace the RP, in which case the moving party shall notify the Industrial Commission that the motion does not need to be decided.

C. For good cause, including ineffective delivery of rehabilitation services, failure to comply with applicable laws, rules or regulations, or failure to timely respond to lawful orders of the Commission or other regulatory authorities, the Commission may prohibit or restrict an RP, or group of RPs, further participation by particular workers, employers, or health care providers, groups or classes of them, or all of them. As provided in Industrial Commission Rule 802, the Commission may impose appropriate sanctions for violation of these Rules.

D. A party may request reconsideration of a ruling or appeal from an order as provided in Rule 703 or pursuant to N.C. Gen. Stat. §§ 97-83; 97-84.

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# TORT CLAIMS RULES OF THE NORTH CAROLINA INDUSTRIAL COMMISSION

Effective May 1, 2000.


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## ARTICLE I. ADMINISTRATION

### Rule T101. Location of offices and hours of business.

The offices of the North Carolina Industrial Commission (hereinafter "Industrial Commission") are located in the Dobbs Building, 430 North Salisbury Street, in Raleigh, North Carolina. The General Mailing Address is North Carolina Industrial Commission, 4319 Mail Service Center, Raleigh, NC 27699-4319. The same office hours will be observed by the Industrial Commission as are, or may be, observed by other State offices in Raleigh. The offices are open between the hours of 8:00 a.m. and 5:00 p.m. to accept documents for filing.

### Rule T102. Transaction of business by the Commission.

The Industrial Commission shall remain in continuous session subject to the call of the Chair to meet as a body for the purpose of transacting such business as may come before it.

### Rule T103. Official forms.

(1) The Industrial Commission will supply, on request, forms identified by number and title as follows:

(a) Form T-1, Claim for Damages Under Tort Claims Act, N.C.G.S. § 143-297.

(b) Form T-3, Release of Tort Claim Under N.C.G.S. § 143-297, *et seq.*

(c) Such other forms relating to Tort Claims which, from time to time, may be promulgated by the Industrial Commission.

(2) The use of any printed forms other than those approved and adopted by the Industrial Commission is prohibited. However, a claim for damages under the Tort Claims Act, and an answer or other responsive pleading by a defendant, may be filed by way of an original typed claim or answer and other responsive pleading which is similar in format to a civil pleading in the General Courts of Justice, and which is verified.

**Rule T104. Filing by telefacsimile transmission.**

Filing by telefacsimile transmission shall be allowed when specific permission is granted by the Dockets Director or by the person designated by the Chair to determine matters related to the Tort Claims Act or by the Chair. If a filing fee is required, it must be received by the Industrial Commission contemporaneously with the telefacsimile either by electronic transfer of funds or other procedure accepted by the Commission. The Industrial Commission may adopt procedures for filing by telefacsimile transmission in other instances.

## ARTICLE II. CLAIMS PROCEDURES

**Rule T201. Rules of Civil Procedure.**

(1) The Rules of Civil Procedure as provided in N.C.G.S. § 1A-1 shall apply in tort claims before the Industrial Commission, to the extent that such Rules are not inconsistent with the Tort Claims Act. In the event of such inconsistency, the Tort Claims Act and these Rules shall control.

(2) In medical malpractice cases filed by or on behalf of prison inmates where the plaintiff is alleging that a health care provider as defined in N.C. Gen. Stat. § 90-21.11 failed to comply with the applicable standard of care under N.C. Gen. Stat. § 90-21.12 and the defendant has filed a Motion to Dismiss the claim, all discovery is stayed until the following occurs:

(a) An informal recorded telephonic hearing is held before a Deputy Commissioner for the purpose of determining

(1) whether a claim for medical malpractice has been stated;

(2) whether expert testimony is necessary for the plaintiff to prevail; and

(3) if expert testimony is deemed necessary, whether the plaintiff will be able to produce such testimony on the applicable standard of care.

(b) Upon receipt of a Motion to Dismiss and Request for Telephonic Hearing from the defendant, the Industrial Commission shall issue an order setting the motion on a hearing docket and the case will be assigned to a Deputy Commissioner. Thereafter, the parties shall have 30 days to submit medical records applicable to the claim to the Dockets Director or to the Deputy Commissioner before whom the case is set.

(c) If the defendant's Motion to Dismiss is granted, an appeal lies to the Full Commission. If defendant's Motion to Dismiss is denied, the case will proceed as any other Tort Claims case.

**Rule T202. Filing fees.**

(1) No claim shall be accepted for filing with the Industrial Commission which is not accompanied by an attorney's check, certified check, money order, or electronic transfer of funds in payment of a filing fee in an amount equal to the filing fee required for the filing of a civil action in the Superior Court division of the General Court of Justice.

(2) The provisions of paragraph (1) above notwithstanding, a claim which is accompanied by a Petition to Sue as an Indigent shall be accepted for filing upon the date of its receipt.

(3) A Petition to Sue as an Indigent shall consist of the following:

(a) An affidavit sufficient to satisfy the provisions of N.C. Gen. Stat. § 1-110, stating that plaintiff is unable to comply with subsection (1) of this Rule.

(b) If the plaintiff is an inmate in the North Carolina Department of Correction, a report by the Department of Correction stating the balance of plaintiff's prison trust account, together with an accounting of all credits to and withdrawals from that trust account during the prior six months.

(4) The granting or denial of permission to sue as an indigent shall be in the sole discretion of the Industrial Commission.

(5) If, in the discretion of the Industrial Commission, it is determined that plaintiff is able to pay all or any part of the fees assessed under this Rule, an Order shall be issued directing payment of all or any part of that fee, and the plaintiff shall, within thirty (30) days from his receipt of the Order, forward to the Industrial Commission an attorney's check, certified check, money order, or electronic fund transfer for the full amount which is required to be paid. Failure to submit the required amount of the filing fee within this time shall result in the claim being dismissed without prejudice.

(6) Upon consideration of an inmate's petition to sue as an indigent, the Industrial Commission may determine that the inmate's tort claim is frivolous and dismiss the claim pursuant to N.C. Gen. Stat. § 1-110. Appeals from the dismissal of a claim pursuant to the statute shall proceed directly to the Full Commission and shall be decided without oral argument. The Commission shall forward a copy of the file to the Attorney General's Office without cost upon plaintiff's notice of appeal to the Full Commission.

**Rule T203. Enlargement of time.**

A Commissioner or Deputy Commissioner may upon the motion of a party or upon his own motion, enlarge the time within which an action must be taken or a document filed pursuant to this Article. If the claim has not been calendared, Motions for Enlargement of Time should be directed to the Commissioner or Deputy Commissioner designated by the Chair to determine Tort Claim motions. An enlargement of time may be granted either before or after the relevant time requirement has elapsed.

**Rule T204. Infants and incompetents.**

In all cases where it is proposed that minors or incompetents shall sue by their guardian *ad litem,*the Industrial Commission shall appoint such guardian ad litem upon the written application of a reputable person closely connected with such minor or incompetent; but if such person will not apply, then, upon the application of some reputable citizen; and the Industrial Commission shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

**Rule T205. Motions.**

(1) All Motions in cases which are currently calendared before a Commissioner or Deputy Commissioner shall be sent directly to that Commissioner or Deputy Commissioner at the Industrial Commission. Before a case is calendared, or after a case has been continued, or removed, or after a case has been heard and a Decision and Order entered, Motions shall be directed to the Executive Secretary of the Industrial Commission or the person designated by the Chair to determine these matters, if known.

(2) A motion shall state with particularity the grounds on which it is based, the relief sought, and a brief statement of the opposing party's position, if known. Service shall be made on all other parties.

(3) Motions to continue or remove a case from the hearing docket on which the case is set must be made well in advance of the scheduled hearing and shall be made in writing. In all cases, the moving party must state that the other parties have been advised of the Motion and relate the position of the other parties regarding the Motion. Oral motions shall be permitted in emergency situations for good cause shown.

(4) The responding party to a Motion, with the exception of Motions to continue or remove a case from a hearing docket, shall have ten (10) days after a Motion is served upon him during which to file and serve copies of response in opposition to the Motion. The Industrial Commission may shorten or extend the time for responding to any Motion.

(5) Notwithstanding the provisions of (4) above, the Industrial Commission may act upon a Motion at any time, despite the absence of notice to all parties, and without awaiting a response. A party who has not received actual notice of such a Motion prior to the entry of a ruling by the Industrial Commission or who has not filed a response at the time such ruling is entered and who is adversely affected by the ruling may request reconsideration, vacation, or modification of the ruling. Motions will be determined without argument, unless the Industrial Commission orders otherwise.

(6) In a case in which a Motion to amend pleadings has been filed, the Commissioner or Deputy Commissioner may permit amendment of pleadings at the time of the hearing and then proceed to a determination of the case based on the evidence presented at the hearing without requiring additional pleadings.

(7) Motions to dismiss or for summary judgment for the defendant on the ground that plaintiff has failed to specifically name the individual officer, agent, employee or involuntary servant whose alleged negligence gave rise to the claim, or failure to properly name the department or agency of the State with whom such person was employed, shall be ruled upon following discovery.

(8) In appropriate cases, motions may be set for hearing before a Commissioner or Deputy Commissioner upon request of either party or upon the Commission's own motion.

**Rule T206. Hearings.**

(1) The Industrial Commission may, on its own Motion, order a hearing or rehearing of any case in dispute.

(2) The Industrial Commission shall set a contested case for hearing in a location deemed convenient to witnesses and the Industrial Commission, and conducive to an early and just resolution of disputed issues.

(3) In cases involving a plaintiff who is an inmate in the North Carolina Department of Correction, the Industrial Commission shall set contested cases for hearing as follows:

(a) In the prison unit where plaintiff is incarcerated or in some other prison facility agreed upon by the Industrial Commission and the Attorney General's office; or

(b) By videoteleconference according to procedures adopted by the Industrial Commission; or

(c) By telephone conference according to procedures adopted by the Industrial Commission.

(4) The Industrial Commission may issue writs of habeas corpus ad testificandum in cases arising under the Tort Claims Act. Requests for issuance of a writ of habeas corpus ad testificandum should be sent to the Dockets Department of the Industrial Commission if the case has not been set on a calendar for hearing. If the case has been set for hearing, the request should be sent to the Deputy Commissioner or Commissioner before whom the case is set.

(5) The Industrial Commission will give reasonable notice of a hearing in every case. Postponement or continuance of a duly scheduled hearing will rest entirely in the discretion of a Commissioner or Deputy Commissioner. Where a party has not notified the Industrial Commission of the attorney representing the party prior to the mailing of calendars for hearing, notice to that party shall constitute notice to the party's attorney.

(6) In cases involving minimal property damage, the Commission may, upon its own motion or upon the motion of either party, order a telephonic hearing on the matter.

(7) In cases of multiple claim filings by an inmate, the Industrial Commission may consolidate all of the claims for hearing upon the motion of either party or upon the Commission's own motion. Other cases may be consolidated according to Rule 42 of the North Carolina Rules of Civil Procedure.

(8) In the event of inclement weather or natural disaster, hearings shall be cancelled if the proceedings in the General Court of Justice are cancelled in the county in which the Tort Claims hearings are set.

### Rule T207. Hearing costs.

Hearing costs shall be assessed in each case set for hearing, including those cases which are settled after being calendared and notices mailed, and shall be payable upon submission of a statement by the Industrial Commission.

## ARTICLE III. APPEALS TO FULL COMMISSION

### Rule T301. Notice of appeal to the Full Commission.

A letter or other document expressing an intent to appeal, which is filed within 15 days of receipt of the Decision and Order of the Industrial Commission, and which clearly sets forth the Decision and Order from which appeal is taken, shall be considered notice of appeal to the Full Commission within the meaning of N.C. Gen. Stat. § 143-292. Such notice shall include a written statement confirming service of a copy of the notice by mail or in person on the opposing party or parties.

### Rule T302. Transcripts.

Upon receipt of notice of appeal, the Industrial Commission, after taxing appropriate costs, will prepare and supply to all parties a transcript of the record of the case and decision from which appeal is being taken to the Full Commission.

### Rule T303. Assignments of error.

The appellant shall, within 25 days of receipt of the transcript of the record, or receipt of notice that there will be no transcript of the record, file in triplicate with the Industrial Commission, a written statement of the particular grounds for the appeal. The statement shall certify service of a copy by mail or in person upon the opposing party or parties. Particular grounds for appeal not set forth in the written statement will be deemed to be abandoned and argument thereon will not be heard before the Full Commission. The grounds must be stated in particularity, including the specific errors allegedly committed by the hearing Commissioner or Deputy Commissioner and the pages in the transcript on which the alleged errors are recorded.

**Rule T304. Dismissal of appeal.**

Failure to file assignments of error may result in the dismissal of the appeal either upon the Motion of the non-appealing party or upon the Full Commission's own Motion.

**Rule T305. Briefs.**

(1) Appellant's brief shall be filed with the Industrial Commission in triplicate no later than 25 days after receipt of the transcript of the record or receipt of notice that there will be no transcript.

(2) Thereafter, appellee's brief shall be filed with the Industrial Commission in triplicate no later than 25 days after the service of appellant's brief. When an appellant fails to file a brief, appellee shall file his brief within 25 days after appellant's time for filing brief has expired. If both parties appeal, they shall each file an appellant's and appellee's brief on the schedule set forth herein. The parties may file with the Docket Director a written stipulation to a single extension of time for each party, not to exceed 30 days, if the matter has not been calendared for hearing.

(3) A party who fails to file a brief, will not be allowed oral argument before the Full Commission. Cases should be cited by North Carolina reports, and preferably, to Southeastern reports. Counsel shall not discuss matters outside the record, assert personal opinions or relate personal experiences, or attribute unworthy acts or motives to opposing counsel.

(4) Each brief filed pursuant to this Rule shall be accompanied by a written certification that the brief has been served by mail or in person upon the opposing party or parties.

**Rule T306. Motion for new hearing.**

A Motion for a New Hearing must be filed in writing, and supported by Affidavit. Such Motions filed during the pendency of an appeal to the Full Commission shall be argued before the Full Commission at the time of the hearing of the appeal.

**Rule T307. Motions Before Full Commission.**

During the pendency of an appeal to the Full Commission, any Motion by either party shall be filed in triplicate with the Industrial Commission and directed to the Chair if the case has not been calendared. If the case has been calendared the motion shall be directed to the Full Commission panel before whom the case is set. Every motion shall certify, in writing, that it has been served by mail or in person upon the opposing party or parties.

Motions for Reconsideration of a decision of the Full Commission shall be directed to the Commissioner who authored the Decision and Order.

**Rule T308. Stays.**

When a case is appealed to the Full Commission or to the Court of Appeals, all decisions and orders of a Deputy Commissioner or the Full Commission are stayed pending appeal.

**Rule T309. New evidence.**

No new evidence will be presented to, or heard by, the Full Commission unless the Commission in its discretion permits.

**Rule T310. Waiver of oral argument.**

Either or both parties, with permission of the Full Commission, may waive oral argument before the Full Commission. The Full Commission may in its discretion order that all oral argument in a particular case will be waived. If oral argument is waived by either of these methods, the Full Commission will issue a decision, based on the record, assignments of error, and briefs.

## ARTICLE IV. APPEALS TO THE COURT OF APPEALS

**Rule T401. Rules of Appellate Procedure.**

Except as otherwise provided in N.C. Gen. Stat. § 143-293, in every case appealed to the Court of Appeals, the North Carolina Rules of Appellate Procedure governing appeals in an ordinary civil action shall apply.

**Rule T402. Appeal bond.**

The amount of the appeal bond shall be set by the Chair of the Industrial Commission or the Chair's designee.

**Rule T403. Appeals to the Court of Appeals.**

All Motions filed by the parties regarding appeal to the Court of Appeals shall be addressed to and ruled upon by the Chair of the Industrial Commission, or the Chair's designee.

**Rule T404. Settling record on appeal.**

Upon a proper Motion, the Chair of the Industrial Commission, or the Chair's designee, shall enter an Order settling a record on appeal after conducting a settlement conference, in accordance with the North Carolina Rules of Appellate Procedure. Settlement conferences shall be held at the Industrial Commission offices or by telephone conference.

## ARTICLE V. RULES

**Rule T501. Waiver of rules.**

In the interest of justice, any Tort Claims Rule may be waived by a Commissioner, Deputy Commissioner, or the Full Commission.

**Rule T502. Rulemaking.**

Prior to adopting, deleting or amending any Tort Claims Rule of the Industrial Commission which affects the substantive rights of parties, the Industrial Commission will give at least 30 days notice of the proposed change in Rules. Such notice will be given by publishing, in a newspaper or newspapers of general circulation in North Carolina, notice of such proposed change. Such notice will include an invitation to any interested party to submit in writing any objection, suggestion or other comment with respect to the proposed Rule change or to appear before the Full Commission at a time and place designated in the notice for the purpose of being heard with respect to the proposed Rule change.

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With amendments received through September 10, 1997.


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## ARTICLE I. ADMINISTRATION

### Rule 101. Locations of offices and hours of business.

The offices of the Industrial Commission are located in the Dobbs Building, 430 North Salisbury Street, in Raleigh, North Carolina 27611. The same office hours will be observed by the Industrial Commission as are or may be observed by other State offices in Raleigh.

### Rule 102. Transaction of business by the Commission.

The Commission will remain in continuous session subject to the call of the Chairman to meet as a body for the purpose of transacting such business as may come before it.

### Rule 103. Official forms.

The use of any printed forms other than those approved and adopted by this Commission is prohibited. Approved forms may be obtained from the Commission. Insurance carriers and self-insurers may prepare forms for their own use, provided: (1) that the color of the paper upon which the form is printed shall be substantially identical to that used on the approved Commission's form, (2) no statement, question, or information blank contained on the approved Commission's form is omitted from the substituted form, and (3) such substituted form is substantially identical in size and format with the approved Commission's form.

## ARTICLE II. RULES OF COMMISSION

### Rule 201. Rules of Civil Procedure.

The Rules of Civil Procedure apply in cases involving a purported Childhood Vaccine-Related Injury, so long as such rules are consistent with Article 17 of Chapter 130A of the General Statutes, except as hereinafter specifically provided.

### Rule 202. Procedure.

Upon provision of a copy of the claim and supporting documentation, including all available medical records pertaining to the alleged injury, as provided in N.C.G.S. § 130A-425(b), further proceedings shall be suspended

for a period of ninety (90) days during which the responsible government agencies shall determine and report their position on the issues listed in N.C.G.S. § 130A-426(a). If the said agencies agree that the claimant is entitled to money compensation meeting or exceeding the maximum amount set forth in § 130A-427(b), the Commission shall so notify the claimant and respondents, and further notify them of the services the Department of Human Resources proposes to provide pursuant to § 130A-427(a)(5). The Commission shall thereafter allow the parties a reasonable period of time to settle the matter before proceeding to hearing.

**Rule 203. Attorneys fees.**

At the conclusion of the case, counsel for the plaintiff shall submit to the Commission an account of time and services rendered the plaintiff for consideration in setting a fee pursuant to § 130A-427(a)(4).

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**Editor's note.** — Each local rule has been given the same number as the rule in the Federal Rules of Appellate Procedure to which it pertains, and the court has attempted not to repeat any information that can be found in the body of any rule. Whenever possible, information concerning practices and procedures of this court is set forth in the published internal operating procedures of the court rather than in the local rules. The court has adopted a local rule only in those circumstances where the rule establishes specific affirmative obligations on the parties proceeding before the court, delegates additional authority to the clerk or creates certain options which the Federal Rules of Appellate Procedure indicate can only be exercised by creation of a local rule.

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For website, see www.aoc.state.nc.us.

## ORGANIZATION OF THE COURT

A. *Judges of the United States Court of Appeals for the Fourth Circuit*

Chief Judge:

| | |
|---|---|
| J. HARVIE WILKINSON III | CHARLOTTESVILLE, VA |

Circuit Judges:

| | |
|---|---|
| H. EMORY WIDENER, JR. | ABINGDON, VA |
| WILLIAM W. WILKINS, JR. | GREENVILLE, SC |
| PAUL V. NIEMEYER | BALTIMORE, MD |
| J. MICHAEL LUTTIG | ALEXANDRIA, VA |
| KAREN J. WILLIAMS | ORANGEBURG, SC |
| M. BLANE MICHAEL | CHARLESTON, WV |
| DIANA GRIBBON MOTZ | BALTIMORE, MD |
| WILLIAM B. TRAXLER, JR. | GREENVILLE, SC |
| ROBERT B. KING | CHARLESTON, WV |
| ROBERT L. GREGORY | RICHMOND, VA |

Senior Circuit Judges:

| | |
|---|---|
| JOHN D. BUTZNER, JR. | RICHMOND, VA |
| J. DICKSON PHILLIPS, JR. | CHAPEL HILL, NC |
| ROBERT F. CHAPMAN | COLUMBIA, SC |
| CLYDE H. HAMILTON | COLUMBIA, SC |

B. *Office of the Circuit Executive*

| | |
|---|---|
| Circuit Executive: | Samuel W. Phillips<br>(804) 916-2184 |

C. *Office of the Clerk of Court*

| | |
|---|---|
| Clerk: | Patricia S. Connor |
| Office: | (804) 916-2700 |

D. *Office of Staff Counsel*

| | |
|---|---|
| Senior Staff Counsel: | Robert W. Jaspen<br>(804) 916-2900 |

E. *Library*

| | |
|---|---|
| Librarian: | Peter A. Frey<br>(804) 916-2319 |

F. *Office of the Circuit Mediator*

| | |
|---|---|
| Chief Circuit Mediator: | William T. Howell<br>(843) 521-4022 |

G. *Fourth Circuit Advisory Committee on Rules and Procedure*

Knox L. Haynsworth, Esquire, Chairman
George Beall, Esquire
Norman B. Smith, Esquire
Carrie Goodwin Fenwick, Esquire
Russell V. Palmore, Jr., Esquire

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**Rule 3(a). Filing and docket fees.**

Upon filing a notice of appeal appellant shall pay the clerk of the district court a fee of $105.00, which includes a $5.00 filing fee for the notice of appeal, and a $100.00 fee for docketing the appeal in this Court. (Amended effective December 1, 1995.)

**Rule 3(b). Docketing statement.**

To assist counsel in giving prompt attention to the substance of an appeal, to help reduce the ordering of unnecessary transcripts, to provide the Clerk of the Court of Appeals at the commencement of an appeal with the information needed for effective case management, and to provide necessary information for any mediation conference conducted under Local Rule 33, counsel filing a notice of appeal for any direct or cross-appeal must complete and file a docketing statement, using the form provided by the clerk of the district court. The Clerk of the Court of Appeals will provide a similar form for petitions for review, applications for enforcement, and Tax Court appeals.

Two copies of the docketing statement and attachments must be received and filed in the Court of Appeals within 14 days of filing the notice of appeal,

with a copy served on the opposing party or parties. Docketing statements for petitions for review, applications for enforcement, and Tax Court appeals must be received and filed with the Clerk of the Court of Appeals within 14 days of docketing of the petition, application, or tax appeal. A copy of the docketing statement must be served on the opposing party or parties.

Each copy of the docketing statement served or filed shall have attached to it copies of:

(a) the notice of appeal, application for enforcement, or petition for review;

(b) the docket sheet of the court or agency from which the appeal is taken;

(c) the judgment or order sought to be reviewed and any opinion or findings;

(d) any opinion, findings, or recommendation of a magistrate judge, an administrative law judge, a Social Security Appeals Council, or a bankruptcy court underlying the order at issue; and

(e) any transcript order.

Although a party will not be precluded from raising additional issues, counsel will make every effort to include in the docketing statement all of the issues that will be presented to the Court. Failure to file the docketing statement within the time set forth above will cause the Court to initiate the process for dismissing a case under Local Rule 45.

If an opposing party concludes that the docketing statement is in any way inaccurate, incomplete, or misleading, the Clerk's Office should be informed in writing of any errors and any proposed additions or corrections within 7 days of service of the docketing statement, with copies to all other parties. (Amended effective June 8, 1994; amended effective September 28, 1994; amended effective December 1, 1995; amended effective March 4, 1998.)

**Rule 5. Interlocutory orders.**

The Court of Appeals will initially enter a petition for permission to appeal upon the miscellaneous docket; a docket fee shall not be required unless the petition is granted. A Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statement must be filed with the petition and answer. See FRAP 26.1, Local Rule 26.1, and Form A. Upon granting the petition, the Court of Appeals will notify the district court by copy of the order and transfer the case to the regular docket. (Amended effective December 1, 1995.)

**Rule 5.1. Appeals by permission (Deleted December 1, 1998).**

**Rule 8. Stay or injunction pending appeal.**

Filing a notice of appeal does not automatically stay the operation of the judgment, order or decision for which review is sought. If an application to the district court for temporary relief pending appeal is not practicable, counsel must make a specific showing of the reasons the application was not made to the district court in the first instance. Any motion to the Court of Appeals should include copies of all previous applications for relief and their outcome. A Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statement must accompany the motion and any response unless the parties have previously filed disclosure statements with the Court in the case. See FRAP 26.1, Local Rule 26.1, and Form A. If any party deems that parts of the record or other materials are essential to a fair presentation of the issues regarding a motion, copies of these papers must be attached to each copy of the motion. Filing and assignment of emergency motions for stay or injunction pending appeal are governed by Local Rule 27(e). An order granting a stay or injunction pending appeal remains in effect until

issuance of the mandate or further order of the Court and may be conditioned upon the filing of a supersedeas bond in the district court. (Amended effective December 1, 1995; amended effective February 1, 2001.)

**Rule 9(a). Release prior to judgment of conviction.**

A criminal defendant may be released in accordance with the conditions set by the district court prior to judgment of conviction. If the district court refuses to release the prisoner, or sets conditions for release that cannot be met, the order is appealable as a matter of right and will be given prompt consideration by the Court of Appeals. Counsel should submit memoranda in support of their position on appeal and, in cases involving corporate defendants, Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statements required by FRAP 26.1, Local Rule 26.1 and Form A. The appeal is usually decided without oral argument upon the materials presented by the parties. A motion for release pending determination of the appeal may be filed and will be assigned as provided in Local Rule 27(e). (Amended effective December 1, 1995; amended effective February 1, 2001.)

**Rule 9(b). Release after conviction and notice of appeal.**

After the district court has ruled on a motion for bail or reduction of bail pending appeal, the appellant may renew the motion for release, or for a modification of the conditions of release, before the Court of Appeals without noting an additional appeal. A copy of the district court statement of reasons should accompany the motion. The motion will be submitted to a three-judge panel for decision. (Amended effective December 1, 1995.)

**Rule 9(c). Recalcitrant witnesses.**

When an appeal arises from the incarceration of a witness who refuses to testify or produce evidence in any court or grand jury proceeding, the Court of Appeals is required by statute, 28 U.S.C. § 1826, to decide the appeal within 30 days of the filing of the notice of appeal. Therefore, counsel should immediately contact the Clerk's office regarding all such witness contempt matters so that the appeal may be expedited for resolution within the statutory guidelines. (Amended effective December 1, 1995.)

**Rule 10(a). Retention of the record on appeal in the district court.**

In cases in which all parties are represented by counsel on appeal, the district court clerk will transmit a certificate to the Clerk of the Court of Appeals as soon as the record on appeal is complete. The certificate will state that the record is complete and available to the Court of Appeals upon request. Receipt of the district court clerk's certificate will have the same effect as the receipt of the record on appeal. The district court will then retain the record on appeal until and unless a judge of this Court asks the Clerk of this Court to obtain it. Upon receipt of a request from the Clerk of the Court of Appeals, the clerk of the district court will assemble and transmit the record on appeal within 24 hours. (Amended effective December 1, 1995.)

**Rule 10(b). Records on appeal.**

The preparation and transmittal of the record on appeal is the obligation of the clerk of the lower court, board or agency, and any questions concerning form or content should be addressed to the trial forum in the first instance. A record on appeal consists of a specific number of volumes of pleadings,

transcripts, and exhibits. Parties should check with the clerk of the lower court, board or agency to determine whether everything relevant to the issues on appeal will be included initially in the record on appeal in order to obviate motions to supplement the record. The record is transmitted to the appellate court as soon as it is complete, except as provided in Local Rule 10(a). Local Rule 10(a) does not apply to records in cases in which one or more parties are proceeding without counsel on appeal. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 10(c). Transcripts.**

(1) *Responsibilities and designation.* The appellant has the duty of ordering transcript of all parts of the proceedings material to the issues to be raised on appeal whether favorable or unfavorable to appellant's position. Transcript Order forms are provided to appellant by the clerk of the district court at the time the notice of appeal is filed. Appellant should complete the form and distribute the appropriate parts of the form to the clerk of the Court of Appeals, the court reporter, the clerk of the district court, and the appellee.

Before the transcript order is mailed, appellant must make appropriate financial arrangements with the court reporter for either immediate payment in full or in other form acceptable to the court reporter, payment pursuant to the Criminal Justice Act, or at government expense pursuant to 28 U.S.C. § 753(f).

In cross-appeals each party must order those parts of the transcript pertinent to the issues of such appeals. The parties are encouraged to agree upon those parts of the transcript jointly needed and to apportion the cost, with additional portions being ordered and paid for by the party considering them essential to that party's appeal.

If the entire transcript of proceedings is not to be prepared, the appellant's docketing statement filed pursuant to Local Rule 3(b) may constitute the statement of issues required by FRAP 10(b)(3)(A).

(2) *Monitoring and receipt by clerk.* Failure to order timely a transcript, failure to make satisfactory financial arrangements with the court reporter, or failure to specify in adequate detail those proceedings to be transcribed will subject the appeal to dismissal by the clerk for want of prosecution pursuant to Local Rule 45. The Clerk's Office is charged with monitoring the status of transcripts pending with court reporters.

(3) *Statement in lieu of transcript.* The parties may prepare and sign a statement of the case in lieu of the transcript or the entire record on appeal. The use of a statement in lieu of a transcript of a hearing substantially accelerates the appellate process. The statement should contain a description of the essential facts averred and proved or sought to be proved and a summary of pertinent testimony.

(4) *Guidelines for preparation of appellate transcripts in the fourth circuit.* An appendix to these rules contains the guidelines adopted by the Fourth Circuit Judicial Council to define the obligations of appellants, appellees, clerks of the district court, court reporters and the Clerk of the Court of Appeals in the ordering, preparation, and filing of transcripts completed pursuant to these rules. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 10(d). Sealed records.**

The Court of Appeals expects that motions to seal all or any part of the record will be presented to, and resolved by, the lower court or agency — in accordance with applicable law — during the course of trial, hearing, or other proceedings below. In the rare event that a change of circumstances occurs during the

pendency of an appeal that warrants reconsideration of a sealing issue decided below, or initial consideration of the need to seal all or part of the record on appeal or additional material filed for the first time on appeal, an appropriate motion may be filed with the Clerk of the Court of Appeals.

The motion to seal must identify with specificity the documents or portions thereof for which sealing is requested and state the reasons why sealing is necessary and why less drastic alternatives to sealing will not afford adequate protection. Any sealed material necessary to consideration of the motion shall be placed in a separate, sealed attachment, rather than in the motion itself. The motion to seal will be placed on the public docket at least five calendar days prior to determination by the Court. Material subject to a motion to seal will be held under seal pending the Court's disposition of the motion. The clerk will refer the motion to seal and any response thereto to a panel of the Court.

Material contained in the record subject to a protective order remains subject to that order on appeal unless modified or amended by the Court of Appeals. Material subject to a protective order shall be available to counsel for the parties unless prohibited by that order.

At the time of filing a brief, appendix, or other document that would disclose material sealed by another court or an agency, counsel must file a separate "certificate of confidentiality," stating that the document discloses sealed information and setting forth the terms of the protective order governing the information. Counsel shall prominently note on any sealed document that it is filed "Under Seal" and shall submit the required number of copies in an envelope marked "Sealed." Counsel must place sealed material in a sealed supplement to the brief, appendix, or other document, thereby avoiding the need to seal the entire brief, appendix, or document. The Court requires only four copies of the sealed portions of briefs and appendices.

Upon filing of a certification that a document filed on appeal would disclose material sealed by another court or an agency, the Court will enter an order sealing the document. (Amended effective December 1, 1995; amended effective December 1, 2000.)

**Rule 10(e). Supplemental records, modification or correction.**

Disputes concerning the accuracy or composition of the record on appeal should be resolved in the trial court in the first instance, although the Court of Appeals has the power, either on motion or of its own accord, to require that the record be corrected or supplemented. It is unnecessary to seek permission of the Court of Appeals to supplement the record and the record may be supplemented by the parties by stipulation or by order of the district court at any time during the appellate process. (Amended effective December 1, 1995.)

**Rule 11(a). Transcript acknowledgements.**

Upon receipt of an order for a transcript, the clerk of the Court of Appeals will prepare for the reporter a transcript order acknowledgement which will set forth the date the transcript order was received in the Clerk's Office and the transcript due date, computed from the order receipt date in accordance with the time limits set forth in the applicable district court reporter management plan. If the transcript order is correct in all respects, except for an order date error in the reporter's favor, no response will be required from the reporter. If the reporter believes that there is a problem with the transcript order, he or she must complete a copy of the acknowledgement form noting the problem and return it to the Court of Appeals within 7 days of receipt of the form by the reporter, or within such further time as the Court of Appeals allows. The time for completion of the transcript will automatically cease to run until the problem has been remedied. The clerk of the Court of Appeals will send a new

transcript order acknowledgement setting forth new transcript order and filing dates taking into account the delay caused by resolving the problem with the original transcript order. (Amended effective December 1, 1995.)

**Rule 11(b). Time limits for filing transcripts.**

Although FRAP 11(b)(1)(B) requires that transcripts be completed within 30 days from the purchase order date, this court routinely uses instead the time limits set forth in the district court reporter management plans. All of the plans establish a 60-day period for preparation of transcripts, with the following exceptions:

(1) Special provisions adopted by the Fourth Circuit Judicial Council for appeals by incarcerated criminal defendants.

(a) transcripts of 1000 pages or less shall be filed within 30 days of transcript order and completion of satisfactory financial arrangements.

(b) transcripts of more than 1000 pages shall be filed within the time ordered by the clerk of the court of appeals.

(2) Special circumstances, such as

(a) bail appeals,

(b) death penalty cases, or

(c) other expedited procedures in which the transcript shall be filed within the time ordered by the Clerk of the Court of Appeals. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 11(c). Exhibits.**

Counsel should be aware that certain portions of the record will not be transmitted to the Court of Appeals as part of the record. If bulky documents and physical exhibits are required by a party for oral argument, the party must make advance arrangements with the clerks of both courts for their transportation and receipt. Such arrangements are best made after the completion of the briefing schedule on appeal and receipt of notice of oral argument. (Amended effective December 1, 1995.)

**Rule 11(d). Access of counsel to original record.**

Counsel desiring to use the record on appeal in preparing their case should make arrangements with the clerk of the district court for access to the record. Under Local Rule 10(a), records in cases in which all parties are represented by counsel are retained by the district court clerk during appeal unless a judge of the Court of Appeals requests that they be obtained. If the record is transmitted to the Court of Appeals, the record may be withdrawn upon proper application and returned to the trial court or the nearest district court clerk's office for counsel's review. Law professors representing indigents by Court appointment may request that the record be sent to the law school for their review. (Amended effective December 1, 1995.)

**Rule 12(a). Appeals by aggrieved non-parties in the lower court.**

If the appellant was not a party to the lower court proceeding, the appeal shall be styled "In re _____, Appellant," and the title of the action in the district court shall also be given. (Amended effective December 1, 1995.)

**Rule 12(b). Joint appeals/cross-appeals and consolidations.**

For the purpose of identifying consolidated appeals and cross-appeals, the earliest docketed appeal will be designated the lead case and identified by an

"L" following its docket number. The parties should designate lead counsel for each side and communicate lead counsel's identity in writing to the clerk within 10 days of the consolidation order. Although most consolidations will be on the Court's own motion, a party is not precluded from filing a request. (Amended effective December 1, 1995.)

**Rule 12(c). Expedition of appeals.**

The Court on its own motion or on motion of the parties may expedite an appeal for briefing and oral argument. Any motion to expedite should state clearly the reasons supporting expedition, the ability of the parties to present the appeal on the existing record, and the need for oral argument. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 12(d). Abeyance.**

In the interest of docket control the Court may, either on its own motion or upon request, place a case in abeyance pending disposition of matters before this Court or other courts which may affect the ultimate resolution of an appeal. During the period of time a case is held in abeyance the appeal remains on the docket but nothing is done to advance the case to maturity and resolution. If a case is held in abeyance for cases other than a Fourth Circuit case, the parties will be required to make periodic status reports. (Amended effective December 1, 1995.)

**Rule 12(e). Intervention.**

A party who appeared as an intervenor in a lower court proceeding shall be considered a party to the appeal upon filing a notice of appearance. Otherwise, a motion for leave to intervene must be filed with the Court of Appeals. Any notice of appearance or motion to intervene should indicate the side upon which the movant proposes to intervene. The provisions of FRAP 15(d) govern intervention in appeals from administrative agencies. Intervenors are required to join in the brief for the side which they support unless leave to file a separate brief is granted by the Court. (Amended effective December 1, 1995.)

**Rule 15(a). Docketing fee.**

Upon filing a petition for review of an agency order, petitioner shall pay the prescribed docketing fee of $100, payable to the Clerk, U.S. Court of Appeals, or submit a properly executed application for leave to proceed in forma pauperis. (Amended effective December 1, 1995; further amended December 4, 1996.)

**Rule 15(b). Petitions for Review.**

Whenever filing a petition for review or an application or cross-application for enforcement, the party shall attach to the petition, application or cross-application a copy of the agency order for which review or enforcement is sought. The petition, application or cross-application shall also be accompanied by a list of respondents specifically identifying the respondents' names and the addresses where respondents may be served with the copies of the petition, application or cross-application. (Added December 4, 1996.)

**Rule 18. Procedures.**

This Court's local rules accompanying FRAP 8 and 27 apply also to applications for stays under FRAP 18. (Added effective December 1, 1995.)

**Rule 21(a). Case captions for extraordinary writs.**

A petition for a writ of mandamus or writ of prohibition shall not bear the name of the district judge, but shall be entitled simply "In re _____, Petitioner." To the extent that relief is requested of a particular judge, unless otherwise ordered, the judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge. (Amended effective December 1, 1995.)

**Rule 21(b). Petitions for mandamus or prohibition.**

Strict compliance with the requirements of FRAP 21 is required of all petitioners, even pro se litigants. Petitioner must pay the prescribed docket fee of $100, payable to the Clerk, U.S. Court of Appeals; submit the forms required by Local Rule 21(c)(1) for cases subject to that Local Rule; or submit a properly executed application for leave to proceed in forma pauperis. The parties are required to submit Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statements with the petition and answer. See FRAP 26.1, Local Rule 26.1, and Form A.

After docketing, the clerk shall submit the application to a three-judge panel. A motion for emergency relief pending determination of the petition may be filed and will be assigned in accordance with Local Rule 27(e).

If the Court believes the writ should not be granted, it will deny the petition without requesting an answer. Otherwise the Court will direct the clerk to obtain an answer. After an answer has been filed, the Court ordinarily will decide the merits of the petition on the materials submitted without oral argument. Occasionally, however, briefs may be requested and the matter set for oral argument. (Amended effective December 1, 1995; further amended September 25, 1996; amended February 1, 2001.)

**Rule 21(c). Fees and Costs for Prisoner Petitions for Mandamus, Prohibition, or other Extraordinary Relief.**

(1) *Proceedings arising out of civil matters.* A prisoner filing a petition for writ of mandamus, prohibition, or other extraordinary relief in a matter arising out of a civil case must pay the full $100 docket fee. A prisoner who is unable to prepay this fee may apply to pay the fee in installments by filing with the Court of Appeals (1) an application to proceed without prepayment of fees; (2) a certified copy of the prisoner's trust fund account statement for the six-month period immediately preceding the filing of the notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined; and (3) a form consenting to the collection of fees from the prisoner's trust account.

The Court of Appeals will assess an initial partial filing fee of 20% of the greater of:

(a) the average monthly deposits to the prisoner's account for the six-month period immediately preceding the filing of the petition; or

(b) the average monthly balance in the prisoner's account for the six-month period immediately preceding the filing of the petition.

The Court will direct the agency having custody of the prisoner to collect this initial partial fee from the prisoner's trust account, and to collect the remainder of the $100 fee, as well as any other fees, costs, or sanctions imposed by the Court, in monthly installments of 20% of the preceding month's deposits credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the Clerk, U.S. Court of Appeals, each time the amount in the account exceeds $10 until all fees, costs, and sanctions are paid for the petition.

If a prisoner proceeding under this rule fails to file the forms or make the payments required by the Court, the appeal will be dismissed pursuant to Local Rule 45.

(2) *Effect of prior actions and appeals on proceedings arising out of civil matters.* A prisoner who has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which relief could be granted, may not proceed in a matter arising out of a civil case without prepayment of fees unless the prisoner is under imminent danger of serious physical injury.

(3) *Proceedings arising out of criminal matters.* A prisoner who is unable to prepay the full $100 docket fee for a petition for writ of mandamus, prohibition, or other extraordinary relief arising out of a criminal case may apply to proceed without the prepayment of fees by filing an application for leave to proceed in forma pauperis. (Added effective September 25, 1996.)

**Rule 22(a). Certificates of appealability.**

All applications for certificates of appealability shall either be in the form of a motion under FRAP 27(a) or be accompanied by informal briefs pursuant to Local Rule 34(b), regardless of whether the petitioner is represented by counsel. An application for a certificate of appealability may be referred to a panel of three judges. If all the judges on the panel conclude that the certificate should not issue, the certificate will be denied; but if any judge of such panel is of the opinion that the applicant has made a substantial showing of the denial of a constitutional right, the certificate will issue. The certificate shall indicate which specific issue or issues satisfy the required showing. If the Court grants a certificate of appealability, it may thereafter affirm, reverse or remand without further briefing or direct full briefing and oral argument. (Amended effective December 1, 1995; further amended effective June 5, 1996; amended effective December 1, 1998.)

**Rule 22(b). Death penalty cases and motions for stay of execution.**

(1) *Statement certifying existence of sentence of death.* Whenever a petition for writ of habeas corpus or motion to vacate a federal sentence in which a sentence of death is involved is filed in the district court or the Court of Appeals, the petitioner shall file with the petition a statement certifying the existence of a sentence of death and the emergency nature of the proceedings and listing any proposed date of execution, any previous cases filed by petition in federal court and any cases filed by petitioner pending in any other court. The clerk of the district court shall immediately forward to the Court of Appeals a copy of any such statement filed, and shall immediately notify by telephone the Court of Appeals upon issuance of a final order in that case. If a notice of appeal is filed, the clerk of the district court shall transmit the available record forthwith. The clerk of the Court of Appeals will maintain a special docket for such cases and these cases shall be presented to the Court of Appeals on an expedited basis.

(2) *Lodging of documents.* In cases in which an execution date has been set, counsel shall lodge with the clerk of the Court of Appeals all district court documents as they are filed and any pertinent state court materials. If an execution date is imminent, counsel may also lodge proposed appellate papers in anticipation of having to seek emergency appellate relief.

(3) *Motion for stay of execution.* Any motion for stay of execution shall be considered initially in conjunction with any pending application for a certificate of appealability. Should a party file a motion to stay execution or a motion

to vacate an order granting a stay of execution, the following documents shall accompany such motion:

(a) The habeas petition or motion to vacate filed in the district court;

(b) Each brief or memorandum of authorities filed by either party in the district court;

(c) Any available transcript of proceedings before the district court;

(d) The memorandum opinion giving the reasons advanced by the district court for denying relief;

(e) The district court judgment denying relief;

(f) The application to the district court for stay;

(g) Any certificate of appealability or order denying a certificate of appealability;

(h) The district court order granting or denying a stay and a statement of reasons for its action; and

(i) A copy of the docket entries of the district court. (Amended effective December 1, 1995; further amended June 5, 1996.)

**Rule 22(c). Petitions for rehearing in death penalty cases.**

(1) *All death penalty cases.* Once the Court's mandate has issued in a death penalty case, any petition for panel or en banc rehearing should be accompanied by a motion to recall the mandate and motion to stay the execution.

Counsel should be aware that the process for distributing materials by the Clerk's Office ordinarily requires a minimum of three days for all members of the Court to receive a petition. Generally, the Court will not enter a stay of execution solely to allow for additional time for counsel to prepare, or for the Court to consider, a petition for rehearing. Consequently, counsel should take all possible steps to assure that any such petition is filed sufficiently in advance of the scheduled execution date to allow it to be considered by the Court. Counsel should notify the Clerk's Office promptly of their intention to file a petition for rehearing so that arrangements can be made in advance for the most expeditious consideration of the matter by the Court.

(2) *Emergency petitions.* In extraordinary circumstances, when the petition cannot be filed earlier than three days before a scheduled execution date, the Clerk's Office will endeavor to inform the members of the panel that issued the Court's decision of the filing of a petition for panel or en banc rehearing within a shorter period of time. At the direction of a panel member, similar efforts will be made to inform the full Court of the matter. The Clerk's Office will give notice to counsel by telephone of the Court's decision on such petitions. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 22(d). Motions for authorization.**

Any individual seeking to file in the district court a second or successive application for relief pursuant to 28 U.S.C. § 2254 and § 2255 shall first file a motion with the Court of Appeals for authorization as required by 28 U.S.C. § 2244, on the form provided by the clerk for such motions. The motion shall be entitled "In re _____, Movant." The motion must be accompanied by copies of the § 2254 or § 2255 application which movant seeks authorization to file in the district court, as well as all prior § 2254 or § 2255 applications challenging the same conviction and sentence, all court opinions and orders disposing of those applications, and all magistrate judge's reports and recommendations issued on those applications. The movant shall serve a copy of the motion with attachments on the respondent named in the proposed application and shall file an original and three copies of the motion with attachments in the Court of Appeals. Failure to provide the requisite information and attachments may result in denial of the motion for authorization.

If the Court requires a response to the motion, it will direct that the response be received by the clerk for filing within no more than seven days. The Court will enter an order granting or denying authorization within 30 days of receipt of the motion by the clerk for filing, and the clerk will certify a copy of the order to the district court. If authorization is granted, a copy of the application will be attached to the certified order for filing in the district court. No motion or request for reconsideration, petition for rehearing, or any other paper seeking review of the granting or denial of authorization will be allowed. (Added effective June 5, 1996.)

**Rule 24. Prisoner appeals.**

(a) *Payment of Fees and Costs Required.* A prisoner appealing a judgment in a civil action must pay in full the $105 fee required for commencement of the appeal. A prisoner who is unable to prepay this fee may apply to pay the fee in installments by filing with the Court of Appeals (1) an application to proceed without prepayment of fees; (2) a certified copy of the prisoner's trust fund account statement or institutional equivalent for the six-month period immediately preceding the filing of the notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined; and (3) a form consenting to the collection of fees from the prisoner's trust account.

The Court of Appeals will assess an initial partial filing fee of 20% of the greater of:

(1) the average monthly deposits to the prisoner's account for the six-month period immediately preceding the filing of the notice of appeal; or

(2) the average monthly balance in the prisoner's account for the six-month period immediately preceding the filing of the notice of appeal.

Based upon the prisoner's consent, the Court will direct the agency having custody of the prisoner to collect this initial partial fee from the prisoner's trust account, and to collect the remainder of the $105 filing fee, as well as any other fees costs, or sanctions imposed by the Court of Appeals, in monthly installments of 20% of the preceding month's deposits credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the district court each time the amount in the account exceeds $10 until all fees, costs, and sanctions are paid for the appeal.

If a prisoner proceeding under this rule fails to file the forms or make the payments required by the Court, the appeal will be dismissed pursuant to Local Rule 45.

(b) *Effect of Prior Actions and Appeals.* A prisoner who has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which relief could be granted, may not proceed on appeal without prepayment of fees unless the prisoner is under imminent danger of serious physical injury. (Added effective September 25, 1996.)

**Rule 25(a). Paper size, number of copies, attachments.**

(1) *Paper size.* The Judicial Conference of the United States has adopted 8½ x 11 inch lettersize paper as the standard for use throughout the federal judiciary. All documents and other papers submitted to this Court must conform to this standard.

(2) *Number of copies, attachments.* Unless otherwise provided by rule, all papers except briefs and appendices submitted to the Fourth Circuit for filing and for consideration by the Court must be in the form of an original paper and three copies. Any attachments to motions which are necessary to an under-

standing of the matters set forth in the motion must be submitted with three copies and conform to the standard paper size unless advance permission is sought to submit oversized materials. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 25(b). Filing papers, service, certificate of service.**

(1) *Filing papers.* Papers except briefs and appendices are not timely filed unless actually received by the Clerk's Office within the time fixed for filing. Papers are deemed filed upon receipt by the Clerk's Office and papers may be presented either in person or by mail.

Papers may be transmitted for filing by use of telephonic facsimile transmission equipment. In such cases, the original document signed by counsel need not be filed. Although the Clerk's Office has a fax machine, material may be transmitted directly to the Clerk's Office only when an emergency situation exists and advance permission has been obtained to use the Clerk's Office machine. Several printing services in Richmond will accept papers by fax for filing with the Court. Their telephone numbers may be obtained from the Clerk's Office.

(2) *Service.* Service on a party represented by counsel must be on all counsel of record.

(3) *Certificate of service.* All papers must be accompanied by a valid certificate of service. The certificate of service of a brief should be bound with the brief as the last, unnumbered page. A certificate of service can be prepared in advance of actual mailing or hand delivery of the paper served. If service is not actually accomplished in the manner and on the date stated in the certificate, an amended certificate of service is required. (Amended effective December 1, 1995; amended effective December 1, 1998.)

NOTE

Local Rule 25(a) has been amended to delete the reference to typeset briefs because FRAP 32(a) no longer provides for typeset briefs.

The first sentence of the last paragraph of Rule 25(b)(1) has been moved to Local Rule 27(d) because it refers to the filing of responses to motions. The final sentence of Local Rule 25(b)(1) has been deleted because it duplicates the information in the first sentence of Local Rule 27(d)(1).

**Rule 26. State holidays and inclement weather.**

Whenever a party in computing a filing or service date relies upon an extension of time due to the inaccessibility of the Clerk's Office because of inclement weather or other conditions, or due to a state holiday, counsel must certify such reliance in the certificate of service or by separate written declaration. (Amended effective December 1, 1995.)

**Rule 26.1. Disclosure of corporate affiliations and other entities with a direct financial interest in litigation.**

(a) All parties to a civil or bankruptcy case, and all corporate defendants in a criminal case, whether or not they are covered by the terms of FRAP 26.1, shall file a corporate affiliate/financial interest disclosure statement. This rule does not apply to the United States, to state and local governments in cases in which the opposing party is proceeding without counsel, or to parties proceeding in forma pauperis.

(b) The statement shall set forth the information required by FRAP 26.1 and the following:

(1) A trade association shall identify in the disclosure statement all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock.

(2) All parties shall identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

(3) Whenever required by FRAP 26.1 or this rule to disclose information about a corporation that has issued shares to the public, a party shall also disclose information about similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded.

(c) The disclosure statement shall be on a form provided by the Clerk. A negative statement is required if a party has no disclosures to make.

(d) The disclosure statement shall be filed within 10 days of receipt of the notice of docketing and the disclosure form, unless earlier pleadings are submitted for the Court's consideration, in which case the disclosure statement shall be filed at that time. The parties are required to amend their disclosure statements when necessary to maintain their current accuracy. (Amended effective December 1, 1998.)

NOTE

Local Rule 26.1(b)(1) has been changed to conform the disclosure requirements for trade associations to the general amendments in FRAP 26.1.

## Rule 27(a). Content of motions, notification and consent.

In cases where all parties are represented by counsel, all motions shall contain a statement by counsel that counsel for the other parties to the appeal have been informed of the intended filing of the motion. The statement shall indicate whether the other parties consent to the granting of the motion, or intend to file responses in opposition. (Amended effective December 1, 1998.)

NOTE

Former Local Rule 27(a) has been deleted as unnecessary because the provision has been incorporated into FRAP 27(e).

## Rule 27(b). Procedural orders acted on by clerk; reconsideration thereof.

Motions and applications for orders if consented to, or if unopposed after due notice to all interested parties has been given or waived, or if the orders sought are procedural or relate to the preparation or printing of the appendix and briefs on appeal, or are such as are ordinarily granted as of course and without notice or hearing, need not be submitted to the Court, or to a judge thereof. Such orders may be entered for the Court by the clerk, who shall forthwith send copies thereof to the parties.

Any party adversely affected by an order entered by the clerk pursuant to this rule shall be entitled to request reconsideration of the clerk's action by the Court, if within 14 days after entry of the order, such party shall file with the clerk and serve upon the parties to the proceedings a request, in writing, for reconsideration, vacation or modification of the order, stating the grounds for such request. The clerk shall thereupon submit to the Court the request for reconsideration, vacation or modification, the motion or application upon which the order was entered, and any responses by other parties which may

have been filed in support or opposition to the request. The Court may thereafter take such action as may be proper. (Amended effective December 1, 1998.)

NOTE

Local Rule 27(c) has been redesignated 27(b), and the title has been changed from "Non-Controversial Orders Granted by the Clerk" to "Procedural Orders Acted on by the Clerk." The change better characterizes the clerk's delegation of authority.

**Rule 27(c). Form of papers; Number of copies.**

All motions should be filed with the clerk and comply with FRAP 27(d). Three copies must be filed with the original. A Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation statement must accompany the motion unless previously filed with the Court. See FRAP 26.1, Local Rule 26.1, and Form A. Counsel should always review carefully the specific rule which authorizes relief to ascertain the requirements and any motion should contain or be accompanied by any supporting documents required by a specific rule. If a motion is supported by attachments, these materials should also be served and filed with each copy of the motion. The parties should not make requests for procedural and substantive relief in a single motion, but should make each request in a separate motion. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 27(d). Responses; replies.**

(1) *Responses.* Although any party may file a response to a motion, a party need not respond to a motion until requested to do so by the Court. The three-day mailing period permitted by FRAP 26(c) does not apply to responses requested by the Court or clerk by letter wherein a response date is set forth in the request. A Disclosure of Corporate Affiliations and Other Financial Entities with a Direct Financial Interest in Litigation statement must accompany any response to a motion unless previously filed with the Court. See FRAP 26.1, Local Rule 26.1, and Form A. If the Court acts upon a motion without a response, any party adversely affected by such action may by application to the Court request reconsideration, vacation or modification of the Court's action.

(2) *Replies.* The Court will not ordinarily await the filing of a reply before reviewing a motion and response. If movant intends to file a reply and does not want the Court to actively consider the motion and response until a reply is filed, movant shall notify the clerk in writing of the intended filing of the reply and request that this Court not act on the motion until the reply is received. (Amended effective December 1, 1995; amended effective December 1, 1998.)

NOTE

Local Rule 27(e) has been redesignated Local Rule 27(d) and the seven-day period for filing a response has been deleted from the local rule because FRAP 27(a)(3)(A) now affords ten days for a response. Reference in the local rule to the absence of a standard time period for filing a reply is deleted because FRAP 27(a)(4) now provides a seven-day reply period. The local rule retains, however, the statement that the court will ordinarily not await the filing of a reply before reviewing the motion or response. Replies are not routinely filed and waiting an additional seven days before actively considering a matter simply delays the disposition of motions by the court. The local rule is amended to provide that when a movant intends to file a reply, the movant shall inform the clerk that a reply is forthcoming and specifically request that the motion not be considered until a reply is received. Subsection 3 of the local rule has been deleted because the statement is now contained in FRAP 27(a)(2)(C)(iii).

**Rule 27(e). Panel assignments and emergency motions.**

There is a strong presumption that the Court will act, in all but routine procedural matters, through panels or en banc, as prescribed by 28 U.S.C. § 46(c). Ordinarily, counsel shall present all motions to the clerk for presentation to the Court. Application to a single judge should be made only in exceptional circumstances where action by a panel would be impractical due to the requirements of time. In such exceptional circumstances, counsel shall attempt to notify the clerk's office that application is being made directly to a single judge, and copies of all papers presented to the judge shall be presented to the clerk as soon as practical for filing.

When a single judge determines to act, the matter will be referred to a panel as early in the process as is practical. As soon as a matter has been assigned to a panel, any action in the matter will be decided by the panel.

The selection of motion panels is similar to the process set forth in I.O.P. 34.1 for hearing panels. In a case where a request for single judge action is made to the clerk and action by a panel is not feasible, the clerk will assign the matter to a judge selected at random. In cases where a single judge, selected *at random*, has found it necessary to act, the clerk will fill out the panel with the at-random selection of two additional judges. In cases in which a single judge, selected *by counsel*, has found it necessary to act, the clerk will assign the matter to a three-judge panel selected at random, which may or may not include the single judge who acted in the case. (Amended effective December 1, 1995; amended effective December 1, 1998; amended effective February 1, 2001.)

**Rule 27(f). Motions for summary disposition.**

Motions for summary affirmance, reversal or dismissal are reserved for extraordinary cases only and should not be filed routinely. Counsel contemplating filing a motion to dispose summarily of an appeal should carefully consider whether the issues raised on appeal are in fact manifestly unsubstantial and appropriate for disposition by motion. Motions for summary affirmance or reversal are seldom granted.

Motions for summary disposition should be made only after briefs are filed. If such motions are submitted before the completion of the briefing schedule, the Court will defer action on the motion until the case is mature for full consideration.

Motions to dismiss based upon the ground that the appeal is not within the jurisdiction of the Court or for other procedural grounds may be filed at any time. The court may also sua sponte summarily dispose of any appeal at any time. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 28(a). Consolidated cases and briefs.**

Related appeals or petitions for review will be consolidated in the Office of the Clerk, with notice to all parties, at the time a briefing schedule is established. One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by Court order, unless leave to the contrary is granted upon good cause shown. In consolidated cases lead counsel shall be selected by the attorneys on each side and that person's identity made known in writing to the clerk within 7 days of the date of the order of consolidation. In the absence of an agreement by counsel, the clerk shall designate lead counsel. The individual so designated shall be responsible for the coordination, preparation and filing of the briefs and appendix.

### Rule 28(b). Attachments to briefs.

Each party shall include, in the body of the brief or in an addendum thereto, the verbatim text of the relevant portion of any constitutional provision, treaty, statute, ordinance, rule or regulation cited in the brief, if its construction is sought, there is controversy among the parties concerning its proper application to the case, or it is otherwise pertinent to the substantive issues on appeal. Each party shall also include in the addendum any unpublished opinion cited pursuant to Local Rule 36(c). Should a party wish to supplement the brief with matters other than those enumerated above, the additional material shall be presented to the Court under separate cover, accompanied by a motion for leave to file that specifically identifies the proposed material, indicates whether it is a matter of record, and sets forth good cause for deviating from the general prohibition of attachments to briefs. (Amended effective December 1, 1995; amended effective December 1, 1998.)

NOTE

The last sentence of Local Rule 28(b) has been deleted because the clerk's current practice is to hold a non-conforming brief and require its correction rather than return the brief for resubmission in proper form.

### Rule 28(c). Responsibilities of counsel listed on a brief.

The Court will interpret the listing of an attorney on a brief as a representation that he or she is capable of arguing the appeal if lead counsel is unavailable. (Amended effective December 1, 1995.)

### Rule 28(d). Joint appeals and consolidations.

Where multiple parties are directed to file a consolidated brief, counsel on the same side of the case should confer and agree upon a means for assuring that the positions of all parties are addressed within the length limits allowed and that each counsel will have an opportunity to review and approve the consolidated brief before it is filed.

Motions to file separate briefs are not favored by the Court and are granted only upon a particularized showing of good cause, such as, but not limited to, cases in which the interest of the parties are adverse. Generally unacceptable grounds for requests to file separate briefs include representations that the issues presented require a brief in excess of the length limitations established by FRAP 32(a)(7) (appropriately addressed by a motion to exceed length limit), that counsel cannot coordinate their efforts due to different geographical locations, or that the participation of separate counsel in the proceedings below entitles each party to separate briefs on appeal.

If a motion to file separate briefs is granted, the length of such briefs may be limited by the Court. The parties shall continue to share the time allowed for oral argument. (Amended effective December 1, 1995; amended effective December 1, 1998.)

NOTE

Former Local Rule 28(d) has been moved to Local Rule 32(b) and amended to conform to FRAP 32(a)(7).

**Rule 28(e). Citation of additional authorities.**

Counsel may, without leave of Court, present a letter drawing the Court's attention to supplemental authorities under Rule 28(j). An original and three copies of the letter should be filed with the clerk and a copy of the letter should be mailed to all counsel of record. No argument should be made in the letter. The Court may grant leave for or direct the filing of additional memoranda, which may include additional argument, before, during or after oral argument. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 28(f). Statement of facts.**

Every opening brief filed by appellants in this Court shall include a separate section, the title of which is STATEMENT OF FACTS. In this section the attorneys will prepare a narrative statement of all of the facts necessary for the Court to reach the conclusion which the brief desires. The said STATEMENT OF FACTS will include exhibit, record, transcript, or appendix references showing the source of the facts stated. An appellee's brief shall also include a STATEMENT OF FACTS so prepared unless appellee is satisfied with appellant's statement of facts. (Added effective June 5, 1996; amended effective December 4, 1996; amended effective December 1, 1998.)

NOTE

Local Rule 28(g), which has been redesignated 28(f), has been amended to conform to FRAP 28(a)(7) (listing the statement of facts as a separate section) and FRAP 28(b) (providing that appellee is not required to include a statement of facts unless appellee is dissatisfied with appellant's statement).

**Rule 29. Motion for leave to file brief as amicus curiae (Deleted December 1, 1998).**

NOTE

Local Rule 29 has been deleted because the federal rule now details the filing requirements for amicus curiae briefs.

**Rule 30(a). Attorney sanctions for unnecessary appendix designations.**

The Court, on its own motion or on motion of any party, may impose sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix. Attorneys shall receive reasonable notice and opportunity to respond before the imposition of any sanction. A party's motion for the imposition of sanctions will be entertained only if filed within 14 days after entry of judgment and only if counsel for the moving party previously objected to the designation of the allegedly unnecessary material in writing to opposing counsel within 10 days of the material's designation. (Amended effective December 1, 1995.)

**Rule 30(b). Appendix contents; Number of copies.**

Although there is no limit on the length of the appendix except as provided in Local Rule 32(a), it is unnecessary to include everything in the appendix. The appendix should contain only those parts of the record vital to the understanding of the basic issues on appeal. The use of a selectively abridged

record allows the judges to refer easily to relevant parts of the record and saves the parties the considerable expense of reproducing the entire record.

In all criminal appeals seeking review of the application of the sentencing guidelines, appellant shall include the sentencing hearing transcript and presentence report in the appendix.

Pursuant to the authority granted by FRAP 30(a)(3), the Court requires that only six copies of the appendix must be filed with appellant's opening brief and a copy served on counsel for each party separately represented. Appointed counsel may file five copies and any party proceeding in forma pauperis who is not represented by Court-appointed counsel may file four copies. If the Court allows a deferred appendix the parties routinely file four page-proof copies of the brief in lieu of the requisite number of copies. After the deferred appendix is filed, the parties must replace their page-proof copies with the requisite number of copies of their final brief, which must contain proper references to the appendix. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 30(c). Responsibility of parties.**

Notwithstanding that FRAP 30 provides that the appellant shall prepare and file the appendix, the Court considers the coordination of preparing the appendix to be the responsibility of both sides. The failure of a side to designate does not absolve the other side from the responsibility.

Except under the most extraordinary circumstances, supplementary appendices will not be accepted. If the appellant omits from the appendix the portions designated by the appellee, the appellant will be required to file a corrected appendix incorporating such material, and to bear the cost regardless of the outcome of the appeal.

If a party files a motion for leave to file a supplemental appendix, the motion must specifically identify the contents of the supplemental appendix, state that the items are matters of record, and set forth good cause why the original appendix should not be returned for insertion of the additional materials. (Amended effective December 1, 1995.)

**Rule 30(d). Dispensing with appendix.**

Motions to proceed on the original record pursuant to FRAP 30(f) are carefully reviewed in the Fourth Circuit and are not usually granted unless the appellant is proceeding in forma pauperis, the record is short, or the appeal is expedited. Even if the motion is granted, counsel must include an abbreviated appendix consisting of:

i. pertinent district court docket entries,
ii. indictment or complaint,
iii. judgment or order being appealed,
iv. notice of appeal,
v. any crucial portions of the transcript of proceedings referred to in appellant's brief,
vi. a copy of the order granting leave to proceed on the original record.

The requisite number of copies of the abbreviated appendix as set forth in Local Rule 30(b) must be filed with the brief, but it may be included as part of the brief rather than being reproduced separately. (Amended effective December 1, 1995.)

**Rule 31(a). Shortened time for service and filing of briefs in criminal cases.**

Pursuant to the authority conferred by FRAP 31(a)(2), the time for serving and filing briefs in criminal appeals is shortened as follows: the appellant shall

serve and file appellant's brief and appendix within thirty-five days after the date on which the briefing order is filed; the appellee shall serve and file appellee's brief within twenty-one days after service of the brief of the appellant; the appellant may serve and file a reply brief within ten days after service of the brief of the appellee. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 31(b). Briefing orders.**

A formal briefing schedule shall be sent to the parties upon receipt of the record, notification that the record is complete pursuant to Local Rule 10(a), or when the Clerk determines that no hearing was held for which a transcript is necessary—whichever occurs first. Thus, the time for designating the contents of the joint appendix and the filing of briefs is controlled by the briefing order and not the receipt of the record as provided in FRAP 31(a)(1). (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 31(c). Filing and service.**

Briefs and appendices are deemed filed on the date of mailing if first class mail or other classes of mail at least as expeditious are used. If a courier service is used, the briefs and appendices are deemed timely filed if the briefs and appendices are given to the courier service on or before the due date to be dispatched to the Clerk's Office for delivery within three calendar days. Filing must be within the time allowed by the briefing order. A brief must be accompanied by a valid certificate of service, which should be bound with the brief as the last, unnumbered page. A certificate of service can be prepared in advance of actual mailing or hand delivery of the paper served. If service is not actually accomplished in the manner and on the date stated in the certificate, an amended certificate of service is required.

Extensions will be granted only when extraordinary circumstances exist. A motion for an extension of time to file a brief must be filed well in advance of the date the brief is due and must set forth the additional time requested and the reasons for the request. The Court discourages these motions and may deny the motion entirely or grant a lesser period of time than the time requested. (Amended effective December 1, 1995; amended effective December 4, 1996.)

**Rule 31(d). Number of copies.**

Each party must file eight copies of the brief with the clerk and serve two copies on counsel for each party separately represented. Appointed counsel may file six copies and serve one copy on counsel for each party separately represented. Any party proceeding in forma pauperis who is not represented by Court-appointed counsel may file four copies, with service of one copy on counsel for each party separately represented. If an en banc hearing or rehearing en banc is scheduled, additional copies of briefs may be requested. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 32(a). Reproduction of briefs and appendices.**

Double-sided copying of briefs is permitted but not preferred. Double-sided copying of appendices is preferred in all cases. If an appendix is prepared by a commercial printer in a court-appointed case, the materials contained in the appendix should be reproduced on both sides of a sheet because reimbursement for copying expenses will be limited to 35 cents per double-sided sheet of the joint appendix. No joint appendix in a court-appointed case should exceed

250 sheets without advance permission from the Court; unless such permission is granted, reimbursement of copy expenses will be limited to 250 sheets. (Amended effective December 1, 1995; amended effective December 1, 1998.)

NOTE

Former Local Rule 32(a) has been deleted in its entirety as superseded by FRAP 32(a)(7).

Former Local Rule 32(b) has been redesignated Local Rule 32(a). Consistent with the FRAP amendments, it deletes reference to typeset briefs. It recasts as a preference the court's former requirement that materials in the joint appendix be reproduced on both sides of a sheet in court-appointed cases. FRAP 32(d) requires the court to accept any document in conformity with the requirements of FRAP but permits the court by local rule or order in a particular case to accept documents that do not meet all the FRAP form requirements. FRAP 32(a)(1) and 32(b) provide that briefs and appendices should be copied on only one side of the paper. Several years ago, the Court adopted a double-sided copying requirement and limited the size of the appendix to control excessive reproduction costs in Criminal Justice Act cases. The provision has proved an effective cost reduction mechanism which should be retained if possible. The amended local rule does this by stating that reimbursement will be limited to $.35 per double-sided sheet if the appendix is reproduced by a commercial printer, and that reimbursement will be limited to 250 sheets (500 pages) unless counsel obtained leave to file a longer appendix.

## Rule 32(b). Length of briefs.

The Fourth Circuit encourages short, concise briefs. Under no circumstances may a brief exceed the limits set forth in FRAP 32(a)(7) without the Court's advance permission.

A motion for permission to submit a longer brief must be made to the Court of Appeals at least 10 days prior to the due date of the brief and must be supported by a statement of reasons. These motions are not favored and will be granted only for exceptional reasons. (Amended effective December 1, 1998.)

NOTE

Local Rule 32(b) contains some of the information previously found in old Local Rule 28(d), but deletes the second sentence of old Local Rule 28(d), which was superseded by limits set forth in FRAP 32(a)(7). The last sentence of former Local Rule 28(d) has also been deleted from Local Rule 32(b) because footnotes and narrow margins can no longer be used to circumvent the size limitations for briefs established by the new rules.

## Rule 32(c). Correction of briefs and appendices.

If briefs, appendices, or other papers are illegible or are not in the form required by the federal rules or by this Court's local rules or standards when filed, counsel will be required to file corrected copies of the document. If the corrected copies are not submitted within the time allowed by the clerk, they must be accompanied by a motion to file out of time. (Added effective December 1, 1995; amended effective December 1, 1998.)

NOTE

Former Local Rule 32(c) has been deleted because FRAP 32(a)(2)(F) requires counsel's phone number.

## Rule 33. Circuit mediation conferences.

All civil and agency cases in which all parties are represented by counsel on appeal will be reviewed by a circuit mediator after the filing of the docketing statements required by Local Rule 3(b). The circuit mediator will determine

whether a mediation conference may assist either the Court or the parties. Counsel for a party may also request a conference if counsel believes it will be of assistance to the Court or the parties. Counsel's participation is required at any scheduled conference. Mediation conferences will generally be conducted by telephone but may be conducted in person in the discretion of a circuit mediator. Mediation conferences may be adjourned from time to time by a circuit mediator. Purposes of the mediation conference include:

(a) Jurisdictional review;

(b) Simplification, clarification, and reduction of issues;

(c) Discussion of settlement; and

(d) Consideration of any other matter relating to the efficient management and disposition of the appeal.

Although the time allowed for filing of briefs is not automatically tolled by proceedings under this local rule, if the parties wish to pursue, or are engaged in, settlement discussions, counsel for any party may move to extend the briefing schedule. The mediator, through the Clerk of the Court, may enter orders which control the course of proceedings and, upon agreement of the parties, dispose of the case.

Statements and comments made during all mediation conferences, and papers or electronic information generated during the process, are not included in Court files except to the extent disclosed by orders entered under this local rule. Information disclosed in the mediation process shall be kept confidential and shall not be disclosed to the judges deciding the appeal or to any other person outside the mediation program participants. Confidentiality is required of all participants in the mediation proceedings. All statements, documents, and discussions in such proceedings shall be kept confidential. The mediator, attorneys, and other participants in the mediation shall not disclose such statements, documents, or discussions without prior approval of the Standing Panel on Attorney Discipline. Any alleged violations of this rule shall be referred to the Court's Standing Panel on Attorney Discipline for a determination pursuant to Local Rule 46(g) of whether imposition of discipline is warranted. All proceedings before the Standing Panel on Attorney Discipline involving confidential information under this procedure shall be confidential. (Adopted and effective June 8, 1994; amended effective December 1, 1995; amended effective March 4, 1998; amended effective December 11, 2001.)

**Editor's note.** — Rule 33 is set out above as it will read effective December 11, 2001, subject to revision in light of any comments received on or before that date. The amendment effective December 11, 2001, deletes "by a circuit mediator, counsel, or parties" following "shall not be disclosed" in the second sentence of the final paragraph, and adds the last five sentences of that paragraph, as set out above.

**Rule 34(a). Oral argument; Pre-argument review and summary disposition of appeals; Statement regarding the need for oral argument.**

In the interest of docket control and to expedite the final disposition of pending cases, the chief judge may designate a panel or panels to review any pending case at any time before argument for disposition under this rule.

In reviewing pending cases before argument, the panel will utilize the minimum standards set forth in FRAP 34(a)(2). If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument is not to be allowed, they may make any appropriate disposition without oral argument including, but not limited to, affirmance or reversal.

Because any case may be decided without oral argument, all major arguments should be fully developed in the briefs. In furtherance of the disposition of pending cases under this rule, parties may include in their briefs at the conclusion of the argument a statement setting forth the reasons why, in their

opinion, oral argument should be heard. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 34(b). Informal briefs.**

Whenever an application for a certificate of appealability from the denial of a writ of habeas corpus or a motion under 28 U.S.C. § 2255 is filed, or whenever any pro se appeal is filed, the clerk shall notify the appellant that appellant shall file, within twenty-one days after receipt of such notice, an informal brief, listing the specific issues and supporting facts and arguments raised on appeal. Appellant's informal brief and any informal brief filed by appellee shall be considered, together with the record and other relevant papers, by the panel to which the proceeding has been referred. The Court will limit its review to the issues raised in the informal brief.

The informal brief may be submitted on a form provided by the clerk and shall provide the specific information required by the form. The parties need not limit their briefs solely to the form. An additional supporting memorandum may be attached if a party deems it necessary in order to address adequately the issues raised, but the briefs with any attachments shall not exceed the length limitations established by FRAP 32(a)(7). It is not necessary to cite cases in an informal brief. Two copies of the brief and attachments, if any, must be filed with the Court and a copy mailed to opposing counsel.

Once an informal briefing schedule has been established the parties may file a formal brief only with the permission of the Court. The Court initially reviews cases that are informally briefed under its procedures set forth in Local Rule 34(a) pertaining to pre-argument review.

If the panel reviewing an informal brief submitted by an indigent pro se litigant determines that further briefing and possible oral argument would be of assistance, counsel will be appointed and directed to file additional formal briefs. In any appeal that has been informally briefed, the Court may direct that additional briefs be filed prior to oral argument. (Amended effective December 1, 1995; further amended June 5, 1996, September 25, 1996; amended effective December 1, 1998.)

**Rule 34(c). Court sessions and notification to counsel.**

The court sits in Richmond, Virginia, for five consecutive days in October, November, December, February, March, April, May and June for its regular court terms. Court sessions are usually the first full week of each month, but adjustments are made because of holidays and elections, and special sessions may be scheduled at any time, anywhere in the circuit. Panels of the court also regularly sit in the first full week of a scheduled month in Baltimore, Maryland, usually at least three times per year. On specified days during the summer months, panels sit in various cities throughout the circuit.

The Court initially hears and decides cases in panels consisting of three judges with the Chief Judge or most senior active judge presiding. Each panel regularly hears oral argument in four cases each day during court week; additional cases are added as required.

Attorneys appearing for oral argument must register with the Clerk's Office on the morning of argument to learn of courtroom assignment, order of appearance, and allocation of oral argument time. Counsel not already a member of the Fourth Circuit bar will be admitted to practice before the Court at that time upon compliance with the provisions of Local Rule 46(b). Registration commences at 8:00 a.m. and must be completed by 8:30 a.m., with the exception of Friday, when registration commences at 7:15 a.m. and must be completed by 7:45 a.m.

The Court convenes at 9:30 a.m., with the exception of Friday, when it convenes at 8:30 a.m.

Preparation for the argument calendar begins in the Clerk's Office approximately two months prior to argument. Immediately upon receiving notice that a case has been tentatively assigned to an argument session, counsel must inform the clerk of any conflict or other matter that would affect scheduling of the case for that session. Once a case has been scheduled for argument, it will be removed from the argument calendar only for extreme unforeseeable problems. Excusal from an established oral argument date is not granted because of a prior professional commitment. Although a case will not be removed from the calendar because of a scheduling conflict by counsel after the notification of oral argument has been issued, the Court may direct another lawyer from the same firm to argue the appeal if counsel of record cannot be present. (Amended effective December 1, 1995.)

### Rule 34(d). Argument time.

Briefs for the cases assigned to a hearing panel are distributed by the clerk to the judges on a hearing panel at the time the hearing panel assignments are made. The members of the Court hearing oral argument will have read the briefs before the hearing and therefore will be familiar with the case. In oral argument, counsel should emphasize the dispositive issues.

Since the appellant is allowed to open and close the argument, counsel for appellant should indicate at registration before oral argument how much time counsel wants to reserve for rebuttal. It is recommended that no more than two attorneys argue per side. Each side is normally allowed 20 minutes, even in consolidated cases, but counsel may not need the full time allotted or the Court may shorten the time allotted. In social security disability cases, black lung cases, and labor cases where the primary issue is whether the agency's decision is supported by substantial evidence and in criminal cases where the primary issue involves the application of the sentencing guidelines, each side is limited to 15 minutes. In black lung cases in which the Director, Office of Workers' Compensation Programs, has been granted leave to file a separate brief, the Director will share argument time with whichever side the Director's brief supports.

If counsel believes that more time is needed for oral argument, a written motion setting forth the reasons for additional time and whether the other parties consent must be submitted well in advance of the hearing date. The Court may sua sponte extend the allotted time during the argument or it may terminate the argument whenever in its judgment further argument is unnecessary. (Amended effective December 1, 1995; amended effective December 1, 1998; amended effective June 1, 1999.)

NOTE

Local Rule 34(d) was amended to provide that the court may reduce argument time from 30 minutes when extended argument is unnecessary.

### Rule 34(e). Motion to submit on briefs.

As soon as possible upon completion of the briefing schedule or within 10 days of tentative notification of oral argument, whichever is earlier, any party may file a motion to submit the case on the briefs without the necessity of oral argument. Such motions are not granted as a matter of course. A motion to submit on briefs should not be used to alleviate a scheduling conflict after the notification of oral argument has been issued. (Amended effective December 1, 1995; amended effective December 1, 1998.)

NOTE

Local Rule 34(e) has been amended to conform to the court's practice of requiring that motions to submit on the briefs be filed within ten days of notification to counsel that a case is tentatively calendared. This notification may occur before briefing is completed.

## Rule 35. En banc proceedings.

(a) *Petition for rehearing en banc.* A petition for rehearing en banc must be made at the same time, and in the same document, as a petition for rehearing. The request for en banc consideration shall be stated plainly in the title of the petition. Petitions for rehearing en banc will be distributed to all active and senior judges of the Court, and to any visiting judge who may have heard and decided the appeal.

(b) *Decision to hear or rehear a case en banc.* A majority of the circuit judges who are in regular active service may grant a hearing or rehearing en banc. For purposes of determining a majority under this rule, the term majority means of all judges of the Court in regular active service who are presently serving, without regard to whether a judge is disqualified. Unless a judge requests that a poll be taken on the petition, none will be taken. If no poll is requested, the panel's order on a petition for rehearing will bear the notation that no member of the Court requested a poll. If a poll is requested and hearing or rehearing en banc is denied, the order will reflect the vote of each participating judge. A judge who joins the Court after a petition has been submitted to the Court, and before an order has been entered, will be eligible to vote on the decision to hear or rehear a case en banc.

(c) *Decision of cases heard or reheard en banc.* An en banc hearing will be before all eligible, active and participating judges of the Court. An en banc rehearing will be before all eligible and participating active judges, and any senior judge of the Court who sat on the panel that decided the case originally. An active judge who takes senior status after a case is heard or reheard by an en banc Court will be eligible to participate in the en banc decision. A judge who joins the Court after argument of a case to an en banc Court will not be eligible to participate in the decision of the case. A judge who joins the Court after submission of a case to an en banc Court without oral argument will participate in the decision of the case. Granting of rehearing en banc vacates the previous panel judgment and opinion; the rehearing is a review of the judgment or decision from which review is sought and not a review of the judgment of the panel. (The circuit takes the position that the change of wording in 28 U.S.C. § 46(c) referring to participation in en banc decisions does not alter the long-standing rule that the en banc Court reviews the decision from which review is sought in this Court, not the decision of a panel.)

(d) *Additional copies of briefs and appendix for en banc hearing or rehearing.* The Court's order granting hearing or rehearing en banc may require the parties to file additional copies of the briefs and appendix. Each party will bear the initial cost of additional copies of its own briefs. The party that requested the hearing or rehearing en banc will bear the initial cost of filing additional copies of the appendix. In the event that cross petitions for hearing or rehearing en banc are granted, the parties will share equally the initial cost of preparing additional copies of the appendix. (Amended effective March 9, 1994; amended effective December 1, 1995; further amended December 4, 1996; amended effective December 1, 1998.)

## Rule 36(a). Publication of decisions.

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or

ii. It involves a legal issue of continuing public interest; or

iii. It criticizes existing law; or

iv. It contains a historical review of a legal rule that is not duplicative; or

v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

The court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication, and all members of the court have acknowledged in writing their receipt of the proposed opinion. A judge may file a published opinion without obtaining all acknowledgments only if the opinion has been in circulation for ten days. (Amended effective December 1, 1995.)

### Rule 36(b). Unpublished dispositions.

Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel. Any individual or institution may receive copies of all published and certain unpublished opinions of the Court by paying an annual subscription fee for this service. In addition, copies of such opinions are sent to all circuit judges, district judges, bankruptcy judges, magistrate judges, clerks of district court, United States Attorneys, and Federal Public Defenders upon request. All opinions are available on ABBS, the Appellant Bulletin Board System, for a minimum of six months after issuance. The Federal Reporter periodically lists the result in all cases involving unpublished opinions. Copies of any unpublished opinion are retained in the file of the case in the Clerk's Office and a copy may be obtained from the Clerk's Office for $2.00.

Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result. (Amended effective December 1, 1995.)

### Rule 36(c). Citation of unpublished dispositions.

In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court. Such service may be accomplished by including a copy of the disposition in an attachment or addendum to the brief pursuant to the procedures set forth in Local Rule 28(b). (Amended effective December 1, 1995.)

#### CASE NOTES

**Use of Unpublished Dispositions.** — Since unpublished opinions are not regarded as binding precedent, such opinions cannot be considered in deciding whether particular conduct violates clearly established law for purposes of adjudging entitlement to qualified im-

munity. Hogan v. Carter, 85 F.3d 1113 (4th Cir. 1996), cert. denied, 519 U.S. 974, 117 S. Ct. 408, 136 L. Ed. 2d 321 (1996).

### Rule 39(a). Printing costs.

The cost of printing or otherwise producing necessary copies of briefs and appendices shall be taxable as costs at a rate equal to actual cost, but not higher than $4.00 per page of photographic reproduction of typed material. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**NOTE**

Local Rule 39(a) has been amended to delete reference to printing costs for typeset briefs.

### Rule 39(b). Bill of costs.

The verified bill of costs may be that of a party or counsel, and should be accompanied by the printer's itemized statement of charges. When costs are sought for or against the United States, counsel should cite the statutory authority relied upon. Taxation of costs will not be delayed by the filing of a petition for rehearing or other postjudgment motion. A late affidavit for costs must be accompanied by a motion for leave to file. The clerk rules on all bills of costs and objections in the first instance. (Added effective December 1, 1995.)

### Rule 39(c). Recovery of costs in the district court.

The only costs generally taxable in the Court of Appeals are: (1) the docketing fee if the case is reversed; and (2) the cost of printing or reproducing briefs and appendices, including exhibits.

Although some costs are "taxable" in the Court of Appeals, all costs are recoverable in the district court after issuance of the mandate. If the matter of costs has not been settled before issuance of the mandate, the clerk will send a supplemental "Bill of Costs" to the district court for inclusion in the mandate at a later date.

Various costs incidental to an appeal must be settled at the district court level. Among such items are: (1) the cost of the reporter's transcript; (2) the fee for filing the notice of appeal; (3) the fee for preparing and transmitting the record; and (4) the premiums paid for any required appeal bond. Application for recovery of these expenses by the successful party on appeal must be made in the district court, and should be made only after issuance of the mandate by the Court of Appeals. These costs, if erroneously applied for in the Court of Appeals, will be disallowed without prejudice to the right to reapply for them in the district court. (Added effective December 1, 1995.)

### Rule 40(a). Filing of petition.

Although petitions for rehearing are filed in a great many cases, few are granted. Filing a petition solely for purposes of delay or in order merely to reargue the case is an abuse of privilege.

Whenever a request for rehearing en banc is contained in a petition, such fact must be stated plainly on the cover of and in the title of the document.

The Court requires 4 copies of the petition. If the petition contains a request for rehearing en banc, the Court requires 20 copies. In either case, a pro se party who is indigent need file only the original. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 40(b). Statement of purpose.**

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist:

i. A material factual or legal matter was overlooked in the decision.

ii. A change in the law occurred after the case was submitted and was overlooked by the panel.

iii. The opinion is in conflict with a decision of the United States Supreme Court, this Court, or another court of appeals and the conflict is not addressed in the opinion.

iv. The proceeding involves one or more questions of exceptional importance.

A petition should only be made to direct the Court's attention to one or more of the above situations. The points to be raised should be succinctly listed in counsel's statement of purpose. (Amended effective December 1, 1995; amended effective December 1, 1998.)

NOTE

Local Rule 40(b) has been amended to add a fourth ground for filing a petition for rehearing. The local rule now incorporates the standard contained in FRAP 35(b)(1). Because the statement of purpose section of a petition for rehearing is not a requirement of FRAP, the provision in Local Rule 40(b) regarding rejection of a petition which fails to contain such a statement has been deleted.

**Rule 40(c). Time limits for filing petitions.**

The Court strictly enforces the time limits for filing petitions for rehearing and petitions for rehearing en banc. The Clerk's Office will deny as untimely any petition received in the Clerk's Office later than 45 days after entry of judgment in any civil case where the United States, or an agency or officer thereof is a party, or 14 days after the entry of judgment in any other case. The only grounds for an extension of time to file a petition, or to accept an untimely petition, are as follows:

i. the death or serious illness of counsel, or of a member of counsel's immediate family (or in the case of a party proceeding without counsel, the death or serious illness of the party or a member of the party's immediate family); or

ii. an extraordinary circumstance wholly beyond the control of counsel or of a party proceeding without counsel.

Petitions for rehearing and petitions for en banc rehearing from incarcerated persons proceeding without the assistance of counsel are deemed filed when they are delivered to prison or jail officials. All other such petitions are deemed filed only when received in the Clerk's Office. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 40(d). Papers filed after denial of a petition for rehearing.**

Except for timely petitions for rehearing en banc, cost and attorney fee matters, and other matters ancillary to the filing of an application for writ of certiorari with the Supreme Court, the Office of the Clerk shall not receive motions or other papers requesting further relief in a case after the Court has denied a petition for rehearing or the time for filing a petition for rehearing has expired. (Amended effective December 1, 1995; amended effective December 1, 1998.)

**Rule 41. Motion for stay of the mandate.**

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion shall be denied unless there is a specific showing that it is not frivolous or filed merely for delay. The motion must

present a substantial question or set forth good or probable cause for a stay. Stay requests are normally acted upon without a request for a response. (Amended effective December 1, 1995.)

**Rule 42. Voluntary dismissals.**

In civil cases, the stipulation of dismissal or motion for voluntary dismissal may be signed by counsel. In criminal cases, however, the agreement or motion must be signed or consented to by the individual party appellant personally or counsel must file a statement setting forth the basis for counsel's understanding that the appellant wishes to dismiss the appeal and the efforts made to obtain the appellant's written consent. Counsel must serve a copy of this statement on appellant. (Amended effective December 1, 1995.)

**Rule 45. Dismissals for failure to prosecute.**

When an appellant in either a docketed or non-docketed appeal fails to comply with the Federal Rules of Appellate Procedure or the rules or directives of this Court, the clerk shall notify the appellant or, if appellant is represented by counsel, appellant's counsel that upon the expiration of 15 days from the date thereof the appeal will be dismissed for want of prosecution, unless prior to that date appellant remedies the default. Should the appellant fail to comply within said 15-day period, the clerk shall then enter an order dismissing said appeal for want of prosecution, and shall issue a certified copy thereof to the clerk of the district court as and for the mandate. In no case shall the appellant be entitled to reinstate the case and remedy the default after the same shall have been dismissed under this rule, unless by order of this Court for good cause shown. The dismissal of an appeal shall not limit the authority of this Court, in an appropriate case, to take disciplinary action against defaulting counsel. (Amended effective December 1, 1995; amended effective December 1, 1998.)

NOTE

Local Rule 45 eliminates the requirement that the clerk notify appellant personally of counsel's default before dismissing an appeal for failure to prosecute.

**Rule 46(a). Legal assistance to indigents by law students.**

An eligible law student with the written consent of an indigent and the attorney of record may appear in this Court on behalf of that indigent in any case. An eligible law student with the written consent of the United States Attorney or authorized representative may also appear in this Court on behalf of the United States in any case. An eligible law student with the written consent of the State Attorney General or authorized representative may also appear in this Court on behalf of that state in any case. In each case, the written consent shall be filed with the clerk.

An eligible law student may assist in the preparation of briefs and other documents to be filed in this Court, but such briefs or documents must be signed by the attorney of record. The student may also participate in oral rgument with leave of the Court, but only in the presence of the attorney of record. The attorney of record shall assume personal professional responsibility for the law student's work and for supervising the quality of that work. The attorney should be familiar with the case and prepared to supplement or correct any written or oral statement made by the student.

In order to make an appearance pursuant to this rule, the law student must:

1. Be duly enrolled in a law school approved by the American Bar Association;

2. Have completed legal studies amounting to at least four (4) semesters, or the equivalent if the school is on some basis other than a semester basis;

3. Be certified by the dean of the student's law school as being of good character and competent legal ability which certification shall be filed with the clerk. This certification may be withdrawn by the dean at any time by mailing notice to the clerk or by termination by this Court without notice of hearing and without any showing of cause;

4. Be introduced to the Court by an attorney admitted to practice before this Court;

5. Neither ask for nor receive any compensation or remuneration of any kind from the person on whose behalf the student renders services, but this shall not prevent an attorney, legal aid bureau, law school, public defender agency, a State, or the United States from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require;

6. Certify in writing that he or she has read and is familiar with the Code of Professional Responsibility or Rules of Professional Conduct in force in the state in which the student's law school is located. (Amended effective December 1, 1995.)

**Rule 46(b). Admission to practice.**

Only attorneys admitted to the bar of this Court may practice before the Court. An attorney may be named on a brief filed in this Court without being admitted to the bar of the Fourth Circuit, provided that at least one lawyer admitted to practice in this Court also appears on the brief. Any other document submitted by an attorney who is not a member of the bar of the Fourth Circuit will be accepted for filing conditioned on his or her qualifying for membership within a reasonable time.

Each applicant for admission to the bar of this Court shall file with the clerk an application on the form approved by the Court and furnished by the clerk. Thereafter, upon written or oral motion of a member of the bar of the Court, the Court will act upon the application. A qualified attorney may be admitted upon personal appearance in open court. It is not necessary that an applicant appear in open court for the purpose of being admitted unless the Court shall otherwise order.

The requisite $40.00 fee must accompany the application, but attorneys appointed by the Court to represent a party in forma pauperis, counsel for the United States and any agency thereof who has a case pending before this Court, and law clerks to the judges of the Court and to the district judges, magistrate judges, and bankruptcy judges within this Circuit shall be admitted to the bar of this Court without the payment of an admission fee.

Fees collected by the clerk from applicants for admission shall be deposited in a bank designated by the Court and shall be used for the benefit of the bench and bar in the administration of justice. A certificate indicating that an attorney has been admitted to practice before the Fourth Circuit will be sent to counsel by mail after admission. (Amended effective December 1, 1995.)

**Rule 46(c). Appearance of counsel; withdrawal; substitutions.**

Each attorney of record must file a written appearance with the clerk within 10 days after the appeal is docketed or after being retained or appointed. At the time of docketing, the clerk will send to each counsel or party in the trial court a "designation of counsel" form. This form should be filled out and returned to the Clerk of the Fourth Circuit within 10 days. Thereafter, the Court will send correspondence, notices of oral argument, and copies of final decisions only to those attorneys who have filed their appearance forms. More than one attorney

of the same firm may sign the same form. This form does not affect the credit line listed on printed opinions, as that information is furnished to publishing firms from those names listed on the briefs.

Once an appearance in an appeal has been filed, an attorney may not withdraw from representation without notice to the party he or she is representing and consent of the Court. A motion to withdraw should state fully the reason for the request. Substitution of counsel of record can be accomplished by submitting a counsel of record form or written appearance for new counsel along with existing counsel's motion to withdraw or strike appearance. (Amended effective December 1, 1995.)

**Rule 46(d). Appointment of counsel.**

In any appeal in which appointment of counsel is mandated by section (a)(1) of the Criminal Justice Act, 18 U.S.C. § 3006A(a)(1), counsel is appointed upon the docketing of the appeal without prior notice to the attorney who represented the indigent in the case below. The duty of counsel appointed under the CJA extends through advising an unsuccessful appellant in writing of the right to seek review in the Supreme Court. If the appellant requests in writing that a petition for a writ of certiorari be filed and in counsel's considered judgment there are grounds for seeking Supreme Court review, counsel shall file such a petition. If appellant requests that a petition for a writ of certiorari be filed but counsel believes that such a petition would be frivolous, counsel may file a motion to withdraw with the Court of Appeals. The motion must reflect that a copy was served on the client and that the client was informed of the right to file a response to the motion within seven days. The Clerk will hold the motion after filing for fifteen days before submitting it to the Court to allow time for appellant's response, if any, to be received.

Assignment of counsel is discretionary in other indigent cases. Therefore, such cases receive a preliminary review before a decision is made regarding appointment of counsel. In assigning counsel, the Court may direct counsel to brief a particular issue, but counsel is free to address any additional issues which appear to be meritorious.

Payment of counsel appointed under the CJA is governed by 18 U.S.C. § 3006A(d) and this Circuit's Plan in Implementation of the Criminal Justice Act. Unless compensation for legal services becomes available to assigned counsel by statute, the Court will pay counsel assigned for appellate representation not covered by the CJA a maximum fee of $750 plus expenses from the Attorney Admission Fund.

To receive payment from the Court, court-appointed or court-assigned counsel in all cases must submit to the Clerk's Office an itemized statement of expenses, with receipts, within sixty days of final disposition of the case. Depending upon the course of the case, this may be sixty days from (1) the date of judgment, (2) dismissal of the appeal, or (3) denial of a petition for rehearing. Before the expiration of the sixty-day time period the Court, for good cause shown, may grant counsel an extension of time to file the application for compensation and reimbursement. If court-appointed counsel files a petition for writ of certiorari with the Supreme Court, the 60-day period for applying for compensation and reimbursement runs from the date of filing the petition for writ of certiorari. (Amended effective December 1, 1995; amended effective February 1, 2001.)

**Rule 46(e). Attorney's fees and expenses.**

The Court may award attorney's fees and expenses whenever authorized by statute. Any application for an award must include a reference to the statutory basis for the request and a detailed itemization of the amounts requested.

Court-appointed counsel may apply for an award of fees and expenses, but any award by the Court is in lieu of the regular appointment fees provided by the Court. In certain agency cases, counsel may submit the standard government form for fees and expenses provided by the agency for approval by the Court. (Amended effective December 1, 1995.)

**Legal Periodicals.** — For note, "Attorney Fees, Freedom of Information, and Pro Se Litigants: Per Se Prohibitions Frustrate Policies," see 26 Wm. & Mary L. Rev. 349 (1985).

### Rule 46(f). Proceeding pro se.

An individual may proceed without the aid of counsel, but should so inform the Court at the earliest possible time. In any pro se appeal, the clerk shall notify the parties that they shall file informal briefs as provided by Local Rule 34(b). The Court will limit its review to the issues raised in the informal briefs and will consider the need for the appointment of counsel when reviewing the appeal under Local Rule 34(a). Cases involving pro se litigants are ordinarily not scheduled for oral argument. (Amended effective December 1, 1995; further amended September 25, 1996.)

### Rule 46(g). Rules of disciplinary enforcement.

(1) A member of the bar of this Court may be disciplined by this Court as a result of

(a) Conviction in any court of the United States, the District of Columbia, or any state, territory or commonwealth of the United States, of any felony or of any lesser crime involving false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, or theft;

(b) Imposition of discipline by any other court of whose bar the attorney is a member, or an attorney's disbarment by consent or resignation from the bar of such court while an investigation into allegations of misconduct is pending;

(c) Conduct with respect to this Court which violates the rules of professional conduct or responsibility in effect in the state or other jurisdiction in which the attorney maintains his or her principal office, the Federal Rules of Appellate Procedure, the local rules of this Court, or orders or other instructions of this Court; or

(d) Any other conduct unbecoming a member of the bar of this Court.

(2) Discipline may consist of disbarment, suspension from practice before this Court, monetary sanction, removal from the roster of attorneys eligible for appointment as court-appointed counsel, reprimand, or any other sanction that the Court may deem appropriate. Disbarment is the presumed discipline for conviction of a crime specified in paragraph (1)(a) above. The identical discipline imposed by another court is presumed appropriate for discipline taken as a result of that other court's action pursuant to paragraph (1)(b). A monetary sanction imposed on disciplinary grounds is the personal responsibility of the attorney disciplined, and may not be reimbursed by a client.

(3) The clerk reviews reports received from other courts concerning discipline imposed on members of the bar of this Court. He refers to the Court all disbarments, suspensions, resignations during the pendency of misconduct investigations, and other actions sufficient to cast doubt upon the member's continuing qualification to practice before this Court.

(4) The clerk issues a notice to show cause why a member of the bar shall not be disciplined by this Court upon receipt of official notification of an attorney's conviction of a crime specified in paragraph (1)(a) or of the imposition of discipline by another court referred to this Court pursuant to paragraph (3) above, or upon the Court's determination that cause may exist for discipline

pursuant to paragraphs (1)(c) or (1)(d). Such notice is sent by certified mail, directs that a response be filed within 30 days of the date of the notice, and directs that the attorney complete and return to the clerk within that time a declaration of the names and addresses of other bars to which he or she is admitted, using the form supplied by the clerk, whether or not the attorney chooses otherwise to respond to the notice. The clerk also appends a copy of Local Rule 46(g).

(5) Upon receiving official notification that a member of the bar has been convicted of a crime specified in paragraph (1)(a), the clerk automatically will issue an order suspending the attorney's privilege to practice before this Court pending the Court's determination of appropriate discipline.

(6) An attorney to whom a notice to show cause has been sent may consent to disbarment, by filing with the clerk an affidavit stating that the attorney desires to consent to disbarment and that:

(a) The attorney's consent is freely and voluntarily rendered; the attorney is not being subjected to coercion or duress; the attorney is fully aware of the implications of so consenting;

(b) The attorney is aware that there is a presently pending proceeding involving allegations that there exist grounds for the attorney's discipline, the nature of which the attorney shall specifically set forth;

(c) The attorney acknowledges that the material facts so alleged are true; and

(d) The attorney so consents because the attorney knows that he or she cannot successfully defend himself or herself.

The order disbarring the attorney on consent is a matter of public record. However, the affidavit will not be publicly disclosed or made available for use in any other proceeding except upon order of this Court.

(7) If the attorney fails to respond to the notice within 30 days, or such other time as the court shall allow, the clerk enters an order imposing the presumptive discipline. If no presumptive discipline is specified for the conduct, the clerk notifies the court of the attorney's non-response and the court takes such action as it deems appropriate.

(8) All matters pertaining to discipline of attorneys are submitted to the court's Standing Panel on Attorney Discipline, which consists of three active circuit judges, each of whom is appointed by the Chief Judge to serve on the Panel for a three-year term. The initial members of the Standing Panel are appointed for terms of one, two, and three years so that the Panel members' terms are staggered for continuity of decisionmaking. If any member of the Standing Panel is unable to hear a particular matter, the clerk randomly designates another active circuit judge to the Panel for the purpose of disposing of that matter.

(9) The Standing Panel considers all materials submitted by an attorney to whom notice to show cause has issued. The Panel may request further information from a court that has previously imposed discipline on the attorney, or from its disciplinary agency. A copy of any such information is made available to the attorney or to his or her counsel. Should an attorney request a hearing on the matter it will be heard by the Standing Panel at a time and place of its choosing.

(10) The Court may at any time appoint counsel to investigate or prosecute a disciplinary matter, or to represent an indigent attorney instructed to show cause. The Court prefers to appoint as prosecuting counsel the disciplinary agency of the highest court of the state in which the attorney maintains his or her principal office. However, if the state disciplinary agency declines appointment, or the Court deems other counsel more appropriate, it may appoint any other member of the bar as prosecuting counsel. Counsel appointed either for prosecution or defense will be compensated for his or her services according to

the Court's plan for appointment of counsel in criminal cases, from the attorney admission fund.

(11) The Court's order imposing discipline will set forth the nature of the discipline imposed; if disbarment or suspension from practice before the court, the terms upon which reinstatement will occur or be considered by the court; and any instructions to the clerk concerning the notification of the court's action to be given to other courts or official bodies.

(12) The clerk is responsible for

(a) Automatically initiating show cause proceedings when official notice of an attorney's conviction of a crime specified in paragraph (1)(a) or discipline by another court pursuant to paragraph (3) is brought to his or her attention;

(b) Bringing to the attention of the Standing Panel instances of violations by members of the bar of this court of the Federal Rules of Appellate Procedure, this court's local rules, or this Court's orders or other instructions that may warrant discipline;

(c) Obtaining declarations of the names and addresses of other bars of which an attorney possibly subject to discipline by this court may be a member; and

(d) Unless directed otherwise by the Court, within 10 days of the imposition of discipline upon a member of the bar of this Court, notifying all other courts of those bars the attorney reports that he or she is a member, and the American Bar Association's National Disciplinary Data Bank, of the Court's action, enclosing a certified copy of the Court's order. (Amended effective December 1, 1995.)

### Rule 47(a). Procedures for adoption of local rules and internal operating procedures.

Following tentative approval of an amendment to its Local Rules or Internal Operating Procedures, and consultation with its Advisory Committee on Rules and Procedures, the Court of Appeals will provide public notice of the proposed amendment and an opportunity for comment.

The Court will set a period for comment for each proposed amendment, based upon the urgency of the matter involved. If the Court determines that there is an immediate need for a rule, the Court may provide that an amendment take immediate effect, and promptly thereafter afford notice and opportunity for comment.

Notice of a proposed amendment will be provided by distribution of the proposed change to all district judges, bankruptcy judges, magistrate judges, district and bankruptcy clerks, United States Attorneys, and state bar associations within the Circuit. Notice will also be sent to all legal newspapers and bar journals within the Circuit. Such notice shall include the text of a proposed amendment, unless it is lengthy. If the amendment is lengthy, the notice will describe the purpose and effect of the proposed amendment, and advise interested parties to obtain copies of the text of the proposed amendment from the clerk. Any person or organization requesting routine notice of proposed amendments to the Court's rules and internal operating procedures may, by letter to the clerk, be placed on the mailing list for such proposed changes.

All comments will be addressed to the Clerk of the Court of Appeals. If comments are received, they will be circulated to all members of the Court prior to the effective date of the proposed amendment, unless the amendment was given immediate effect.

### Rule 47(b). Advisory committee on rules and procedures.

The Court's Advisory Committee on Rules and Procedures shall consist of five attorneys, one from each of the states constituting the Fourth Circuit.

The members shall be appointed by the Chief Judge of the Circuit for three-year terms. The terms shall be staggered, so that no more than two members' terms expire in any year. No person may serve more than two full three-year terms.

The Chief Judge of the Circuit shall designate one of the members to serve as chair of the Committee. The Clerk shall serve as the Court's principal liaison with the Committee.

The Committee shall study the Court's local rules and internal operating procedures, make recommendations concerning them, and advise the Court concerning all proposed changes to them.

# APPENDIX OF FORMS

**Form 1. Notice of appeal to a court of appeals from a judgment or order of a district court.**

United States District Court for the _____
District of _____
File Number _____

A. B., Plaintiff )
)
*v.* ) Notice of Appeal
)
C. D., Defendant )

Notice is hereby given that _____ (here name all parties taking the appeal) _____ (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from the order (describing it)) entered in this action on the _____ day of _____, ____.

(s) _____
(Address)
Attorney for _____
Address: _____

**Form 2. Notice of appeal to a court of appeals from a decision of the tax court.**

United States Tax Court
Washington, D.C.

A. B., Petitioner )
*v.* ) Docket No. _____
Commissioner of Internal Revenue, )
Respondent )

Notice of Appeal

Notice is hereby given that _____ here name all parties taking the appeal* _____, hereby appeal to the United States Court of Appeals for the _____ Circuit from [that part of] the decision of this court entered in the above captioned proceeding on the _____ day of _____, ____ [relating to _____].

(s) _____
Counsel for _____
Address: _____

*See Rule 3(c) for permissible ways of identifying appellants.

**Form 3. Petition for review of order of an agency, board, commission or officer.**

United States Court of Appeals for the _____ Circuit

| | | |
|---|---|---|
| A. B., Petitioner | ) | |
| | ) | |
| *v.* | ) | Petition for Review |
| | ) | |
| XYZ Commission, Respondent | ) | |

_____ (here name all parties bringing the petition) _____ hereby petition the court for review of the order of the XYZ Commission (describe the order) entered on _____, ____.

_____
*Attorney for Petitioners*
Address: _____

**Form 4. Motion and affidavit for permission to appeal in forma pauperis.**

## Motion and Affidavit for Permission to Appeal In Forma Pauperis

Appeal No. _____

v. District Court or Agency No. _____

| Affidavit in Support of Motion | Instructions |
|---|---|
| I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.) | Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number. |
| Signed: _____ | Date: _____ |

**My issues on appeal are:**

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

| Income source | Average monthly amount during the past 12 months | | Amount expected next month | |
|---|---|---|---|---|
| | You | Spouse | You | Spouse |
| Employment | $_____ | $_____ | $_____ | $_____ |
| Self-employment | $_____ | $_____ | $_____ | $_____ |
| Income from real property (such as rental income) | $_____ | $_____ | $_____ | $_____ |
| Interest and dividends | $_____ | $_____ | $_____ | $_____ |
| Gifts | $_____ | $_____ | $_____ | $_____ |
| Alimony | $_____ | $_____ | $_____ | $_____ |

| | | | | |
|---|---|---|---|---|
| Child support | $_____ | $_____ | $_____ | $_____ |
| Retirement (such as social security, pensions, annuities, insurance | $_____ | $_____ | $_____ | $_____ |
| Disability (such as social security, insurance payments) | $_____ | $_____ | $_____ | $_____ |
| Unemployment payments | $_____ | $_____ | $_____ | $_____ |
| Public-assistance (such as welfare) | $_____ | $_____ | $_____ | $_____ |
| Other (specify):_____ | $_____ | $_____ | $_____ | $_____ |
| **Total monthly income:** | $_____ | $_____ | $_____ | $_____ |

2. *List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

| Employer | Address | Dates of employment | Gross monthly pay |
|---|---|---|---|
| _____ | _____ | _____ | _____ |
| _____ | _____ | _____ | _____ |
| _____ | _____ | _____ | _____ |

3. *List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

| Employer | Address | Dates of employment | Gross monthly pay |
|---|---|---|---|
| _____ | _____ | _____ | _____ |
| _____ | _____ | _____ | _____ |
| _____ | _____ | _____ | _____ |

4. *How much cash do you and your spouse have?* $_____

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

| Financial institution | Type of account | Amount you have | Amount your spouse has |
|---|---|---|---|
| _____ | _____ | $_____ | $_____ |
| _____ | _____ | $_____ | $_____ |
| _____ | _____ | $_____ | $_____ |

**If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.**

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.*

| Home (Value) | Other real estate (Value) | Motor vehicle #1 (Value) |
|---|---|---|
| _____ | _____ | Make & year: _____ |
| _____ | _____ | Model: _____ |
| _____ | _____ | Registration #: _____ |
| **Motor vehicle #2 (Value)** | **Other assets (Value)** | **Other assets (Value)** |
| Make & year: _____ | _____ | _____ |
| Model: _____ | _____ | _____ |
| Registration #: _____ | _____ | _____ |

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

| Person owing you or your spouse money | Amount owed to you | Amount owed to your spouse |
|---|---|---|
| _____ | _____ | _____ |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

7. *State the persons who rely on you or your spouse for support.*

| Name | Relationship | Age |
|---|---|---|
| _____ | _____ | _____ |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

| | You | Your Spouse |
|---|---|---|
| Rent or home-mortgage payment (include lot rented for mobile home) | $_____ | $_____ |
| Are real-estate taxes included? ☐ Yes ☐ No<br>Is property insurance included? ☐ Yes ☐ No | | |
| Utilities (electricity, heating fuel, water, sewer, and telephone) | $_____ | $_____ |
| Home maintenance (repairs and upkeep) | $_____ | $_____ |
| Food | $_____ | $_____ |
| Clothing | $_____ | $_____ |
| Laundry and dry-cleaning | $_____ | $_____ |

| | | |
|---|---|---|
| Medical and dental expenses | $_____ | $_____ |
| Transportation (not including motor vehicle payments) | $_____ | $_____ |
| Recreation, entertainment, newspapers, magazines, etc. | $_____ | $_____ |
| Insurance (not deducted from wages or included in Mortgage payments) | $_____ | $_____ |
| Homeowner's or renter's | $_____ | $_____ |
| Life | $_____ | $_____ |
| Health | $_____ | $_____ |
| Motor Vehicle | $_____ | $_____ |
| Other: _____ | $_____ | $_____ |
| Taxes (not deducted from wages or included in Mortgage payments) (specify): _____ | $_____ | $_____ |
| Installment payments | | |
| Motor Vehicle | $_____ | $_____ |
| Credit card (name): _____ | $_____ | $_____ |
| Department Store (name): _____ | $_____ | $_____ |
| Other: _____ | $_____ | $_____ |
| Alimony, maintenance, and support paid to others | $_____ | $_____ |
| Regular expenses for operation of business, profession, or farm (attach detailed statement) | $_____ | $_____ |
| Other (specify): _____ | $_____ | $_____ |
| **Total monthly expenses:** | $_____ | $_____ |

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*
☐ Yes ☐ No If yes, describe on an attached sheet.

*10. Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form?* ☐Yes ☐ No

If yes, how much? $_____

If yes, state the attorney's name, address, and telephone number:

_____

_____

_____

*11. Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?*
☐Yes ☐ No

If yes, how much? $_____

If yes, state the person's name, address, and telephone number.

_____

_____

_____

*12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

*13. State the address of your legal residence.*

_____

_____

Your daytime phone number: (___) _____

Your age: _____ Your years of schooling: _____

Your social-security number: _____

**Form 5. Notice of appeal to a court of appeals from a judgment or order of a district court or a bankruptcy appellate panel.**

United States District Court for the _____
District of _____

In re

_____,
Debtor

A. B., Plaintiff )
)
) File No. _____
v. )
)
C. D., Defendant )

Notice of Appeal to United States Court of Appeals
for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, ____ [here describe the judgment, order, or decree] _____.

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated _____
Signed _____
Attorney for Appellant
Address: _____
_____

# FOURTH CIRCUIT FORMS

**Form A. Disclosure of corporate affiliations and other entities with a direct financial interest in litigation.**

NOTE: ONLY ONE FORM NEED BE COMPLETED FOR A PARTY EVEN IF THE PARTY IS REPRESENTED BY MORE THAN ONE ATTORNEY. DISCLOSURES MUST BE FILED ON BEHALF OF INDIVIDUAL PARTIES AS WELL AS CORPORATE PARTIES. DISCLOSURES ARE REQUIRED FROM AMICUS CURIAE ONLY IF AMICUS IS A CORPORATION. COUNSEL HAS A CONTINUING DUTY TO UPDATE THIS INFORMATION. PLEASE FILE AN ORIGINAL AND THREE COPIES OF THIS FORM.

Pursuant to FRAP 26.1 and Local Rule 26.1,

_____, who is _____,
(name of party) (appellant/appellee)

makes the following disclosure:

1. Is the party a publicly held corporation or other publicly held entity?
(check one) ( ) YES ( ) NO

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity (see Local Rule 26.1(b))?

(check one) ( ) YES ( ) NO

If the answer is YES, state the name of the entity and its relationship to the party:

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation (see Local Rule 26.1(b))?

(check one) ( ) YES ( ) NO

If the answer is YES, state the name of the entity and the nature of its financial interest:

_____ _____
(Signature of counsel) (date)

**Form B. Appearance of counsel.**

No. _____

THE CLERK WILL ENTER MY APPEARANCE AS COUNSEL ON BEHALF OF:

_____ as the
(party name)

[ ] appellant(s) [ ] appellee(s) [ ] amicus curiae
[ ] petitioner(s) [ ] respondent(s) [ ] intervenor(s)

_____
(signature)

Area Code & Phone No.: _____

[ ] IF YOU WILL NOT BE PARTICIPATING IN THIS CASE, PLEASE CHECK HERE AND RETURN, AND GIVE US THE NAME AND ADDRESS OF ANOTHER ATTORNEY, IF ANY, WHO WILL PROVIDE APPELLATE REPRESENTATION.

_____

_____

NOTE: Must be signed by an Attorney admitted to practice before the United States Court of Appeals for the Fourth Circuit pursuant to Local Rule 46(b). Individual and not firm names must be signed.
If your name has changed since you were admitted to the Fourth Circuit Bar PLEASE show the name under which you were admitted.

## Form C. Certificate of death penalty case — Fourth Circuit Local Rule 22(b).

**Fourth Circuit Form C**

CERTIFICATE OF DEATH PENALTY CASE
Fourth Circuit Local Rule 22(b)

| | |
|---|---|
| U.S. District Court for the | |
| Case Caption: | |
| Counsel for Petitioner/Defendant (name, address, phone) | Counsel for Respondent/Plaintiff: (name, address, phone) |
| Institution of Incarceration: | |
| Explanation of Emergency Nature of Proceedings | |
| Has petitioner/defendant previously filed cases in federal court?<br>[ ] No [ ] Yes (give court, caption, number, filing date, disposition and disposition date) | |
| Does petitioner/defendant have cases pending in other courts?<br>[ ] No [ ] Yes (give court, caption, number, filing date and status) | |
| I hereby certify under penalty of perjury that the petitioner/defendant is presently under a sentence of death and that the information provided on this form is currently accurate and correct. | |
| Date | Signature |

Note: The Court of Appeals will periodically request case status reports. Counsel is under a continuing affirmative obligation to immediately notify the Fourth Circuit of any changes or additions to the information contained on this form. In cases with a pending execution date, counsel must provide the Court of Appeals with four copies of all documents filed in the U.S. District Court and any pertinent state court materials.

**Form D. Application for admission to the bar.**

**Instructions:** Only attorneys admitted to the bar of the United States Court of Appeals for the Fourth Circuit may practice before the Court. An attorney who has been admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States Court of Appeals, or a United States District Court (including the District Courts for Guam, the Northern Mariana Islands, and the Virgin Islands), and who is of good moral and professional character, may become a member of the bar by:

- providing the information requested below;
- having a member of the bar of the Court move admission by signing the Motion for Admission;
- swearing or affirming the Oath before the clerk, a deputy clerk, a notary public or the Court (admission by personal appearance before the Court is usually reserved for ceremonial occasions);
- paying the admission fee of $40.00 by check made payable to "Clerk, United States Court of Appeals." (The fee is waived for attorneys appointed to represent a party in forma pauperis, law clerks to judges of the Court, and counsel for the United States or any agency thereof who have a case pending before the Court. If a fee waiver is sought, add the Fourth Circuit docket number here: _____); and
- mailing or delivering the completed form and check to the Clerk of the United States Court of Appeals, 1100 E. Main Street, Suite 501, Richmond, VA 23219-3517.

**NAME** (present practicing name):

Last _____

First _____ Middle _____

Generation Title

(Jr., Sr., II, III, etc.) _____ (if applicable) _____

Prefix (Mr., Mrs., Miss, Ms., Professor, etc.) _____

**STATE OF RESIDENCE** (for use on your certificate): _____

**FIRM:** _____

**BUSINESS ADDRESS:** _____

_____

_____

City _____

State _____ Zip Code _____ - _____ Phone (____) ____ - _____ Ext. ____

Fax ( ____ ) _____ - _____ E-mail _____

**DATE OF BIRTH:** ____ - ____ - ____
Month Day Year

**STATE AND FEDERAL COURT ADMISSIONS** (attach additional page if more space is needed):

| | Status (active, inactive) | Approx. Date Admitted (if available) |
|---|---|---|
| 1. | | |
| 2. | | |

3. _____

**AVAILABILITY FOR COURT-APPOINTMENT**

Do you want to be considered for court-appointments Yes ☐ No ☐

If yes, specify case types below:

1. Prisoner civil rights cases ☐
2. Capital punishment cases ☐
3. Federal criminal appeals ☐
4. Habeas corpus cases ☐
5. Indigent civil cases ☐
6. All case types ☐

**OATH**

I, _____, do solemnly swear (or affirm) that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

_____

(signature)

Subscribed and sworn to before me this _____ day of _____, 20____.

Notary commission expires:

_____ _____

(date) (signature and title)

**MOTION FOR ADMISSION**

I, _____, a member of the Bar of the United States Court of Appeals for the Fourth Circuit, hereby move the admission of the applicant to the Bar of the Court. I am satisfied that the applicant possesses the qualifications provided by Federal Rule of Appellate Procedure 46(a). [This rule states, in part: "An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, or another United States court of appeals, or a United States district court ...."]

_____ _____

(date) (signature and title)

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# INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Revised effective October, 1992,
with amendments received through February 1, 2001.


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6.1. Bankruptcy appeals.
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**Editor's Note.** — Each operating procedure (I.O.P.) has been given a number which corresponds to the number of the rule in the Federal Rules of Appellate Procedure to which it pertains, and the court has attempted not to repeat any information that can be found in the body of any rule. Whenever possible, information concerning practices and procedures of this court are set forth in the published internal operating procedures of the court rather than in the local rules. The court has adopted a local rule only in those circumstances where the rule establishes specific affirmative obligations on the parties proceeding before the court, delegates additional authority to the clerk or creates certain options which the Federal Rules of Appellate Procedure indicate can only be exercised by creation of a local rule.

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For website, see www.aoc.state.nc.us.

## IOP 3.1. Transmission of district court order.

The clerk of the district court shall transmit to the clerk of the court of appeals a copy of the order appealed from, along with copies of the materials required by FRAP 3(d)(1). (Amended effective December 1, 1995; amended effective December 1, 1998.)

## IOP 6.1. Bankruptcy appeals.

The Fourth Circuit has not established panels of three bankruptcy judges to hear appeals from bankruptcy courts pursuant to 28 U.S.C. § 158.

**IOP 11.1. Sanctions for court reporter's failure to file a timely transcript.**

The Fourth Circuit Judicial Council has implemented a resolution of the Judicial Conference of the United States which mandates sanctions for the late delivery of transcripts. For transcripts not delivered within 60 days of the date ordered and payment received therefor, the reporter may charge only 90 percent of the prescribed fee; for a transcript not delivered within 90 days the reporter may charge only 80 percent of the prescribed fee with the following exception. For transcripts not delivered within the time limits set forth in Local Rule 11(b), the reporter may charge only 90 percent of the prescribed fee; for a transcript not delivered within 30 days after that time the reporter may charge only 80 percent of the prescribed fee. The time period in criminal proceedings for the preparation of transcripts that are ordered before sentencing shall not begin to run until after entry of the judgment and commitment order. (Amended effective December 1, 1995.)

**IOP 12.1. Organization of the court's docket (Deleted December 1, 1998).**

**IOP 22.1. Death penalty cases.**

Once a notice of appeal has been filed in a case involving a sentence of death where an execution date has been set, a panel of three judges will be promptly identified for consideration of all matters related to the case. The position of coordinator of case information in death penalty cases has been established in the Clerk's Office of the Court of Appeals for the purpose of establishing personal liaison with district court personnel and counsel to aid in the expeditious treatment of appeals involving a sentence of death. An expedited briefing schedule will be established when necessary to allow the Court the opportunity to review all issues presented. (Amended effective December 1, 1995; amended effective June 1, 1999.)

**IOP 34.1. Calendar assignments and panel composition.**

The Clerk of Court maintains a list of mature cases available for oral argument and on a monthly basis merges those cases with a list of three-judge panels provided by a computer program designed to achieve total random selection.

The composition of each panel usually changes each day during court week except on those occasions where only one panel is sitting in a given geographical location. Every effort is made to assign cases for oral argument to judges who have had previous involvement with the case on appeal through random assignment to a preargument motion or prior appeal in the matter, but there is no guarantee that any of the judges who have previously been involved with an appeal will be assigned to a hearing panel. The varied assignment of judges to panels and the independent assignment of varied cases to panels is designed, insofar as practicable, to assure the opportunity for each judge to sit with all other judges an equal number of times, and to assure that both the appearance and the fact of presentation of particular types of cases to particular judges is avoided. (Amended effective December 1, 1995; amended effective February 1, 2001.)

**IOP 34.2. Disposition without oral argument.**

A decision against oral argument must be unanimous, and if a case is decided without oral argument the decision on the merits must be unanimous

also. Whenever at least one member of the review panel determines that oral argument would be of assistance, the panel notifies the clerk who places the case on the oral argument calendar. (Amended effective December 1, 1995.)

### IOP 36.1. Opinion preparation assignments.

The custom of the Fourth Circuit is to reserve judgment at the conclusion of oral argument. A conference of the panel is held promptly after oral argument, usually immediately after the presentation of the case. Although a tentative decision may be reached at this conference, additional conferences are sometimes necessary. Opinion assignments are made by the Chief Judge on the basis of recommendations from the presiding judge of each panel on which the Chief Judge did not sit.

### IOP 36.2. Circulation of opinions in argued cases and announcement of decision.

Although one judge writes the opinion, every panel member is equally involved in the process of decision. An appeal may be heard and decided by two of the three judges assigned to a panel, when one judge becomes unavailable. If a panel is reduced to two and the two cannot agree, however, the case will be reargued before a new three-judge panel which may or may not include prior panel members.

When a proposed opinion in an argued case is prepared and submitted to other panel members, copies are provided to the non-sitting judges including the senior judges and their comments are solicited. The opinion is then finalized. The Clerk's Office never receives advance notice of when a decision will be rendered, so counsel should not call for such information.

It is the policy of the Fourth Circuit to mail a copy of the opinion to counsel on the day judgment is entered. Upon written request, counsel will be called on that day and informed of the disposition of the case; the text of the opinion will not be read over the telephone. (Amended effective December 1, 1995.)

### IOP 36.3. Summary opinions.

If all judges on a panel of the Court agree following oral argument that an opinion in a case would have no precedential value, and that summary disposition is otherwise appropriate, the Court may decide the appeal by summary opinion. A summary opinion identifies the decision appealed from, sets forth the Court's decision and the reason or reasons therefor, and resolves any outstanding motions in the case. It does not discuss the facts or elaborate on the Court's reasoning.

### IOP 40.1. Submission of petitions for rehearing to the court.

The Clerk's Office will hold any petition for rehearing or petition for rehearing en banc until the time for filing all such petitions, or any extension thereof granted in the particular case, has run. Thereafter, all petitions for rehearing in the same case will be distributed to the Court simultaneously. (Amended effective December 1, 1995; amended effective December 1, 1998.)

### IOP 40.2. Panel rehearing.

The panel of judges who heard and decided the appeal will rule on the petition for rehearing. Such panel may include a senior circuit judge or a visiting judge sitting in the Fourth Circuit by designation.

If a petition for rehearing is granted, the original judgment and opinion of the Court are vacated and the case will be reheard before the original panel.

The Court may direct the filing of additional briefs, or the parties may seek leave of Court to file additional briefs. (Amended effective December 1, 1995.)

### IOP 41.1. Issuance of the mandate.

On the date of issuance of the mandate, the Clerk of the Court will issue written notice to the parties and the clerk of the lower court that the judgment of the Court of Appeals takes effect that day. The trial court record will be returned to the clerk of that court once the mandate has issued.

### IOP 41.2. Petitions for writs of certiorari.

A petition for a writ of certiorari must be filed with the Supreme Court within 90 days of the entry of judgment in a criminal case or a civil case. The time for the petition does not run from the issuance of the mandate, but from the date of judgment which is also the opinion date. If a petition for rehearing or a petition for rehearing en banc is timely filed, the time runs from the date of denial of that petition. Counsel should consult the Rules of the Supreme Court for details on how to proceed with the petition.

The Rules of the Supreme Court do not require that the record accompany a petition for certiorari and the record will not be forwarded unless specifically requested by the petitioner or counsel. Requests to certify and transmit the record to the Supreme Court prior to action on the petition for a writ of certiorari are disfavored by the Supreme Court. The Clerk of the Supreme Court will request the record from the Court of Appeals when review of the record is desired by the Supreme Court prior to action on a petition for writ of certiorari or upon granting certiorari if the record has not been transmitted earlier. The same procedures are followed for Supreme Court review by certification pursuant to 28 U.S.C. § 1254(2).

If a case is remanded to the Court of Appeals from the Supreme Court, the case shall be reopened under the original docket number and the Court of Appeals may require additional briefs and oral argument, summarily dispose of the case, or take any other action consistent with the Supreme Court's opinion. (Amended effective December 1, 1995; amended effective December 1, 1998.)

NOTE

I.O.P. 41.2 is amended to clarify, consistent with amendments to FRAP 35, that a timely petition for rehearing en banc will now stay the time to petition for certiorari.

### IOP 45.1. Clerk's office.

The Clerk's Office is located on the fifth floor of the United States Courthouse Annex in Richmond, Virginia, and is open from 8:30 a.m. to 5:00 p.m. every weekday, except federal holidays. All correspondence concerning cases pending before the Court should be addressed to:

Clerk, United States Court of Appeals
for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517
Telephone 804/916-2700

### IOP 45.2. Public information.

Information concerning the status of appeals and the operation of rules and procedures may be obtained from the Clerk's Office by telephone inquiry.

Matters of public record may be reviewed upon request at the Clerk's Office and case documents may be transmitted to the district court for review by counsel upon proper application to the Clerk's Office.

**IOP 47.1. Judicial conference.**

(a) There shall be held each year a conference of all the circuit and district judges, all bankruptcy judges and all full-time magistrate judges of the Circuit for the purpose of considering the business of the courts, advising means of improving the administration of justice within such Circuit, and discussion of ideas with respect to the administration of justice. It shall be the duty of every judge of the Circuit in active service and every full-time magistrate judge to attend such conference.

(b) The first day of the conference shall be devoted to a session for the judges alone, in which there shall be discussed matters affecting the state of the dockets and the administration of justice in their respective districts.

(c) Members of the bar to be chosen, as hereafter set forth, shall be members of the conference and shall participate in its discussions and deliberations on the second and third days.

(d) Members of the conference from the bar shall be as provided in I.O.P. 47.2 as approved by the active circuit judges sitting from time to time in administrative session.

(e) The Circuit Executive of this Court shall be the secretary of the conference, and shall make and preserve an accurate record of its proceedings.

(f) Each member of the bar chosen to be a member of the conference shall pay an annual membership fee in an amount fixed by the Court of Appeals, to be applied to the payment of the expenses of the conference as approved by the Chief Judge of the Circuit. The payment of the annual membership fee by members of the bar is a condition to retention of conference membership. The Chief Judge may excuse the payment of the fee in individual cases.

**IOP 47.2. Bar membership in the judicial conference of the circuit.**

Commencing with the 1997 annual conference, the members of the conference of the bar are as follows:

A. Ex officio members.

1. The Attorney General of the United States, or designee.

2. The presidents of the state bar associations of the states of the Circuit. When two bar associations in the same state are both recognized under this rule, the president of each shall be entitled to attend, and the maximum number of members of the conference from the bar, from any state, under this provision, shall be limited to two. As long as there is only one state bar association in Maryland, the Bar Association of Baltimore City may be treated as a state bar association under this provision.

3. All United States Attorneys in the Circuit.

4. All Federal Public Defenders in the Circuit.

5. All Chief Justices of the courts of last resort of the states comprising this Circuit.

6. All Attorneys General of the states comprising this Circuit.

7. The Chief Judge of the United States Court of Appeals for the Armed Forces.

8. The Chief Judge of the United States Tax Court.

9. One representative of each accredited law school within the Circuit.

B. Members designated by judges.

1. Each active and senior circuit judge and each active and senior district judge may annually designate two lawyers to be invited by the Chief Judge as guests of the conference.

2. By attending three conferences as guests invited under (1) above, a lawyer retains permanent membership in the conference. Permanent membership entitles the member to attend all annual conferences. (Amended effective February 16, 1993; further amended September 25, 1996.)

# APPENDICES

## Appendix A. Resolution respecting bar membership in the judicial conference of the circuit.

**Editor's note.** — The United States Court of Appeals for the Fourth Circuit adopted new I.O.P. 47.2, which was formerly Appendix A, effective April 30, 1992.

**Appendix B. Guidelines for preparation of appellate transcripts in the Fourth Circuit.**

## I. INTRODUCTION

A. Purpose

These guidelines set forth in detail the following:

1. Duties of the district court clerk's office, appellant and appellee in ordering the transcript;
2. Responsibilities of the court reporter for preparing and timely filing the transcript;
3. Duties of the court of appeals for acknowledging transcript orders and monitoring the timeliness of the filing of transcripts;
4. Procedures for court reporters to follow in requesting extensions of time and waivers of fee sanctions;
5. Criteria to be used by the court of appeals in acting on requests for extensions and waivers;
6. Common problems that have been encountered by court reporters and the court of appeals in the ordering, preparation and filing of transcripts; and
7. Provisions for supplementation of these Guidelines by local procedures adopted by a district court.

B. Relation to Federal Rules of Appellate Procedure

Although Rule 11(b), Federal Rules of Appellate Procedure, requires transcripts to be filed within thirty days of the purchase order date, the court of appeals will use the time limits set forth in the district court reporter management plans governing the application of fee sanctions as the time periods within which transcripts will be due. All of the plans establish a 60-day period for preparation of transcripts without financial penalty. Exceptions are:

1. Special provisions adopted by the Fourth Circuit Judicial Council for appeals by incarcerated criminal defendants;
2. Special circumstances, such as
(a) bail appeals,
(b) death penalty cases,
(c) expedited sentencing appeals,
(d) recalcitrant witness appeals, or
(e) other expedited procedures.

The Table on the next page sets forth the time requirements in detail.

TABLE OF TRANSCRIPT DUE DATES AND APPLICABLE SANCTIONS

| NATURE OF CASE | LENGTH OF TRANSCRIPT | TRANSCRIPT DUE | 10% FEE SANCTION | 20% FEE SANCTION |
|---|---|---|---|---|
| Direct criminal appeals, appellant incarcerated | 1000 pages or less | within 30 days of transcript order or judgment and commitment order, whichever is later | if filed after 30th day | if filed after 60th day |
| | more than 1000 pages | as ordered by clerk following consultation with reporter and parties | if due date missed | if due date missed by more than 30 days |
| All other cases, in other than exceptional circumstances | Any length | within 60 days of transcript order or judgment and commitment order, whichever is later | if filed after 60th day | if filed after 90th day |
| Exceptional circumstances (e.g., bail appeals, death penalty cases, expedited sentencing appeals, etc.) | Any length | as ordered by clerk following consultation with reporter and parties | * | * |

*Twenty percent fee sanction automatically imposed if due date missed. Letter to chief district judge, after consultation with chief circuit judge requiring immediate preparation of the transcript.

C. Effective Date

These guidelines will take effect on June 1, 1986, and will apply to all Fourth Circuit cases subject to F.R.A.P. 11(b) in which the transcript is ordered after that date.

D. Definitions

For purposes of these Guidelines, references to appellant-appellee will refer to counsel for appellant-appellee unless appellant-appellee is proceeding pro se, in which case all duties and responsibilities are those of appellant-appellee individually.

## II. ORDERING AND ACKNOWLEDGING TRANSCRIPTS

A. Duties of District Court Clerk's Office

1. When a notice of appeal is filed, the district court clerk's office will furnish appellant with a copy of the Transcript Order form.

2. Upon entry of an order authorizing preparation of a transcript at government expense pursuant to the Criminal Justice Act or 28 U.S.C.

§ 753(f), the district court reporter coordinator or appeals deputy will notify the court of appeals of the date on which the order was entered.

3. When substitute reporters or contract reporters are used, the district court reporter coordinator or district court appeals deputy will furnish them with copies of these guidelines and explain the procedures to be followed in preparing appellate transcripts.

4. When the transcript is filed, the district court clerk's office will see that the court reporter or the court reporter coordinator mails a copy of the reporter's certification to the court of appeals.

B. Duties of Appellant

1. Within ten days after filing the notice of appeal, the appellant is required by F.R.A.P. 10(b)(1) to order from the court reporter such transcript of the proceedings as the appellant deems necessary.

2. By service of a copy of the Docketing Statement, appellant will notify appellee(s) that (a) a transcript is not needed for the appeal, (b) a transcript is already on file in the district court, or (c) less than the complete transcript will be ordered. The statement of issues in the Docketing Statement will satisfy the requirement of F.R.A.P. 10(b)(3).

3. Before a transcript can be ordered, the appellant must obtain from the court reporter an estimate of the length of the transcript and make appropriate financial arrangements with the reporter (1) by immediate payment in full or by another payment arrangement acceptable to the reporter, (2) payment pursuant to the Criminal Justice Act, or (3) payment at government expense pursuant to 28 U.S.C. § 753(f). [Local Rule 10(c)(1)]. Payment or acknowledgment of financial arrangements satisfactory to the reporter must accompany the court reporter's copy of the Transcript Order. [F.R.A.P. 10(b)(4)].

4. In criminal cases, counsel may seek authorization from the district court to order transcript after entry of verdict but prior to sentencing. The district court may authorize the early ordering of transcript if it determines that defense counsel has informed the defendant of the right to appeal and the defendant has instructed counsel to appeal regardless of the nature or length of the sentence imposed. The time requirements for the preparation of transcripts that are ordered before sentencing shall not begin to run until after entry of the judgment and commitment order.

5. To order a transcript, the appellant completes the Transcript Order form furnished by the district court clerk's office and distributes the copies as follows:

| | |
|---|---|
| court reporter — | mail original to court reporter within 10 days of filing notice of appeal |
| district court — | file copy in district court clerk's office within 10 days of filing notice of appeal |
| court of appeals — | attach copies to both copies of Docketing Statement filed in court of appeals clerk's office within 14 days of filing notice of appeal |
| opposing counsel — | attach copy to Docketing Statement served on opposing counsel within 14 days of filing notice of appeal |

A separate Transcript Order must be prepared for each court reporter from whom a transcript is requested.

6. Failure by the appellant to timely order a transcript, failure to make satisfactory financial arrangements with the court reporter, or failure to specify in adequate detail those proceedings to be transcribed will subject the appeal to dismissal by the clerk of the court of appeals for want of prosecution pursuant to Local Rule 45.

7. When supplemental transcripts are requested, appellant must complete another Transcript Order form, make satisfactory financial arrangements with

the reporter, and distribute copies to the same persons to whom the original Transcript Order was sent.

8. If payment is waived by the reporter at the time of ordering the transcript, the appellant must make full payment upon receipt of the reporter's invoice. If payment is not made within a reasonable period of time, the appeal will be subject to dismissal by the clerk of the court of appeals pursuant to Local Rule 45.

9. Transcripts ordered under the Criminal Justice Act do not include opening and closing statements, voir dire, or jury instructions unless prior special authorization has been received by appellant. CJA Form 24 forms should be obtained from the district court and submitted to the district court judge for approval. In multi-defendant cases involving CJA defendants, only original transcripts should be purchased from the court reporter(s). Requests for copies will be arranged by the district court using commercial printers. Contact the district court reporter coordinator or district court clerk's office for further instructions.

10. When an appellant has ordered a transcript, he or she is obligated to pay the reporter for it. If the appeal is dismissed voluntarily, the appellant is nonetheless responsible to the reporter for the cost of transcript prepared prior to the reporter's receipt of notification from the appellant of the appeal's dismissal.

C. Duties of Appellee

1. If the appellee deems a transcript of other parts of the proceedings to be necessary, he or she is required by F.R.A.P. 10(b)(3), within ten days after service of the Docketing Statement by the appellant, to file and serve on the appellant a designation of additional parts to be included. Unless within ten days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following ten days either order the parts or move the district court for an order requiring the appellant to do so.

2. If the appellee wishes to obtain a copy of the transcript which has been ordered by the appellant, he or she may do so by ordering the copy directly from the court reporter. Satisfactory financial arrangements must be completed with the reporter before obtaining the copy. It is not appellant's responsibility to order and pay for a copy of the transcript for appellee.

D. Duties of the Court Reporter

1. Upon receipt of the Transcript Order form and completion of satisfactory financial arrangements, the reporter must prepare the required transcript within the time set forth in the applicable district court reporter management plan.

2. The appellant attaches copies of the transcript order to the two copies of the Docketing Statement filed with the court of appeals. Upon receiving the transcript order, the court of appeals will complete and send to the reporter, and to the court reporter coordinator and the district court, a Transcript Order Acknowledgment form to verify the transcript order. A copy of the Acknowledgment form will be sent to the reporter along with a photocopy of the Transcript Order. The Acknowledgment will contain the order date and the date by which the transcript must be filed to avoid sanctions. The order date set out in the Transcript Order Acknowledgment form will be the date the Transcript Order form was received by the court of appeals. The due date is computed from this date by the court of appeals in accordance with the time specified in the district court reporter management plans. If the Transcript Order form is complete and accurate and satisfactory financial arrangements have been completed, NO RESPONSE IS REQUIRED FROM THE COURT REPORTER TO THE TRANSCRIPT ORDER FORM OR THE TRANSCRIPT ACKNOWLEDGMENT FORM.

3. If there is a problem with the order date (e.g., the court reporter had not received the Transcript Order by the date it was received in the court of appeals), with financial arrangements with the appellant, with identification of the transcript ordered, with proper designation of the court reporters involved in the case, or with any other aspect of the Transcript Order, the court reporter must complete and mail a copy of the Acknowledgment form to the court of appeals within seven days of receipt by the reporter (time may be extended for vacation, serious illness or other unusual circumstances). A copy should also be sent to the court reporter coordinator. The court reporter need not inform the court of appeals if he or she in fact received the Transcript Order before the order date shown on the Acknowledgment. The court reporter may use any additional time so created for preparation of the transcript without fear of incurring a sanction for late filing. The court of appeals' Acknowledgment constitutes an implied fee sanction waiver to the due date set forth on the form.

4. The time for completion of the transcript will stop running automatically upon the reporter's mailing of the Acknowledgment form, indicating a problem with the terms of the order, for whatever reasonable period of time is required for the reporter or district court reporter coordinator to resolve the problem with the appellant. The court of appeals transcript coordinator will be in touch with the reporter or district court reporter coordinator upon receipt of the Acknowledgment form to offer assistance, such as notification to the appellant that the appeal will be dismissed if the problem is not remedied promptly.

5. When the problem has been remedied, the court of appeals will send a revised Transcript Order Acknowledgment setting forth a new transcript filing date reflecting the delay caused by the problem with the original Transcript Order.

6. Unless the court of appeals is notified of a problem with the Transcript Order, or of some other reason why the information on the Transcript Order Acknowledgment form prepared by the court of appeals is incorrect, the reporter will be held to the schedule set forth therein absent the granting of an extension of time. It is the court reporter's responsibility to notify the court of appeals of any problem.

7. If the transcript is estimated to be more than 1000 pages and is ordered in a criminal appeal in which the appellant is incarcerated, the reporter will receive an acknowledgment form with the order date and a due date which will be established by the court of appeals.

8. When the transcript has been completed and the court copy filed in the district court, a copy of the reporter's certification setting forth the date the transcript was filed in the district court must be sent to the court of appeals by the court reporter, or by the court reporter coordinator, to notify the court of appeals that the transcript has been filed and to provide a means for the court of appeals to verify that the proper fee reduction was taken by the reporter if the transcript was not timely filed.

9. Unless a written motion is filed by the appellant with the court of appeals, and an extension granted by the clerk of the court of appeals, requests by an appellant that a reporter suspend or delay preparation of a transcript that has been ordered will have no effect on the date the transcript is due, or on the appellant's obligation to pay for it when it is prepared. The only exception is when a motion for voluntary dismissal of the appeal has been granted; in that instance the appellant is responsible for paying only for that portion of the transcript completed prior to the reporter's receipt of notification from the appellant of the appeal's dismissal.

E. Duties of Court of Appeals

1. F.R.A.P. 10(b)(1) requires the appellant to order the transcript within ten days after filing the notice of appeal. If the completed form is not received by

the court of appeals within that time, making reasonable allowance for delivery by mail, the court of appeals will notify the appellant that no order has been received and that failure to comply with F.R.A.P. 10(b)(1) will subject the appeal to dismissal by the clerk for want of prosecution pursuant to Local Rule 45.

2. When the court of appeals receives the Transcript Order form, it will be reviewed for any obvious defects (e.g., multiple reporters on one form, or incompleteness as far as nature of proceedings requested or certification of satisfaction of financial requirements). If it appears to be in order, the court of appeals will prepare for the reporter a Transcript Order Acknowledgment showing the date the Transcript Order was received in the court of appeals and the due date, computed in accordance with the time limits set forth in the applicable district court reporter management plan. The court of appeals clerk's office will work together with reporters and parties to remedy any deficiencies in the Transcript Order that are brought to its attention by the reporter. (See Section D.3 - 8 for full description of procedures.)

## III. REPORTS

Reports on outstanding transcripts will be generated monthly and will be distributed to the court reporters involved, as well as to the district court clerks or their court reporter coordinators. If the report shows a transcript outstanding when it has actually been filed, the reporter or district court reporter coordinator should call the court of appeals and report the date of filing. If everything in the report is correct and none of the transcripts are overdue, no response is required from the reporter.

## IV. TIME LIMITS FOR FILING TRANSCRIPTS— FEE REDUCTION SANCTIONS

### A. Requests for Extensions of Time

As set forth in the district court reporter management plans, all requests for extensions of time for the filing of appellate transcripts (F.R.A.P. 11(b) transcripts) are submitted to the clerk of the court of appeals. They should be in writing, on the designated form. A request for an extension of time will automatically constitute a corresponding request for a waiver of any applicable fee reduction sanction. Requests for extensions must be mailed ten days in advance of the deadline from which relief is sought, unless unforeseen circumstances make later requests necessary, in which case the reasons will be set out by the reporter in the request. When requesting an extension, the information furnished should be very specific. Failure to submit complete information will delay action on the request and lead to additional paperwork for the reporter. After reviewing the request for extension, the court of appeals will issue an order granting, granting in part, or denying the request, which will set forth the resulting timeframes for purposes of fee sanction imposition. Counsel, the district court reporter coordinator, and the district court clerk will also receive copies of this order.

### B. Grounds for Extensions of Time

1. *Excessive burden of transcript, considering length and complexity of the proceedings ordered within a short period of time.* District court reporter coordinators are expected to make court reporter assignments within a district so as to anticipate and to avoid to the extent possible the imposition of excessive transcript loads on individual reporters. When these efforts are unsuccessful, reporters may apply for relief from applicable fee sanctions and have the court of appeals assign the relative priority to be given to competing

appellate transcript orders. The fact that a reporter has accumulated orders for more than 3000 pages within three months will be presumed to establish the existence of an "excessive burden." The existence of outstanding overdue transcripts may or may not be grounds for extending the time for subsequently ordered transcripts. In computing the amount of transcript for purposes of demonstrating excessive burden, the reporter can include all transcripts ordered within ninety days of the request for extension. The reporter may include transcript obligations for the district court as well as those ordered for appellate purposes. However, the orders must be "firm orders". A "firm order" for an appellate transcript is one for which the court of appeals has received a Transcript Order from the appellant. For a district court transcript it is an order communicated by a judge or a party; it cannot be a reporter's speculation that an order will be forthcoming.

2. *Vacation.* A reporter can plan to take reasonable vacations, as authorized by the district court, and obtain extensions of deadlines that would fall within those periods or become impossible to meet in light of them.

3. *Unavoidable, excessive time required for attendance in court.* It is the responsibility of the district court reporter coordinator to adjust reporter assignments to ensure that the needs of the trial and appellate courts can be met. Occasions may arise, nonetheless, when a court reporter's courtroom obligations, including official travel required to reach the courtroom, prevent his or her meeting transcript obligations. Reasonable extensions of time will be given in such instances.

4. *Incapacitation or serious illness.* A reporter may certify to the clerk of the court of appeals that he or she has become temporarily incapacitated or seriously ill, and obtain reasonable relief from pending deadlines. This ground does not include common colds or other ailments that would not prevent attendance in court.

5. *Unforeseen emergencies.* Reporters may seek extensions for any other good cause which makes the completion of a transcript within the allotted time impossible.

## V. SANCTIONS

A. Fee Reduction Sanctions

An official court reporter will be required to deduct from his or her charges for a completed transcript not timely filed with the district court the amount of any fee reduction sanction applicable by the terms of a district court reporter management plan.

B. Removal from Courtroom and Request for Substitute Reporter

The chief judge of the court of appeals, following consultation with the chief judge of the district court, may order a reporter to remain out of the courtroom, and pay the costs of a satisfactory substitute reporter, if a transcript is ninety days overdue.

## VI. MONITORING OF TRANSCRIPT FILING

The clerk of the court of appeals will monitor the filing of all appellate transcripts and the fees charged by reporters when a transcript is filed untimely. The fee sanction mechanism exists by virtue of the district court reporter management plans which require reporters to take fee reductions if a transcript is not filed on time. Therefore, the court of appeals will not issue a sanction order. It is the reporter's duty to abide by the provisions of his or her district court reporter management plan and to take a fee reduction if one is applicable.

The court of appeals will take no action if the transcript is filed on time or, if not filed on time, the appropriate fee reduction has been taken as shown by the copy of the certification that the reporter submitted to the court of appeals when the transcript was filed. If a fee reduction was applicable and was not taken by the reporter, the court of appeals will send a letter to the reporter setting forth the fee reduction that should have been taken. Copies of this letter will be sent to counsel, the district court reporter coordinator (if any) and the judge to whom the reporter reports or the chief district judge. If the certification is not submitted within a reasonable period after the filing of the transcript, the reporter will be requested to submit a copy of his or her invoice.

The court of appeals will also send a letter to the chief district judge when a transcript is sixty days overdue. The letter will identify the particular transcript involved and the date of the order. Copies of the letter will be sent to the judge (if any) to whom the reporter reports, the district court reporter coordinator, the district court clerk, and the reporter. The letter will alert the chief judge of the district court to the possibility that the reporter may be required to remain out of the courtroom, paying for a substitute reporter, until the transcript is completed, if the transcript becomes ninety days overdue.

## VII. COMMON PROBLEMS

### A. Transcripts Prepared at Government Expense

1. *Criminal Justice Act* [18 U.S.C. § 3006A(6)]. When the reporter receives the approved CJA form, preparation of the transcript should begin immediately. The date of receipt of the approved CJA form will begin the running of the time for delivery of the transcript and the imposition of sanctions, except when the transcript is ordered before sentencing as set forth in II.B.4 above.

Pursuant to the provisions of the September 1987 amendment to the Guidelines for the Administration of the Criminal Justice Act, in multi-defendant cases involving CJA defendants, no more than one original transcript should be purchased from the court reporter on behalf of CJA defendants. One of the appointed counsel or the district court should arrange for the duplication, at commercially competitive rates, of enough copies of the transcript(s) for each of the CJA defendants for whom a transcript has been approved.

2. *In Forma Pauperis Litigants* [28 U.S.C. § 753(f)]. When an order is entered directing preparation of a transcript at government expense pursuant to 28 U.S.C. § 753(f), the transcript order date is the date the reporter receives the court's order authorizing preparation of the transcript. The order date is not postponed until receipt of a completed AO Form 19, since the government is under an obligation to pay for the transcript once it is ordered by the court.

### B. Supplemental Transcripts

Supplemental transcripts are usually ordered after the original transcript has been filed and a briefing schedule established by the court of appeals. Therefore, these transcripts should be expedited. Counsel is under an obligation to notify the court of appeals that a supplemental transcript has been ordered. The court of appeals will then send the Transcript Order Acknowledgment form to the reporter with the request that the reporter prepare these transcripts as quickly as possible.

### C. Expedited Proceedings

When a transcript is requested for an expedited proceeding, the due date for filing the transcript is established by the court of appeals. If an expedited transcript is requested and prepared within seven days after receipt or notification of the order, the court reporter may charge the higher rates for expedited transcripts.

Transcripts for appeals arising from a criminal sentence imposed under 18 U.S.C. § 3742 will only be expedited if a motion for expedited review of criminal sentence is granted by the court of appeals. Only those portions of the transcript pertinent to the appeal must be prepared on an expedited basis. The court reporter will be notified by the court of appeals when a motion to expedite has been granted.

In bail appeals, only the portion of the transcript dealing with the bail issue should be ordered on a rush basis. Even though there may be other portions of the transcript that the appellant has ordered, the portion dealing with the bail issue should be prepared first.

In expedited proceedings, a twenty percent fee sanction from the regular transcript rate will be imposed if the due date is missed. At the same time, a letter will be sent to the chief judge of the district court, advising of the delinquency and warning that the chief judge of the court of appeals may order the reporter to remain out of the courtroom, and pay the costs of a satisfactory substitute reporter, if the transcript is not filed immediately. IF THE COURT REPORTER ANTICIPATES A PROBLEM WITH PROMPT PREPARATION OF AN EXPEDITED TRANSCRIPT, THE DISTRICT COURT REPORTER COORDINATOR AND THE COURT OF APPEALS SHOULD BE NOTIFIED IMMEDIATELY.

D. Payment for Transcript

The court of appeals approves of reporters' demanding a substantial deposit or full payment in advance for preparation of a transcript. In those instances where a reporter does not demand full payment in advance, and upon transcript completion has not been paid fully by the appellant, the following procedures should be followed:

1. Timely file the court copy of the transcript with the district court clerk's office.

2. Contact the court of appeals immediately and a letter will be sent to the appellant stating that if full payment is not made to the court reporter within fifteen days of the date of the letter, the appeal will be dismissed for failure to prosecute.

Fee reduction sanctions will be applicable if the court copy of the transcript is not timely filed. Problems with payment for the transcript after its completion will have no effect on the established due date.

E. Substitute Reporters

When an official court reporter hires a substitute, the official reporter still retains responsibility for the timely filing of the transcript. All provisions applicable to an official court reporter will be applicable to the substitute. If there is a problem with the filing of a transcript, the official court reporter will be notified as well as the substitute reporter. All correspondence and orders by the court of appeals will be sent to both reporters. The substitute can request extensions of time and waivers of applicable fee sanctions from the court of appeals. However, all guidelines applicable to the official reporter will be applicable to the substitute reporter and the proper procedures for requesting extensions must be followed.

F. Contract Reporters

Contractual reporting services in district courts are provided as supplements to the services of official staff. Contractual services are used after the district court reporter coordinator has determined that no official court reporter is available. Contract reporters must follow the procedures set out below.

1. All contractors are subject to the provisions of the Terms and Conditions of AO Form 355, Contracts for Court Reporting Services, governing time of

filing (30 days from date of order) and fee sanctions for late delivery of transcripts (2% for each day or fraction of a day the transcript is late, but not less than 10% and not more than 50% of the price of the transcript).

2. All contractors — whether or not the written standard contract is signed — must meet the Terms and Conditions of AO Form 355 as set forth above.

3. Extensions of time for filing transcripts for F.R.A.P. 11(b) cases may be requested in writing following the procedures set forth in these Guidelines. However, the court of appeals cannot waive the fee sanctions set out in AO Form 355. A waiver of applicable fee reduction sanctions may be requested, in writing, from the contracting officer. A copy of the letter requesting a waiver of fee sanctions should be sent to the court of appeals.

G. Filing of Transcripts with the District Court

When the proceedings that are transcribed have been taken in another division of the district court, the reporter may file the court copy of the transcript in the district in which his or her office is located. That division will file stamp the copy and forward it to the appropriate division for inclusion in the record to be transmitted to the court of appeals.

## VIII. ADDITIONAL LOCAL PROCEDURES

Following prior consultation with the clerk of the court of appeals, a district court may institute supplemental local procedures designed to adapt these Guidelines to the structure of court reporting services in place in that district.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**TRANSCRIPT ORDER**

READ INSTRUCTIONS ON BACK PAGE BEFORE COMPLETING

Case Style _____
District Ct. No. _____ District _____
Date Notice of Appeal filed _____ Ct. of Appeals No. _____
Name of Court Reporter/Electronic Rec. _____
Address of Reporter _____

TO BE COMPLETED BY PARTY ORDERING TRANSCRIPT—DO NOT SUBMIT FORM UNTIL FINANCIAL ARRANGEMENTS HAVE BEEN MADE WITH THE REPORTER. IF THIS COMPLETED FORM IS NOT MAILED TO THE COURT REPORTER AND A COPY FILED WITH THE DISTRICT COURT CLERK WITHIN TEN (10) DAYS AFTER FILING NOTICE OF APPEAL, THE APPEAL WILL BE SUBJECT TO DISMISSAL PURSUANT TO FOURTH CIRCUIT LOCAL RULE 45. ADDITIONAL COPIES OF THIS FORM MUST BE FILED WITH TWO COPIES OF APPELLANT'S DOCKETING STATEMENT WITH THE CLERK OF THE COURT OF APPEALS WITHIN FOURTEEN DAYS OF FILING THE NOTICE OF APPEAL. A SEPARATE TRANSCRIPT ORDER MUST BE COMPLETED FOR EACH REPORTER FROM WHOM A TRANSCRIPT IS REQUESTED.

A. This constitutes an order of the transcript of the following proceedings [check appropriate box(es) and indicate total number of pages].

| PROCEEDING | HEARING DATE(S) |
|---|---|
| ☐ Voir Dire | |
| ☐ Opening Statement (Plaintiff) | |
| ☐ Opening Statement (Defendant) | |
| ☐ Closing Argument (Plaintiff) | |
| ☐ Closing Argument (Defendant) | |
| ☐ Opinion of Court | |
| ☐ Jury Instructions | |
| ☐ Sentencing | |
| ☐ Bail Hearing | |
| ☐ Pre-Trial Proceedings (specify) _____ | |
| ☐ Testimony (specify) _____ | |
| ☐ Other (specify) _____ | |

**TOTAL ESTIMATED PAGES** _____

**NOTE:** *FAILURE TO SPECIFY IN ADEQUATE DETAIL THOSE PROCEEDINGS TO BE TRANSCRIBED IS GROUNDS FOR DISMISSAL OF AN APPEAL.*

B. I certify that I have contacted the court reporter (or coordinator if electronic recording from the District of Maryland) and satisfactory financial arrangements for payment of the transcript have been made.
☐ Private funds. (Deposit of $_____ enclosed with court reporter's copy. Check No. _____.)

☐ Criminal Justice Act. A CJA Form 24 has been submitted to the district judge. (Attach a photocopy of the CJA 24 to the court of appeals' and reporter's copies.)
☐ Government expense (civil case). IFP has been granted and a motion for transcript at government expense has been submitted to the district judge.
☐ Advance payment waived by court reporter.
☐ Federal Public Defender - no CJA Form 24 necessary.

Signature _____ Typed Name _____
Address _____
Telephone No. _____ Date mailed to Reporter _____

**INSTRUCTIONS TO APPELLANT FOR ORDERING TRANSCRIPT**

You have ten days after filing your notice of appeal to order transcript from the court reporter and file a copy of this form with the clerk of the district court. Within fourteen days of filing the notice of appeal, additional copies of this form must be filed with two copies of the Docketing Statement with the clerk of the court of appeals and served with the Docketing Statement on opposing counsel.

**DO NOT SUBMIT THIS FORM UNTIL YOU HAVE MADE SATISFACTORY FINANCIAL ARRANGEMENTS WITH THE COURT REPORTER.**

1. Contact each court reporter involved in reporting the proceedings, obtain an estimate of total pages, and make arrangements for payment. If you are unsure of the reporter(s) involved, contact the district court clerk's office for that information. A SEPARATE TRANSCRIPT ORDER MUST BE PREPARED FOR EACH COURT REPORTER FROM WHOM A TRANSCRIPT IS REQUESTED. MAKE COPIES OF BLANK FORM AS NECESSARY.

2. If payment is waived by the reporter until completion of the transcript, the appellant must remit full payment within a reasonable period of time upon receipt of the reporter's invoice.

3. If this was an electronic recording from the District of Maryland, contact the district court reporter coordinator for further instructions.

4. Transcripts ordered under the Criminal Justice Act do not include opening and closing statements, voir dire, or jury instructions unless prior special authorization has been received by the appellant. Request CJA Form 24 from the district court and submit the form(s) to the district court judge for approval. A separate CJA Form 24 must be completed for each court reporter. In multi-defendant cases involving CJA defendants, only original transcripts should be purchased from the court reporter(s). Requests for copies will be arranged by the district court using commercial printers. Contact the district court reporter coordinator or district court clerk's office for further instructions.

5. Complete the Transcript Order in its entirety.

6. Distribute the Transcript Order as follows:

court reporter — mail original to court reporter within 10 days of filing notice of appeal
district court — file copy in district court clerk's office within 10 days of filing notice of appeal

court of appeals — attach copies to both copies of Docketing Statement filed in court of appeals clerk's office within 14 days of filing notice of appeal. For CJA attorneys, a copy of the CJA Form 24 must also be attached

opposing counsel — attach copy to Docketing Statement served on opposing counsel within 14 days of filing notice of appeal

**IF THE TRANSCRIPT ORDER IS NOT FILED WITHIN THE TIME PERIODS SET FORTH ABOVE, PROCEDURES WILL BE INITIATED TO DISMISS THE APPEAL FOR FAILURE TO PROSECUTE.**

If you have further questions, contact the Clerk's Office, U.S. Court of Appeals (804-916-2700).

**Appendix C. Plan of the United States Court of Appeals for the Fourth Circuit in implementation of the Criminal Justice Act.**

The Judicial Council of the Fourth Circuit adopts the following plan, in implementation of the Criminal Justice Act.

## I. RIGHT TO COUNSEL

1. *Direct Appeals:* In every direct appeal involving a person

(a) who is charged with a felony or misdemeanor (other than a petty offense), or with juvenile delinquency as defined in 18 U.S.C. § 5031, or with a violation of probation or supervised release; or who faces modification, reduction, or enlargement of a condition or extension or revocation of a term of supervised release; or who is under arrest and representation is required by law; or who is subject to a mental condition hearing under Chapter 13 of Title 18; or who is held in custody as a material witness; or who appeals from parole proceedings conducted pursuant to 18 U.S.C. § 4106A; or,

(b) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces the loss of liberty, any federal law requires the appointment of counsel,

whether the appeal be by a defendant from a judgment of conviction or other order, from an order revoking probation, or by the United States from a judgment of acquittal or dismissal, a defendant shall be entitled to be represented by counsel as a matter of right.

If the appeal involves a petty offense for which confinement is authorized, the court may appoint counsel for a financially eligible person upon a determination that the interests of justice so require.

In these cases, unless an application for the appointment of counsel has already been received, or notice of appearance has been filed by retained counsel, the clerk of this court shall promptly notify the defendant of his right to counsel and shall inform him that counsel will be appointed if he is financially unable to obtain adequate representation. Where an attorney had previously been appointed to represent the defendant in district court, that attorney shall be reappointed, without prior notice, upon the docketing of the appeal in this court. If there is no such reappointment, either because defendant appeared pro se or was represented by retained counsel in the district court, the clerk shall appoint the attorney of record in the district court, where appropriate, or select an appointee from a panel of approved attorneys.

In pro se cases in which the appellant exercises his right to represent himself as suggested by *Faretta v. California,* 422 U.S. 806 (1975); 28 U.S.C. § 1654, the court may find it appropriate to appoint standby counsel for the appellant to assist in the appeal to protect the integrity and ensure the continuity of the judicial proceedings. (*McKaskle v. Wiggins,* 465 U.S. 168 (1984); *Faretta, supra*). Accordingly, if a pro se appellant is represented, at least in part, by standby counsel, compensation may be provided under the CJA.

2. *Collateral Proceedings:* In an appeal in a post-conviction proceeding under 28 U.S.C. §§ 2254 or 2255, seeking to vacate or set aside a death sentence, a petitioner who is financially unable to obtain adequate representation shall be entitled to appointment of one or more attorneys. 21 U.S.C. § 848(q)(4). In an appeal in a collateral proceeding brought by the petitioner from any other order denying the relief requested pursuant to 28 U.S.C. §§ 2241, 2254, or 2255, a petitioner shall not be entitled to be represented by counsel as a matter of right. In these cases, counsel will be appointed only after the court has decided to hear the case on the merits, as in the granting of leave to appeal or the issuance of a certificate of appealability. However, in an appeal

brought by the United States or a state from an order granting the relief requested, a petitioner shall be entitled to representation as a matter of right.

In any non-capital case brought pursuant to 28 U.S.C. §§ 2241, 2254, or 2255, the court may, on motion of the petitioner or on its own motion, appoint counsel where the court determines that (a) petitioner is financially unable to obtain adequate representation and (b) the interests of justice require legal representation, as when petitioner needs the assistance of counsel to go forward with an apparently meritorious petition. The clerk shall thereupon appoint the attorney of record in the district court, where appropriate, or select an appointee from a panel of approved attorneys.

Where a petitioner is under sentence of death, the clerk shall appoint counsel upon receipt of the notice of appeal.

## II. APPOINTMENT OF COUNSEL

1. *Court Order:* Every appointment of counsel pursuant to the Criminal Justice Act and this Plan shall be made by an order of this court. A prerequisite to appointment shall be an affirmative finding by the court that a defendant is financially unable to employ counsel. However, where counsel was appointed in the lower court, this court will presume, until reason to the contrary appears, that the defendant remains financially unable to retain counsel, and no such finding shall be required.

The selection of counsel under the Criminal Justice Act shall be the exclusive responsibility of the court, and no person entitled to court-appointed counsel shall be permitted to select counsel to represent him.

2. *Retroactivity:* An appointment may be made retroactive to include any representation furnished to an indigent by an attorney prior to appointment pursuant to this Plan.

3. *Scope:* A person for whom counsel is appointed shall be represented at every stage of the proceedings, through appeal, including ancillary matters appropriate to the proceedings and including a petition for writ of certiorari to the Supreme Court if non-frivolous grounds exist for filing such a petition.

4. *Substitution of Counsel:* The court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings. The total compensation to be paid both attorneys shall not exceed the statutory maximum for one appointment, unless the case involves extended or complex representation.

5. *One Attorney for Multiple Defendants:* In appeals involving multiple defendants, separate counsel will normally be appointed for each defendant, unless there has been a waiver on the record by the defendants or good cause is shown. If one attorney is appointed to represent more than one defendant, a separate order of appointment shall be entered for each defendant. The attorney may be compensated for his services up to the maximum for each defendant represented; however, time spent in common on one or more defendants must be prorated.

6. *Multiple Appointments for One Defendant:* In capital cases, and in other cases of extreme difficulty where the interests of justice so require, the court may appoint an additional attorney to represent a defendant. Each attorney so appointed shall be eligible to receive the maximum compensation allowed under the Criminal Justice Act. Any defendant indicted for a capital offense is entitled to have two attorneys appointed. 18 U.S.C. § 3005.

7. *Defendant's Objection to Appointed Attorney:* The court shall give consideration to a defendant's expression of dissatisfaction with his counsel only if specific grounds for dissatisfaction are stated. Appointed counsel shall be relieved only when the court, in its discretion, determines that the interests of justice so require.

8. *Attorney's Motion to Withdraw:* An attorney appointed to represent a defendant in the lower court is generally obliged to continue that representation upon appeal. An attorney who does not desire to continue the representation must file a motion to withdraw with the clerk of this court promptly after filing the notice of appeal. The motion must set forth specific grounds for granting withdrawal; defendant's dissatisfaction with counsel is not sufficient grounds. Also, should counsel, during the course of an appeal, encounter a specific reason which suggests the inappropriateness of further representation of the defendant, counsel should promptly file a motion to withdraw. In any event, counsel has a duty to continue to represent the defendant until a motion to withdraw is granted.

## III. DEFENDANT'S FINANCIAL STATUS

1. *Filing Application:* A defendant who, in the district court, was represented by employed counsel, or was unrepresented, or was represented by appointed counsel but has nonetheless been requested to file a new application in this court, may apply to this court for the appointment of counsel. Such application shall be accompanied by an affidavit disclosing the applicant's financial status and any resources available to him to compensate counsel.

2. *Re-examination by Court:* The court, at any time, may re-examine a defendant's financial status as it bears upon the appointment of counsel and, thereupon, (a) appoint counsel to represent the defendant, if the defendant is not already represented or is unable to pay previously retained counsel, (b) terminate the appointment of counsel, or (c) require a partial payment of counsel fees by the defendant. The defendant shall furnish such financial and related information as may be requested during the re-examination, unless he desires to proceed without counsel.

3. *Insufficiency of Funds; Partial Payment:* If a defendant's net financial resources and anticipated income are in excess of the amount needed to provide him and his dependents with the necessities of life and to provide for his release on bond, but are insufficient to pay fully for retained counsel, this court will find the defendant eligible for the appointment of counsel but will direct him to pay the available excess funds to the clerk at the time of appointment. The court may increase or decrease the amount of such payments and impose appropriate conditions, where applicable. All such payments by the defendant shall be received pursuant to the prescriptions of subsection (f) of the Criminal Justice Act.

4. *Family Resources:* Funds and property standing in the name of, or held by, members of a defendant's family will be considered available for the payment of the fees of retained counsel if there is a finding, upon a reasonable basis of fact, that the family has indicated a willingness and a financial ability to pay all or part of the costs of representation. The initial determination of a defendant's eligibility for the appointment of counsel should be made without regard to family resources unless the family plans and is financially able to retain counsel promptly.

5. *Attorney's Information:* If at any time after appointment, counsel obtains information that a client is financially able to make payment, in whole or in part, for legal services in connection with his representation, and the source of the attorney's information is not protected as a privileged communication, counsel shall so advise this court.

## IV. PANEL OF ATTORNEYS

1. *Composition:* The clerk, subject to this court's approval, shall prepare a list of attorneys from which appointments shall be made. Attorneys, to be

eligible for appointment, must be admitted to practice before this court under Rule 46 of the Federal Rules of Appellate Procedure, and must be competent to provide adequate representation to those persons entitled to counsel under the Criminal Justice Act. In preparing a list, the clerk may review and consider the panels approved for use in the several District Courts in the Fourth Circuit, the recommendations of Bar Associations, Legal Aid Agencies, and Defender Organizations, if any, and the court's own experience with attorneys.

2. *Periodic Revision:* The panel shall be revised periodically to ensure an adequate number of competent attorneys to provide effective representation to all persons entitled to appointed counsel.

3. *Appointments:* Appointments shall be made by the clerk on a rotational basis, subject to this court's discretion. Consideration will be given to the nature of the case, the place of the trial, the residence of the indigent person if on bail, the place of confinement, and other relevant matters. In death penalty cases at least one attorney appointed must have been admitted to practice in the Fourth Circuit Court of Appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in the Fourth Circuit in felony cases. For good cause however, the court may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the petitioner, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation. The Court will look to the factors articulated in the American Bar Association's guidelines for selection of appellate counsel in capital cases including the length of bar membership, general experience in criminal defense litigation, and specific experience in death penalty appeals and appeals of murder, aggravated murder or other serious felonies. The Court will also consider whether counsel has attended and successfully completed a recent training or educational program on criminal advocacy which focused on the appeal of cases in which a sentence of death was imposed. Finally, the Court will review the availability of ongoing consultation support to appointed counsel from experienced counsel.

When the court determines that the appointment of an attorney, who is not a member of the CJA panel, is appropriate in the interest of justice, judicial economy, or some other compelling circumstance warranting his or her appointment, the attorney may be admitted to the CJA panel pro hac vice and appointed to represent the appellant. These appointments should be made only in exceptional circumstances, such as the appointment in a death penalty case of an attorney furnished by a state or local public defender organization or legal aid agency where the attorney had represented the appellant during prior state court proceedings. Further, the attorney should possess such qualities as would qualify him or her for admission to the CJA panel in the ordinary course of panel selection.

4. *Removal from the Panel:* An attorney may be removed from the panel by the clerk for twice refusing to accept an appointment or by the court for any good reason.

## V. ATTORNEY'S DUTY TO CONTINUE REPRESENTATION

1. *Trial Counsel:* Every attorney, including retained counsel, who represented a defendant in the district court shall continue to represent the client after termination of those proceedings, unless relieved of further responsibility by this court. Where counsel has not been relieved:

If there is a judgment of conviction or an order revoking probation, counsel shall inform the defendant of his right to appeal and of his right to have counsel appointed on appeal. If so requested by the defendant, counsel shall file a timely notice of appeal. Thereafter, unless the defendant otherwise so

instructs, counsel shall take appropriate and timely steps to perfect and present the appeal, including, where appropriate, the ordering of such part of the transcript as may be necessary for consideration on appeal.

Similarly, if there is an appeal by the United States from an order or judgment adverse to it, counsel shall continue to represent the client.

In any case brought pursuant to 28 U.S.C. §§ 2241, 2254, or 2255 which results in an order by the district court denying the relief requested, counsel shall inform the petitioner of his right to appeal and of the court's authority to appoint appellate counsel in its discretion. If so requested by the petitioner, counsel shall file a timely notice of appeal and a motion for appointment of appellate counsel, and counsel's duty is thereby ended. On the other hand, if petitioner is granted the relief requested, counsel shall continue to represent the petitioner in the event the respondent appeals the judgment.

2. *Appellate Counsel:* Every attorney, including retained counsel, who represents a defendant in this court shall continue to represent his client after termination of the appeal unless relieved of further responsibility by this court or the Supreme Court. Where counsel has not been relieved:

If the judgment of this court is adverse to the defendant, counsel shall inform the defendant, in writing, of his right to petition the Supreme Court for a writ of certiorari. If the defendant, in writing, so requests and in counsel's considered judgment there are grounds for seeking Supreme Court review, counsel shall prepare and file a timely petition for such a writ and transmit a copy to the defendant. Thereafter, unless otherwise instructed by the Supreme Court or its clerk, or unless any applicable rule, order or plan of the Supreme Court shall otherwise provide, counsel shall take whatever further steps are necessary to protect the rights of the defendant, until the petition is granted or denied.

If the appellant requests that a petition for writ of certiorari be filed but counsel believes that such a petition would be frivolous, counsel may file a motion to withdraw with this court wherein counsel requests to be relieved of the responsibility of filing a petition for writ of certiorari. The motion must reflect that a copy was served on the client.

If the United States seeks a writ of certiorari to review a judgment of this court, counsel shall take all necessary steps to oppose the United States' petition.

Similarly, in any proceeding brought pursuant to 28 U.S.C. §§ 2241, 2254, or 2255 which results in an order by this court, appointed counsel shall take those steps necessary, as set forth above, to protect the rights of the defendant in the Supreme Court.

## VI. COMPENSATION AND REIMBURSEMENT OF EXPENSES

1. *Voucher:* Upon the completion of service in this court, appointed counsel shall submit a voucher for compensation and reimbursement on the Criminal Justice Act form currently approved by the Administrative Office of the United States Courts. Vouchers shall be submitted no later than 60 days after the final disposition of the case, unless good cause is shown. The clerk will determine the amount of compensation and reimbursement to be paid. The approved voucher will then be reviewed by the Circuit Executive, signed by the Chief Judge, and forwarded to the Administrative Office for payment or further handling.

2. *Hourly Rates:* For work done on or after January 1, 2000, counsel may be compensated at rates not exceeding $70 per hour for in court time and $50 per hour for out of court time unless the Judicial Conference determines that a higher rate is justified. In death penalty cases these maximum rates do not apply. Counsel in these cases may be compensated at such rates as the Court

determines to be reasonably necessary, within the $75-$125 per hour range. Time spent awaiting oral argument is considered to be time expended out of court.

3. *Maximum Compensation Allowable:* Effective November 13, 2000, in any direct appeal from a criminal conviction, any appeal in a habeas corpus proceeding, and any appeal in a civil forfeiture proceeding in which counsel is appointed pursuant to 18 U.S.C. § 983, except in death penalty cases, the total compensation, exclusive of expenses, shall not exceed $3,700 for an attorney's services rendered in this court. In death penalty cases compensation is in such amounts as the court determines to be reasonably necessary.

Effective November 13, 2000, in any appeal from a determination of the United States Parole Commission under 18 U.S.C. § 4106A, the compensation shall not exceed $3,900 for an attorney's services rendered in this court.

Effective November 13, 2000, in any other proceeding in which representation is required or authorized by the Criminal Justice Act, including bail appeals and appeals from probation or supervised release revocation proceedings, the total compensation, exclusive of expenses, shall not exceed $1,200 for an attorney's services rendered in this court.

In all cases where there has been a substitution of counsel, or where multiple defendants have been represented by one attorney or multiple appointments have been made for one defendant, total compensation shall be determined pursuant to Section II, Paragraphs 4, 5, and 6.

Payment in excess of the prescribed limitations may be made to provide fair compensation in a case involving extended or complex representation, upon approval by the Chief Judge of this court or other active circuit judge designated by him. Counsel claiming in excess of the statutory maximum must submit with his voucher a detailed memorandum supporting and justifying counsel's claim that the representation given was in a complex or extended case, and that the excess payment is necessary to provide fair compensation. If the legal or factual issues in a case are unusual, thus requiring the expenditure of more time, skill and effort by the lawyer than would normally be required in an average case, the case is "complex". If more time is reasonably required for total processing than would normally be required in the average case, the case is "extended". Attorneys seeking compensation have the burden of providing sufficient details to support their claim that the case is more complex or time consuming than the average case. This burden also exists with regard to the reasonableness of hours claimed for representation.

4. *Reimbursable Expenses:* Counsel shall be entitled to reimbursement for reasonably incurred out-of-pocket expenditures. Travel by privately owned automobile should be claimed at the mileage rate currently applicable to federal employee travel, plus parking fees and tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis. Necessary airline travel will be reimbursed only at coach class rates. Expenditures for meals and lodging, as well as for telephone toll calls, telegrams, and copying are reimbursable. The cost of photocopying or similar copying services is reimbursable, while the cost of printing is not. Where photocopying services are performed in counsel's office, the reimbursement shall be limited to out-of-pocket expenses, not to exceed 15 cents per copy. For photocopying and other services in preparation of briefs and appendices by commercial printers, reimbursement shall not exceed 35 cents per copy. All materials contained in appendices prepared by commercial printers in court-appointed cases will be reproduced on both sides of a sheet. No joint appendix in a court-appointed case shall exceed 250 sheets without advance permission from the Court. Compensation paid to law students for legal research is reimbursable, but expenses incurred by the law student in assisting counsel are not. When necessary for adequate representation in death penalty cases, reasonable

employment and compensation of public and private organizations which provide consulting services to counsel are reimbursable to assist in such areas as records completion, identification of potential issues, exhaustion of state remedies, and review of draft pleadings and briefs. Detailed receipts are required for all travel and lodging expenses, non-office copying services, and any other expense in excess of $50.00. Failure to provide detailed receipts may result in the expense being denied. Any expense in excess of $50.00 must be itemized in a manner which will permit a review of the amount expended.

5. *Representation to the Supreme Court:* Counsel's time and expenses involved in the preparation of a petition for a writ of certiorari to the Supreme Court, and in the protection of the defendant's rights up until the time that Court disposes of a petition, should be included in the voucher for services performed in this court.

6. *Number of Copies:* Appointed counsel is required to file six copies of the brief and five copies of the appendix with the clerk of the court, with service of one copy on counsel for each party separately represented. Appointed counsel shall be entitled to reimbursement for the cost of photocopying required copies.

7. *Non-reimbursable Expenses:* General office overhead, personal items and non-legal personal services for the person represented, filing fees, services of process, and printing are non-reimbursable. (A person represented under the Criminal Justice Act is not required to pay filing fees or costs, or give security therefor, nor must he file the 28 U.S.C. § 1915(a) affidavit, for an appeal.)

8. *Authorized Transcripts:* Authorized transcripts should not be claimed in the voucher by an attorney. The Administrative Office will pay the appropriate court reporter directly.

9. *Interim Payment of Expenses:* This court, in rare cases, will entertain requests for interim reimbursement of extraordinary and substantial expenses.

10. *Direct Payment from Person Represented:* No appointed counsel shall accept a payment or a promise of payment from a defendant for representation in this court without prior authorization from the court on an appropriate Criminal Justice Act form.

11. *Public Defender:* Where a defendant is represented by a federal public defender, the defender shall be compensated solely by his federal salary and shall not submit a Criminal Justice Act form for compensation.

12. *Non-appointed Co-Counsel:* Non-appointed attorneys may not be compensated, but an appointed attorney may claim compensation for services furnished by a partner, associate, or co-counsel, within the maximum compensation allowed to the appointed attorney.

## VII. RULES, REGULATIONS, FORMS

1. *Rules and Regulations:* This Plan shall be subject to and held to have been amended pro tanto by any rule or regulation adopted by the Judicial Conference of the United States concerning the operation of plans under the Criminal Justice Act.

The Judicial Council or this court may adopt rules or regulations concerning the operation of this Plan, which, when promulgated, shall have the same force as provisions of this Plan.

2. *Forms:* Forms approved by the Administrative Office of the United States Courts for use in the administration of the Criminal Justice Act shall be used whenever appropriate. Where there are no approved forms, this court may approve and require the use of designated forms or other instruments.

## VIII. ADMINISTRATION

*Generally; clerk's office:* Any act to be done by the court may be done by any judge of the court, by the clerk, or by a deputy clerk pursuant to delegated authority.

## IX. DEFINITIONS

1. *Supreme Court:* Supreme Court of the United States.
2. *Administrative Office:* Administrative Office of the United States Courts.
3. *This court; the court:* The United States Court of Appeals for the Fourth Circuit.
4. *Criminal Justice Act:* Criminal Justice Act of 1964, 18 U.S.C. § 3006A, as amended.
5. *Defendant; Defendants:* Where appropriate in this Plan, the word "defendant" or "defendants" shall be construed to include petitioner or petitioners in a collateral proceeding.
6. *Judicial Council:* Judicial Council of the Fourth Judicial Circuit of the United States.

## X. AMENDMENTS

This Plan may be amended at any time by the Judicial Council effective when a copy of the amendatory resolution is filed with the Administrative Office or at such later date as may be specified in the resolution.

## XI. EFFECTIVE DATE

This amended plan is effective December 1, 2000.

**Appendix D. Docketing statement instructions.**

1. Counsel for appellant must file two copies of a docketing statement with all attachments within fourteen days of filing the notice of appeal for every case appealed or cross-appealed to the court of appeals. The docketing statement must be received by the court of appeals clerk's office within the fourteen days allowed to be deemed timely filed. Copies must be served on the opposing party or parties.

2. The attorney filing the notice of appeal is responsible for filing the docketing statement, even if different counsel will handle the appeal. In the case of multiple appellants represented by separate counsel, the parties must confer and decide who will file the docketing statement. Appellants proceeding pro se may file a docketing statement, but are not required to do so.

3. The docketing statement is not a brief but will be used by the circuit mediator for pre-briefing review of civil cases in which all parties are represented by counsel, and in mediation conducted in such cases under Fourth Circuit Local Rule 33. The nature of proceedings and relief sought should be stated succinctly. The issues should be framed with reference to the specific facts and circumstances of the case. Conclusory statements such as "the judgment of the trial court is not supported by the law or facts" are unacceptable. Although a party will not be precluded from raising additional issues in the brief, counsel should make every effort to include in the docketing statement all of the issues that will be presented to the Court. The docketing statement should not contain motions or other requests for interim relief. If counsel in a civil case believes a mediation conference would be beneficial, counsel may make a confidential request for mediation by contacting the Office of the Circuit Mediator directly at (843) 521-4022.

4. Counsel's failure to file the docketing statement within the time set forth will cause the Court to initiate the process for dismissal of the appeal under Fourth Circuit Local Rule 45.

5. If an opposing party concludes that the docketing statement is in any way inaccurate, incomplete, or misleading, that party should file two copies of any additions or corrections to the docketing statement with the clerk's office within seven days of service of the docketing statement, with copies to all other parties.

6. You must attach to this docketing statement:

   - ADDITIONAL PAGES CONTAINING EXTENDED ANSWERS TO QUESTIONS ON THIS FORM.
   - THE NOTICE OF APPEAL.
   - THE DISTRICT COURT DOCKET SHEET.
   - A COPY OF THE ORDER OR JUDGMENT FROM WHICH THE APPEAL IS TAKEN.
   - ANY OPINION OR FINDINGS.
   - ANY OPINION, FINDINGS, OR RECOMMENDATION OF A UNITED STATES MAGISTRATE JUDGE, AN ADMINISTRATIVE LAW JUDGE, A SOCIAL SECURITY APPEALS COUNCIL, OR A BANKRUPTCY COURT.
   - A COPY OF THE TRANSCRIPT ORDER (WITH ATTACHMENTS), IF ANY.
   - A CERTIFICATE OF SERVICE FOR THIS DOCKETING STATEMENT.

## DOCKETING STATEMENT

**Caption of Case** **4CCA Docket No. (IF KNOWN)** _____

Type of Action

v.

____ Civil
____ Criminal/Prisoner
____ Cross Appeal

District _____ Judge _____
District Court Docket Number _____
Statute or other authority establishing jurisdiction in the:
District Court _____
Court of Appeals _____

A. Timeliness of Appeal
1. Date of entry of judgment or order appealed from _____
2. Date this notice of appeal filed _____
If cross appeal, date first notice of appeal filed _____
3. Filing date of any post-judgment motion filed by any party which tolls time under FRAP 4(a)(4) or 4(b) _____
4. Date of entry of order deciding above post-judgment motion _____
5. Filing date of any motion to extend time under FRAP 4(a)(5), 4(a)(6) or 4(b) _____
_____
Time extended to _____

B. Finality of Order or Judgment
1. Is the order or judgment appealed from a final decision on the merits?
☐ Yes ☐ No
2. If no,
a.) Did the district court order entry of judgment as to fewer than all claims or all parties pursuant to FRCP 54(b)? ☐ Yes ☐ No
b.) Is the order appealed from a collateral or interlocutory order reviewable under any exception to the finality rule? ☐ Yes ☐ No
If yes, explain
_____
(Criminal only)
3. Has the defendant been convicted? ☐ Yes ☐ No
4. Has a sentence been imposed? ☐ Yes ☐ No
Term _____
5. Is the defendant incarcerated? ☐ Yes ☐ No

C. Has this case previously been appealed? ☐ Yes ☐ No
If yes, give the case name, docket number and disposition of each prior appeal on a separate sheet.

D. Based on your present knowledge:
Will this appeal involve a question of first impression?
☐ Yes ☐ No
If yes, please explain briefly on a separate sheet.

E. Are any related cases or cases raising related issues pending in this Court, any district court of this circuit, or the Supreme Court? ☐ Yes ☐ No
If yes, cite the case and the manner in which it is related on a separate page. If abeyance, consolidation, or in seriatim argument is warranted, counsel must file a separate motion seeking such relief.
If a related case is pending in this Court, has it been accepted for mediation by the Office of the Circuit Mediator? ☐ Yes ☐ No

F. State the nature of the suit, the relief sought, and the outcome below. Attach additional page if necessary.

G. Issues to be raised on appeal. Attach additional page if necessary.

H. Is settlement being discussed?
☐ Yes ☐ No

I. Is disposition on motions, memoranda, or abbreviated briefing schedule appropriate?
☐ Yes ☐ No
If yes, you must file an appropriate motion. Is oral argument necessary?
☐ Yes ☐ No

J. Were there any in-court proceedings below? ☐ Yes ☐ No
Is a transcript necessary for this appeal? ☐ Yes ☐ No
If yes, is transcript already on file with district court?
☐ Yes ☐ No
If transcript is not already on file, attach copy of transcript order.

K. List each adverse party to the appeal. If no attorney, give address and telephone number of the adverse party. Attach additional page if necessary.
1. Adverse party _____
Attorney _____
Address _____
_____
Telephone _____
2. Adverse party _____
Attorney _____
Address _____
_____
Telephone _____

L. If this case arises out of a bankruptcy proceeding, attach a copy of the caption of the case in the bankruptcy court showing the parties' status as debtor, creditor, trustee, plaintiff, defendant, etc.

M. List name(s) and address(es) of appellant(s) who filed this notice of appeal and appellant's counsel. Attach additional page if necessary.
Appellant(s) Name _____
Address _____
_____
_____
Telephone _____

Attorney's Name _____
Firm _____
Address _____
_____
Telephone _____

Will you be handling the appeal? (In criminal cases counsel below will handle the appeal unless relieved by this court.)
☐ Yes ☐ No
FRAP 12(b) provides that each attorney who files a notice of appeal must file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney. Any counsel, other than the

attorney filing this form, who filed a notice of appeal must provide the requisite statement to be attached to this form.

Signature _____
Date _____

ATTACH:

1. ADDITIONAL PAGES CONTAINING EXTENDED ANSWERS TO QUESTIONS ON THIS FORM.
2. THE NOTICE OF APPEAL.
3. THE DISTRICT COURT DOCKET SHEET.
4. A COPY OF THE ORDER OR JUDGMENT FROM WHICH THE APPEAL IS TAKEN.
5. ANY OPINION OR FINDINGS.
6. ANY OPINION, FINDINGS, OR RECOMMENDATION OF A UNITED STATES MAGISTRATE JUDGE, AN ADMINISTRATIVE LAW JUDGE, A SOCIAL SECURITY APPEALS COUNCIL, OR A BANKRUPTCY COURT.
7. A COPY OF THE TRANSCRIPT ORDER (WITH ATTACHMENTS, IF ANY).
8. A CERTIFICATE OF SERVICE FOR THIS DOCKETING STATEMENT.

**Appendix E. Docketing Statement — Agency Instructions.**

1. Counsel for the petitioner or applicant must file two copies of a docketing statement for any petition for review, cross petition, application for enforcement, or cross application within fourteen days of docketing of the petition or application. The docketing statement must be received by the clerk's office within the fourteen days allowed to be deemed timely filed. Copies must be served on the opposing party or parties. Petitioners proceeding pro se may file a docketing statement but are not required to do so.

2. Only one docketing statement shall be filed for each petition or application. If there are multiple petitioners or applicants, the parties should confer and decide who will file the docketing statement. A list of all names and addresses of parties, their attorneys and attorneys' names and addresses, and a certification that all parties have conferred and concurred in the filing must be attached to the docketing statement.

3. The docketing statement is not a brief and should not contain argument or motions. The nature of proceedings and relief sought should be stated succinctly. The issues should be expressed in terms and circumstances of the case but without unnecessary detail. Conclusory statements such as "the findings of the administrative law judge are not supported by the law or facts" are unacceptable. Although a party will not be precluded from raising additional issues, counsel should make every effort to include in the docketing statement all of the issues that will be presented to the Court. The docketing statement will be used in any mediation conducted under Fourth Circuit Local Rule 33. If counsel in a case in which all parties are represented by counsel believes a mediation conference would be beneficial, counsel may make a confidential request for mediation by contacting the Office of the Circuit Mediator directly at (843) 521-4022.

4. Counsel's failure to file the docketing statement within the time set forth above will cause the Court to initiate the process for dismissal under Fourth Circuit Local Rule 45.

5. If an opposing party concludes that the docketing statement is in any way inaccurate, incomplete, or misleading, that party should file two copies of any additions or corrections to the docketing statement with the clerk's office within seven (7) days of service of the docketing statement, with copies to all other parties.

## DOCKETING STATEMENT—AGENCY

**Caption of Case** **4CCA District No. (IF KNOWN)** _____
Type of Action

____ Application for Enforcement
____ Petition for Review
____ Cross Petition

Name of Agency _____
Administrative Law Judge _____
Agency Number _____
Statute or other authority establishing jurisdiction in the Court of Appeals _____

A. Timeliness
   1. Date of entry of order _____
   2. Time allowed for review or enforcement _____
      Authority _____

B. Finality
   1. Tribunal or board issuing order or regulation _____
   2. Is the order or judgment appealed from a final decision on the merits?
      yes ( ) no ( )
   3. If no, is the order appealed from a collateral or interlocutory order reviewable under any exception to the finality rule?
      yes ( ) no ( )
      If yes, explain _____

C. If INS case, is petitioner subject to deportation while this petition is pending?
   yes ( ) no ( )
   If yes, do you intend to file a motion to stay deportation?
   yes ( ) no ( )

D. Has this case been before the Court previously?
   yes ( ) no ( )
   If yes, give case name, docket number, and disposition of each prior appeal on a separate sheet.

E. Is there any case now pending or about to be brought before this Court, any other court or administrative agency, or the Supreme Court which either arises from the same case or controversy or substantially related issues?
   yes ( ) no ( )
   If yes, cite the case and manner in which it is related on a separate sheet. If abeyance, consolidation, or in seriatim argument is warranted, counsel must file a separate motion seeking such relief.

   If related case is pending in this Court, has it been accepted for mediation by the Office of the Circuit Mediator?
   yes ( ) no ( )

F. State the nature of the proceeding, the relief sought, and the outcome below. Attach additional page if necessary.

G. Issues to be raised on petition or application. Attach additional page if necessary.

H. Is settlement being discussed?
yes ( ) no ( )

I. Is disposition on motions, memoranda, or abbreviated briefing schedule appropriate?
yes ( ) no ( )
If yes, you must file an appropriate motion.
Is oral argument necessary?
yes ( ) no ( )

J. List each adverse party to this action. Attach additional sheets if necessary. If no attorney, give address and telephone number of the adverse party.
1. Adverse party _____
Attorney _____
Address _____
Telephone _____

K. Petitioner's or Applicant's Name _____
Address _____
Telephone _____

L. Attorney or pro se litigant filing this docketing statement.
Will you be handling the appeal?
yes ( ) no ( )
Name _____
Attorney ( ) Pro Se ( )
Firm _____
Address _____
Telephone _____

If this is a joint statement by multiple petitioners or applicants, add the names and addresses of other petitioners or applicants and their counsel on an additional sheet, accompanied by a certification that all petitioners or applicants concur in this filing.

Signature _____

Date _____

EACH COPY OF THIS DOCKETING STATEMENT SERVED OR FILED SHALL HAVE ATTACHED TO IT COPIES OF:

(1) THE APPLICATION FOR ENFORCEMENT, OR PETITION FOR REVIEW;
(2) THE DOCKET SHEET OF THE AGENCY FROM WHICH THE APPEAL IS TAKEN;
(3) THE JUDGMENT OR ORDER SOUGHT TO BE REVIEWED AND ANY OPINION OR FINDING;
(4) ANY OPINION, FINDINGS, OR RECOMMENDATION OF AN ADMINISTRATIVE LAW JUDGE UNDERLYING THE ORDER AT ISSUE;
(5) ANY TRANSCRIPT ORDER (WITH ATTACHMENTS, IF ANY); AND
(6) A CERTIFICATE OF SERVICE FOR THIS DOCKETING STATEMENT.

**Appendix F. Docketing statement — Tax court.**

1. Counsel for appellant must file two copies of a docketing statement with all attachments for every case appealed or cross-appealed to the court of appeals within fourteen days of the docketing of the appeal. The docketing statement must be received by the clerk's office within the fourteen days allowed to be deemed timely filed. Copies must be served on the opposing party or parties.

2. The attorney filing the notice of appeal is responsible for filing the docketing statement, even if different counsel will handle the appeal. In the case of multiple appellants represented by separate counsel, the parties must confer and decide who will file the docketing statement. Appellants proceeding pro se may file a docketing statement, but are not required to do so.

3. The docketing statement is not a brief and should not contain argument or motions. The nature of proceedings and relief sought should be stated succinctly. The issues should be expressed in terms and circumstances of the case but without unnecessary detail. Conclusory statements such as "the judgment of the tax court is not supported by the law or facts" are unacceptable. Although a party will not be precluded from raising additional issues, counsel should make every effort to include in the docketing statement all of the issues that will be presented to the Court. The docketing statement will be used in any mediation conducted under Fourth Circuit Local Rule 33. If counsel in a case in which all parties are represented by counsel believes a mediation conference would be beneficial, counsel may make a confidential request for mediation by contacting the Office of the Circuit Mediator directly at (843) 521-4022.

4. Counsel's failure to file the docketing statement within the time set forth above will cause the Court to initiate the process for dismissal of the appeal under Fourth Circuit Local Rule 45.

5. If an opposing party concludes that the docketing statement is in any way inaccurate, incomplete, or misleading, that party should file two copies of any additions or corrections to the docketing statement with the clerk's office within seven (7) days of service of the docketing statement, with copies to all other parties.

## DOCKETING STATEMENT—TAX COURT

Re:
Tax Court Docket Number _____ Judge _____
Statute or other authority establishing jurisdiction in the:
Tax Court _____
Court of Appeals _____

A. Timeliness of Appeal
1. Date of entry of judgment or order appealed from _____.
2. Date this notice of appeal filed _____.
If cross appeal, date first notice of appeal filed _____.

B. Finality of Order or Judgment
1. Is the order or judgment appealed from a final decision on the merits?
yes ( ) no ( )
2. If no, is the order appealed from a collateral or interlocutory order reviewable under any exception to the finality rule?
yes ( ) no ( )
If yes, explain
_____

C. Has this case previously been appealed?
yes ( ) no ( )
If yes, give the case name, docket number, and disposition of each prior appeal on a separate sheet.

D. Are any related cases or cases raising related issues pending in this Court, the Tax Court or the Supreme Court?
yes ( ) no ( )
If yes, cite the case and manner in which it is related on a separate sheet. If abeyance, consolidation, or in seriatim argument is warranted, counsel must file a separate motion seeking such relief.

If related case is pending in this Court, has it been accepted for mediation by the Office of the Circuit Mediator?
yes ( ) no ( )

E. State the nature of the suit, the relief sought and the outcome below. Attach additional page if necessary.

F. Issues to be raised on appeal. Attach additional page if necessary.

G. Is settlement being discussed?
yes ( ) no ( )

H. Is disposition on motions, memoranda, or an abbreviated briefing schedule appropriate?
yes ( ) no ( )
If yes, you must file an appropriate motion.
Is oral argument necessary?
yes ( ) no ( )

I. List each adverse party to the appeal. Attach additional sheets if necessary. If no attorney, give address and telephone number of the adverse party.
1. Adverse party_____
Attorney_____
Address_____
_____
Telephone_____

J. List name(s) and address(es) of appellant(s) who filed this notice of appeal and appellant's counsel. Attach additional page if necessary:

Appellant(s) Name _____
Address _____
_____
Telephone _____

Attorney's Name _____
Firm _____
Address _____
_____
Telephone _____

Will you be handling the appeal? yes ( ) no ( )

FRAP 12 (b) provides that each attorney who files a notice of appeal must file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney. Any counsel, other than the attorney filing this form, who filed a notice of appeal must provide the requisite statement to be attached to this form.

Signature _____
Date _____

ATTACH:

1. ADDITIONAL PAGES, IF ANY, CONTAINING EXTENDED ANSWERS TO QUESTIONS ON THIS FORM.
2. THE NOTICE OF APPEAL.
3. A COPY OF THE ORDER OR JUDGMENT FROM WHICH THE APPEAL IS TAKEN.
4. ANY OPINION OR FINDINGS.
5. A CERTIFICATE OF SERVICE.

**Appendix G. Death Penalty Representation.**

In the Matter of Death Penalty Representation

In the Fourth Circuit

**ORDER**

The Report of the Death Penalty Committee, which is attached to and made a part of this Order, is hereby adopted by the Fourth Circuit Judicial Council. The official policy of the Fourth Circuit shall be:

(1) Federal Public Defenders may be appointed to represent individuals charged with federal capital crimes and collateral attacks on federal capital convictions and sentences.

(2) Federal Public Defenders shall not be appointed to represent criminal defendants petitioning pursunat to 28 U.S.C.A. Section 2254 for relief from a state death sentence.

(3) The limitations on time for decision set forth in 28 U.S.C.A. Section 2266 shall apply at the district and circuit court levels and the Circuit Executive is authorized to inquire into the reasons for any noncompliance with the limitations.

and it so ORDERED

FOR THE COUNCIL:

/s/ J. Harvie Wilkinson III

Chief Judge

Date: October 3, 1996

## DEATH PENALTY REPRESENTATION IN THE FOURTH CIRCUIT

### I. STATUTORY PROVISIONS PRESENTLY APPLICABLE TO APPOINTMENT OF ATTORNEYS FOR CAPITAL REPRESENTATION

*A. APPOINTMENT OF COUNSEL FOR INDIGENT CAPITAL DEFENDANTS IS STATUTORILY GUARANTEED FOR FEDERAL TRIALS, DIRECT APPEAL FROM FEDERAL CONVICTIONS, § 2255 PROCEEDINGS, AND § 2254 PROCEEDINGS.*

Congress has enacted special provisions guaranteeing that "in every criminal action in which a defendant is charged with a crime which may be punishable by death" and in "any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation ... shall be entitled to the appointment of one or more attorneys." 21 U.S.C.A. § 848(q)(4) (West Supp. 1996). Any defendant indicted for a federal capital crime is entitled to have two attorneys appointed. 18 U.S.C.A. § 3005 (West Supp. 1996).

*B. THE MINIMUM QUALIFICATIONS OF APPOINTED COUNSEL ARE STATUTORILY DEFINED.*

The lead attorney appointed to represent one indicted on an offense punishable by death "must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court." 21 U.S.C.A. § 848(q)(5). And, at least one of the attorneys appointed to represent a defendant indicted with a federal capital crime must "be learned in the law applicable to capital cases." 18 U.S.C.A. § 3005.

A lead attorney appointed after conviction to represent a capital defendant on direct appeal, or during § 2255 proceedings, "must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases." 21 U.S.C.A. § 848(q)(6).

A court may, for good cause shown, appoint another attorney who does not meet the requirements set forth in § 848(q)(5)-(6), but whose experience otherwise enables him or her to adequately represent the defendant. 21 U.S.C.A. § 848(q)(7).

Attorneys that have been appointed typically continue the representation on appeal. *See* 21 U.S.C.A. § 848(q)(8) (providing that once appointed attorneys continue representation throughout subsequent proceedings); 18 U.S.C.A. § 3006A(c) (West 1985).

*C. COMPENSATION FOR FEES IS PRESENTLY LIMITED ONLY TO A "REASONABLE FEE" IN THE VIEW OF THE DISTRICT COURT.*

Attorneys appointed pursuant to § 848(q) may be compensated at the statutory ceiling of $125 per hour for both in-court and out-of-court time. 21 U.S.C.A. § 848(q)(10)(A). Counsel is also bound by the limitation of $7,500 for investigative, expert, and other reasonably necessary expenses unless a higher fee is approved by the court. 21 U.S.C.A. § 848(q)(10)(B).

### II. RECOMMENDATIONS

*A. SOLICIT QUALIFIED AND INTERESTED COUNSEL AND MAINTAIN LISTS OF ATTORNEYS QUALIFYING FOR APPOINTMENT AS LEAD COUNSEL AND SECOND-CHAIR COUNSEL.*

*District Court*

** **It is recommended that a plan be adopted under which the district court would contact the bar and solicit applications for a panel of attorneys qualified to represent capital defendants.**

Some districts have experienced difficulty in locating qualified and interested counsel to undertake capital representation. But, it is believed that there are many attorneys who would seek the opportunity for appointment if they were made aware of that opportunity. Accordingly, it is recommended that on a district-by-district basis, a program of solicitation of the bar should be implemented in order to increase the number of attorneys seeking appointment.

** **It is recommended that the district courts maintain lists of those attorneys qualified to represent capital defendants as lead counsel and as second-chair counsel and that these attorneys' expertise in trial, appellate, and habeas representation be identified.**

Because the statutory requirements for lead counsel are more stringent than those for second-chair counsel, courts should maintain separate lists of those attorneys who are qualified for each type of appointment. In addition to the statutory qualifications, specialized skills and experience are necessary to represent capital defendants in trial, appellate, and habeas proceedings. Courts may find separate lists of attorneys with trial, appellate, and/or habeas experience useful. Alternatively, courts may conclude that some other method of identifying various types and levels of expertise is preferable.

In ascertaining which attorneys of those expressing an interest in capital representation and seeking appointment are qualified to be placed on lists of those available for appointment as lead and second-chair counsel, the court may wish to consider appointment of an oversight committee composed of district judges, magistrate judges, district court clerks, and the Federal Public Defender, *see* 18 U.S.C.A. § 3005.

It is envisioned that over time attorneys chosen for appointment from the second-chair counsel list will develop the qualifications to be placed on the lead counsel list, and that appointment of second-chair attorneys is desirable in order to develop a wider range of expertise available for lead counsel appointment. In addition, special consideration should be given to appointment of the attorney who represented a § 2254 petitioner during state collateral proceedings, if interested in appointment and qualified for it. *See* 21 U.S.C.A. § 848(q)(7).

*Circuit Court*

** **It is recommended that the circuit court solicit the bar for applications, maintain lists of those attorneys qualified to represent capital defendants as lead counsel and as second-chair counsel, and identify attorneys' expertise in appellate and habeas representation.**

Although attorneys that have been appointed at the district court level typically continue their representation on appeal, from time to time it is necessary to appoint attorneys pursuant to § 848(q) during appellate proceedings. Consequently, it is recommended that a plan to solicit the bar for applications for appointment to capital representation be adopted and that lists of those attorneys qualified and interested in capital representation as lead and second-chair counsel be maintained.

*B. USE FEDERAL PUBLIC DEFENDERS FOR REPRESENTATION OF FEDERAL CAPITAL CHARGES AND COLLATERAL ATTACKS ON FEDERAL CAPITAL CONVICTIONS AND SENTENCES; DO NOT UTILIZE FEDERAL PUBLIC DEFENDERS FOR PROSECUTION OF HABEAS PROCEEDINGS FILED BY STATE PRISONERS.*

** **It is recommended that Federal Public Defenders be utilized for representation of individuals charged with federal capital crimes and collateral attacks on federal capital convictions.**

Providing representation for defendants charged with federal crimes punishable by the death penalty is within the statutory responsibility of the Federal Public Defender (FPD) to provide representation for all indigents charged with federal crimes. It is contemplated that FPDs will be placed in the pool of attorneys available to represent capital defendants in federal capital trials, on direct appeal, and in § 2255 proceedings. For some period of time, until FPDs develop the qualifications and experience, their appointments may be limited to second-chair positions. *See* 21 U.S.C.A. § 848(q)(7). However, such appointments should be encouraged whenever possible in order to permit FPDs to attain expertise in this area.

** **It is recommended that FPDs not be appointed to represent criminal defendants petitioning pursuant to 28 U.S.C.A. § 2254 for relief from a state death sentence.**

The consensus of opinion among FPDs in the circuit is that FPD representation in § 2254 proceedings challenging a state sentence of death is undesirable for a number of reasons. First, the prospect of a federal agency opposing the validity of state convictions creates the appearance of an unacceptable conflict between separate and independent sovereigns. Second, although the FPD is authorized to represent defendants seeking a writ of habeas corpus, encouraging such representation is problematic because litigation of collateral state-court proceedings and issues may be necessary, raising the question of the appropriateness of FPDs appearing in state court and presenting issues outside their traditional area of expertise. Finally, appointing FPDs to represent § 2254 petitioners could be viewed as an attempt to circumvent the will of Congress, given its recent decision to withdraw funding from death penalty resource centers.

*C. IMPOSE RESTRAINTS ON TIME FOR DECISION.*

** **It is recommended that the limitations on time for decision set forth in 28 U.S.C.A. § 2266 be adopted at the district and circuit court levels and that the Circuit Executive be authorized to inquire into the reasons for any noncompliance with the limitations.**

Under 28 U.S.C.A. § 2266 (enacted by the Antiterrorism and Effective Death Penalty Act of 1996), proceedings brought pursuant to § 2254 that are governed by Chapter 154 of Title 28 and proceedings brought pursuant to § 2255 in which the defendant was sentenced to death must be decided by the district court and the circuit court within specified time limits. The district court is required to render a decision and enter a final judgment (including a resolution of any motion to alter or amend the judgment) within 180 days of the date on which the petition is filed, subject to an extension of up to 30 days if the district court determines that the ends of justice would best be served by the delay. *See* 28 U.S.C.A. § 2266(a)-(b). The court of appeals is required to render a decision within 120 days of the date on which the reply brief is filed and to rule on any petition for rehearing or suggestion for rehearing en banc

within 30 days of the date the petition/suggestion is filed or the date a response thereto is filed, whichever is later. *See* 28 U.S.C.A. § 2266(c). Furthermore, if the petition/suggestion is granted, any hearing must be conducted and a final decision rendered within 120 days of the entry of the order granting rehearing. *Id.* And, following a remand by the court of appeals en banc or the Supreme Court for further proceedings, the period for decision runs from the date the remand is ordered. *Id.*

The time limitations imposed by § 2266 are applicable only in those § 2254 proceedings governed by Chapter 154, (*i.e.*, those challenging a state death sentence where the state has adopted specified procedures for appointment of counsel to represent the defendant in state post-conviction proceedings) and in § 2255 proceedings in which the defendant was sentenced to death. As such, the limitations presently will not apply to the majority of § 2254 petitions challenging a death sentence because of the relatively recent adoption of those mechanisms. *See* Bennett v. Angelone, No. 95-4004, 1996 WL 469705, at *4 (4th Cir. Aug. 20, 1996) (stating that question of whether Virginia's mechanism for appointment of counsel satisfied requirements for application of Chapter 154 was irrelevant because Chapter 154 would not apply when the mechanism was not in place during the petitioner's state collateral proceedings). Time constraints, however, are sorely needed at present. *See, e.g.,* Correll v. Thompson, 63 F.3d 1279, 1285 n.4 (4th Cir. 1995), *cert. denied,* 116 S. Ct. 688 (1996) (noting that § 2254 petition was pending in district court for in excess of three years prior to final decision). Consequently, it is recommended that the time limitations for decision imposed by § 2266 be adopted and implemented by rule immediately. It is contemplated that the limitations would apply to cases pending when the rule became effective, but that the limitations would apply prospectively. (For example, an appeal in a § 2255 proceeding challenging a death sentence that had been argued to this court and was pending decision would have to be decided within 120 days of the date the rule becomes effective.)

Additionally, it is recommended that a mechanism be established to track cases to which the time limitations apply, and in the event that cases remain pending after the date on which they were due to be decided, the Circuit Executive be authorized to make appropriate inquiry on behalf of the Judicial Council to seek an explanation of the reasons why the judge or panel of judges failed to comply with the time limitation.

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# RULES OF THE JUDICIAL COUNCIL OF THE FOURTH CIRCUIT GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY

Revised effective October, 1992,
with amendments through January 19, 2001.


Notice to Persons Considering Filing a Complaint of Judicial Misconduct or Disability.

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1. When to use the complaint procedure.
2. How to file a complaint.
3. Action by clerk of court of appeals upon receipt of a complaint.

**Chapter II. Review of a Complaint by the Chief Judge**

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5. Petition for review of chief judge's disposition.
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Form — Complaint of Judicial Misconduct or Disability

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**Editor's note.** — For North Carolina court system website, see www.aoc.state.nc.us/.

## Notice to Persons Considering Filing a Complaint of Judicial Misconduct or Disability

Most complaints of judicial misconduct or disability filed pursuant to 28 U.S.C. § 372(c) in the United States Court of Appeals for the Fourth Circuit in recent years have been dismissed because they did not allege conduct falling within the reach of the statute. The time and effort of complainants, and of the Court, are wasted by complaints concerning matters that do not come within the coverage of the statute. This notice is issued to draw attention to those portions of the statute, and the Fourth Circuit Judicial Council's Rules Governing Complaints of Judicial Misconduct and Disability, that describe the sorts of conduct that are, and are not, properly raised in a judicial complaint.

The law authorizes complaints about judges who have "engaged in conduct prejudicial to the effective and expeditious administration of the courts." This term includes such things as the use of a judge's office to obtain special

treatment for friends and relatives, acceptance of bribes, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office. It could include habitual failure to decide matters in a timely fashion, or bias against persons of a particular class as demonstrated by actions in a series of cases over a substantial period of time.

*This term does not include a judge's making wrong decisions — Even very wrong decisions — In particular cases. a complaint that a judge has exhibited bias toward a particular person, made an improper ruling or series of procedural rulings in a case, treated a person or party unfairly, or wrongly decided a case, is not a ground for relief under the judicial complaint and disability statute.* Such matters can, and should, be raised in an appeal of the judge's decision to the United States Court of Appeals for the Fourth Circuit, following the Federal Rules of Appellate Procedure.

The statute also authorizes complaints about judges who are "unable to discharge all the duties of office by reason of mental or physical disability." A judge is mentally or physically disabled if he or she is unable to comprehend the nature of the proceedings over which he or she presides, to understand the principles of law involved, or to remember testimony and argument sufficiently well to render fair judgments in the matters coming before him or her for decision. The statute is designed to cover both temporary and permanent disability. The statute does not attempt to define the conditions that could produce such disability, but they could include a mental disease or defect, senility, or drug or alcohol dependency.

These subjects are covered in further detail in Rule 1 of the Fourth Circuit Rules Governing Complaints of Judicial Misconduct or Disability and in §§ 1 and 3(B) of 28 U.S.C. § 372(c).

Clerk

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## CHAPTER I. FILING A COMPLAINT

### Rule 1. When to use the complaint procedure.

(a) *Purpose of the procedure.* The purpose of the complaint procedure is to improve the administration of justice in the federal courts by taking action when judges have engaged in conduct that does not meet the standards expected of federal judicial officers or are physically or mentally unable to perform their duties. The law's purpose is essentially forward-looking and not punitive. The emphasis is on conditions that interfere with the proper administration of justice in the courts.

(b) *What may be complained about.* The law authorizes complaints about United States circuit judges, district judges, bankruptcy judges or magistrate judges who have "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or who are "unable to discharge all the duties of office by reason of mental or physical disability."

"Conduct prejudicial to the effective and expeditious administration of the business of the courts" is not a precise term. It includes such things as use of the judge's office to obtain special treatment for friends and relatives, acceptance of bribes, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office. It does not include making wrong decisions — even very wrong decisions — in cases. The law provides that a complaint may be dismissed if it is "directly related to the merits of a decision or procedural ruling."

"Mental or physical disability" may include temporary conditions as well as permanent disability.

(c) *Who may be complained about.* The complaint procedure applies to judges of the United States court of appeals, judges of United States district courts, judges of United States bankruptcy courts, and United States magistrate judges. These rules apply, in particular, only to judges of the United States Court of Appeals for the Fourth Circuit and to district judges, bankruptcy judges, and magistrate judges of federal courts within the Fourth Circuit. The circuit includes the federal courts in the states of Maryland, North Carolina, South Carolina, Virginia and West Virginia.

Complaints about other officials of federal courts should be made to their supervisors in the various courts. If such a complaint cannot be resolved satisfactorily at lower levels, it may be referred to the chief judge of the court in which the official is employed. The circuit executive, whose address is 1100 East Main Street, Suite 617, Richmond, Virginia 23219-3538, is sometimes able to provide assistance in resolving such complaints.

(d) *Time for filing complaints.* A complaint may be filed at any time. However, complaints should be filed promptly. A complaint may be dismissed if it is filed so long after the events in question that the delay will make fair consideration of the matter impossible. A complaint may also be dismissed if it does not indicate the existence of a current problem with the administration of the business of the courts.

(e) *Limitations on use of the procedure.* The complaint procedure is not intended to provide a means of obtaining review of a judge's decision or ruling in a case. The judicial council of the circuit, the body that takes action under the complaint procedure, does not have the power to change a decision or ruling. Only a court can do that.

The complaint procedure may not be used to have a judge disqualified from sitting on a particular case. A motion for disqualification should be made in the case.

Also, the complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge too long. A petition for mandamus can sometimes be used for that purpose.

(f) *Abuse of the complaint procedure.* A complainant who has filed vexatious repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After affording the offending complainant an opportunity to show cause in writing why his or her ability to file further complaints should not be limited, the judicial council may restrict or impose conditions upon the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any restrictions or conditions imposed. (Amended September 25, 1996; amended January 19, 2001.)

**Rule 2. How to file a complaint.**

(a) *Form.* Complaints should be filed on the official form for filing complaints, which is reproduced in the appendix to these rules. Forms may be obtained by writing or telephoning the Clerk of the Court of Appeals, 1100 East Main Street, Richmond, Virginia 23219-3517, 804-916-2700. Forms may be picked up in person at the office of the Clerk of the Court of Appeals or any district court or bankruptcy court within the circuit.

(b) *Statement of facts.* A statement should be attached to the complaint form, setting forth with particularity the facts on which the claim of misconduct or disability is based. The statement should not be longer than five pages (five sides), and the paper size should not be larger than the paper the form is printed on. Normally, the statement of facts will include —

(1) A statement of what occurred;

(2) The time and place of the occurrence or occurrences;

(3) Any other information that would assist an investigator in checking the facts, such as the presence of a court reporter or other witness and their names and addresses.

(c) *Legibility.* Complaints should be typewritten if possible. If not typewritten, they must be legible.

(d) *Submission of documents.* Documents such as excerpts from transcripts may be submitted as evidence of the behavior complained about; if they are, the statement of facts should refer to the specific pages in the documents on which relevant material appears.

(e) *Number of copies.* Only an original is required.

(f) *Signature and oath.* The form must be signed and the truth of the statements verified in writing under oath. As an alternative to taking an oath, the complainant may declare under penalty of perjury that the statements are true. The complainant's address must also be provided.

(g) *Anonymous complaints.* Anonymous complaints are not handled under these rules. However, anonymous complaints received by the clerk will be forwarded to the chief judge of the circuit for such action as the chief judge considers appropriate. See Rules 2(j) and 20.

(h) *Where to file.* Complaints should be sent to:

Clerk, United States Court of Appeals
for the Fourth Circuit
1100 East Main Street, Room 501
Richmond, Virginia 23219-3517

The envelope should be marked "Complaint of Misconduct" or "Complaint of Disability." The name of the judge complained about should *not* appear on the envelope.

(i) *No fee required.* There is no filing fee for complaints of misconduct or disability.

(j) *Chief Judge's authority to initiate complaint.* In the interest of effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint as authorized by 28 U.S.C. § 372(c)(1) and thereby dispense with the filing of a written complaint. A chief judge who has identified a complaint under this rule will not be considered a complainant and, subject to the second sentence of rule 18(a), will perform all functions assigned to the chief judge under these rules for the determination of complaints filed by a complainant. (Amended January 19, 2001.)

**Rule 3. Action by clerk of court of appeals upon receipt of a complaint.**

(a) *Receipt of complaint in proper form.*

(1) Upon receipt of a complaint against a judge filed in proper form under these rules, the Clerk of the Court of Appeals will open a file, assign a docket number, and acknowledge receipt of the complaint. The clerk will promptly send copies of the complaint to the chief judge of the circuit (or the judge authorized to act as chief judge under Rule 18(f)), to the circuit executive, and to each judge whose conduct is the subject of the complaint. The original of the complaint will be retained by the clerk.

Upon the issuance of an order by the chief judge identifying a complaint under Rule 2(j), the clerk will thereafter expeditiously process such complaint as otherwise provided by these rules.

(2) If a district judge or magistrate judge is complained about, the clerk will also send a copy of the complaint to the chief judge of the district court in which the judge or magistrate judge holds his or her appointment. If a bankruptcy judge is complained about, the clerk will send copies to the chief judges of the

district court and the bankruptcy court. However, if a chief judge of a district court or bankruptcy court is a subject of the complaint, the chief judge's copy will be sent to the judge of such court in regular active service who is most senior in date of commission among those who are not subjects of the complaint.

(b) *Receipt of complaint about official other than a judge of the Fourth Circuit.* If the clerk receives a complaint about an official other than a judge of the Fourth Circuit, the clerk will not accept the complaint for filing and will advise the complainant in writing of the procedure for processing such complaints.

(c) *Receipt of complaint about a judge of the Fourth Circuit and another official.* If a complaint is received about a judge of the Fourth Circuit and another official, the clerk will accept the complaint for filing only with regard to the judge and will advise the complainant accordingly.

(d) *Receipt of complaint not in proper form.* If the clerk receives a complaint against a judge of this circuit that does not comply with the requirements of Rule 2, the clerk will accept the complaint for filing, advise the complainant in writing of the defects in the submission, require that they be remedied within fifteen days of the date of the clerk's letter, and dismiss the complaint without prejudice if the complainant does not remedy them. The clerk will notify the chief judge and the circuit executive of each such dismissal. The chief judge may direct the reinstatement of any such complaint.

## CHAPTER II. REVIEW OF A COMPLAINT BY THE CHIEF JUDGE

### Rule 4. Review by the chief judge.

(a) *Purpose of chief judge's review.* When a complaint in proper form is sent to the chief judge by the clerk's office, the chief judge will review the complaint to determine whether it should be (1) dismissed, (2) concluded on the ground that corrective action has been taken, (3) concluded because intervening events have made action on the complaint no longer necessary, or (4) referred to a special committee.

(b) *Inquiry by chief judge.* In determining what action to take, the chief judge may conduct a limited inquiry for the purpose of determining (1) whether appropriate corrective action has been or can be taken without the necessity of a formal investigation, (2) whether intervening events have made action on the complaint unnecessary, and (3) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation. For this purpose, the chief judge may, individually or through the circuit executive, request the judge whose conduct is complained of to file a written response to the complaint. The chief judge may also, individually or through the circuit executive, communicate orally or in writing with the complainant, the judge whose conduct is complained of, and other people who may have knowledge of the matter, and may review any transcripts or other relevant documents. The chief judge will not undertake to make findings of fact about any matter that is reasonably in dispute.

(c) *Dismissal.* A complaint will be dismissed if the chief judge concludes —

(1) that the claimed conduct, even if the claim is true, is not "conduct prejudicial to the effective and expeditious administration of the business of the courts" and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;

(2) that the complaint is directly related to the merits of a decision or procedural ruling;

(3) that the complaint is frivolous, a term that includes making charges that are wholly unsupported or alleging facts that are shown by a limited inquiry pursuant to Rule 4(b) to be either plainly untrue or incapable of being established through investigation; or

(4) that, under the statute, the complaint is otherwise not appropriate for consideration.

(d) *Corrective action.* The complaint proceeding will be concluded if the chief judge determines that appropriate action has been taken to remedy the problem raised by the complaint or that action on the complaint is no longer necessary because of intervening events.

(e) *Appointment of special committee.* If the complaint is not dismissed or concluded, the chief judge will promptly appoint a special committee, constituted as provided in Rule 9, to investigate the complaint and make recommendations to the judicial council. However, ordinarily a special committee will not be appointed until the judge complained about has been invited to respond to the complaint and has been allowed a reasonable time to do so. In the discretion of the chief judge, separate complaints may be joined and assigned to a single special committee; similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.

(f) *Notice of chief judge's action.*

(1) If the complaint is dismissed or the proceeding concluded on the basis of corrective action taken or because intervening events have made action on the complaint unnecessary, the chief judge will prepare a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition. The memorandum will not include the name of the complainant or of the judge whose conduct was complained of. The order and the supporting memorandum will be provided to the complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to Rule 3(a)(2). The complainant will be notified of the right to petition the judicial council for review of the decision and of the deadline for filing a petition.

(2) If a special committee is appointed, the clerk will notify the complainant, the judge whose conduct is complained of, and any judge entitled to receive a copy of the complaint pursuant to Rule 3(a)(2) that the matter has been referred and will inform them of the membership of the committee.

(g) *Public availability of chief judge's decision.* Materials related to the chief judge's decision will be made public at the time and in the manner set forth in Rule 17.

(h) *Report to judicial council.* The clerk will report annually to the judicial council of the circuit on actions taken under this rule.

(i) *Allegations of criminal conduct.* If a chief judge dismisses, solely for lack of jurisdiction under 28 U.S.C. § 372(c), non-frivolous allegations of criminal conduct by a judge, the chief judge's order of dismissal shall inform the complainant that the dismissal does not prevent the complainant from bringing any allegation of criminal conduct to the attention of appropriate federal or state criminal authorities. If, in this situation, the allegations of criminal conduct were originally referred to the circuit by a Congressional committee or member of Congress, the chief judge — if no petition for review of the dismissal is filed within the thirty-day period specified by Rule 6(a) — shall notify the Congressional committee or member that the Judiciary has concluded that it lacks jurisdiction under § 372(c). (Amended January 19, 2001.)

## CHAPTER III. REVIEW OF CHIEF JUDGE'S DISPOSITION OF A COMPLAINT

### Rule 5. Petition for review of chief judge's disposition.

If the chief judge dismisses a complaint or concludes the proceeding on the

ground that corrective action has been taken or that intervening events have made action unnecessary, a petition for review may be addressed to the judicial council of the circuit. The judicial council may affirm the order of the chief judge, return the matter to the chief judge for further action, or, in exceptional cases, take other appropriate action.

**Rule 6. How to petition for review of a disposition by the chief judge.**

(a) *Time.* A petition for review must be received in the office of the Clerk of the Court of Appeals within 30 days of the date of the clerk's letter to the complainant transmitting the chief judge's order.

(b) *Form.* A petition should be in the form of a letter, addressed to the Clerk of the Court of Appeals, beginning "I hereby petition the judicial council for review of the chief judge's order . . . ." There is no need to enclose a copy of the original complaint.

(c) *Legibility.* Petitions should be typewritten if possible. If not typewritten, they must be legible.

(d) *Number of copies.* Only an original is required.

(e) *Statement of grounds for petition.* The letter should set forth a *brief* statement of the reasons why the petitioner believes that the chief judge should not have dismissed the complaint or concluded the proceeding. It should not repeat the complaint; the complaint will be available to members of the circuit council considering the petition.

(f) *Signature.* The letter must be signed.

(g) *Where to file.* Petition letters should be sent to

Clerk, United States Court of Appeals
for the Fourth Circuit
1100 East Main Street, Room 501
Richmond, Virginia 23219

The envelope should be marked "Misconduct Petition" or "Disability Petition." The name of the judge complained of should *not* appear on the envelope.

(h) *No fee required.* There is no fee for filing a petition under this procedure.

**Rule 7. Action by clerk of court of appeals upon receipt of a petition for review.**

(a) *Receipt of timely petition in proper form.* Upon receipt of a petition for review filed within the time allowed and in proper form under these rules, the Clerk of the Court of Appeals will acknowledge receipt of the petition. The clerk will promptly send to the circuit executive copies of (1) the complaint form and statement of facts, (2) any response filed by the judge, (3) any record of information received by the chief judge in connection with the chief judge's consideration of the complaint, (4) the chief judge's order disposing of the complaint, (5) any memorandum in support of the chief judge's order, (6) the petition for review, (7) any other documents in the files of the clerk that appear to be relevant and material to the petition, and (8) a list of any documents in the clerk's files that are not being sent because they are not considered relevant and material. Upon receipt of these materials, the circuit executive will promptly send copies to each member of the judicial council except for any member disqualified under Rule 18. The clerk will also send the same materials to the chief judge of the circuit, and each judge whose conduct is at issue, except that materials previously sent to a person may be omitted.

(b) *Receipt of untimely petition.* The clerk will dismiss a petition that is received after the deadline set forth in Rule 6(a).

(c) *Receipt of timely petition not in proper form.* Upon receipt of a petition filed within the time allowed but not in proper form under these rules

(including a document that is ambiguous about whether a petition for review is intended), the clerk will acknowledge receipt of the petition, call the petitioner's attention to the deficiencies, and give the petitioner the opportunity to correct the deficiencies within 15 days of the date of the clerk's letter or within the original deadline for filing the petition, whichever is later. If the deficiencies are corrected within the time allowed, the clerk will proceed in accordance with paragraph (a) of this rule. If the deficiencies are not corrected, the clerk will dismiss the petition.

**Rule 8. Review by the judicial council of a chief judge's order.**

(a) *Mail ballot.* Each member of the judicial council to whom a ballot was sent will return a signed ballot, or otherwise communicate the member's vote, to the circuit executive. The ballot form will provide opportunities to vote to (1) affirm the chief judge's disposition, or (2) place the petition on the agenda of a meeting of the judicial council. The form will also provide an opportunity for members to indicate that they have disqualified themselves from participating in consideration of the petition.

Votes will be tabulated when all members of the judicial council to whom ballots were sent have either voted or indicated that they are disqualified. Members who have disqualified themselves will be treated for this purpose as if ballots had not been sent to them.

If all of the votes cast should be for affirmance, the chief judge's order will be affirmed, and the circuit executive will prepare an appropriate order to that effect. If any of the members vote to place the petition on the agenda of a council meeting, that will be done.

(b) *Availability of documents.* Upon request, the clerk will make available to any member of the judicial council or to the judge complained about any document from the files that was not sent to the council members pursuant to Rule 7(a).

(c) *Vote at meeting of judicial council.* If a petition is placed on the agenda of a meeting of the judicial council, council action may be taken by a majority of the members present and voting.

(d) *Rights of judge complained about.*

(1) At any time after the filing of a petition for review by a complainant, the judge complained about may file a written response with the Clerk of the Court of Appeals and shall do so if requested by the judicial council. The clerk will promptly distribute copies of the response to each member of the judicial council who is not disqualified, to the chief judge, and to the complainant. The judge may not otherwise communicate with council members about the matter, either orally or in writing.

(2) The judge complained about will be provided by the clerk with copies of any communications that may be addressed to the members of the judicial council by the complainant.

(e) *Notice of council decision.*

(1) The circuit executive will transmit the council's order, any accompanying memorandum in support of the order, and any ballots returned, to the Clerk of the Court of Appeals for inclusion in the official file.

(2) The order of the judicial council, together with any accompanying memorandum in support of the order, will be provided by the clerk to the complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to Rule 3(a)(2).

(3) If the decision is unfavorable to the complainant, the complainant will be notified by the clerk that the law provides for no further review of the decision.

(4) A memorandum supporting a council order will not include the name of the complainant or the judge whose conduct was complained of. If the order of

the council affirms the chief judge's disposition, a supporting memorandum will be prepared only if the judicial council concludes that there is a need to supplement the chief judge's explanation.

(f) *Public availability of council decision.* Materials related to the council's decision will be made public at the time and in the manner set forth in Rule 17.

## CHAPTER IV. INVESTIGATION AND RECOMMENDATION BY SPECIAL COMMITTEE

### Rule 9. Appointment of special committee.

(a) *Membership.* A special committee appointed pursuant to Rule 4(e) will consist of the chief judge of the circuit and equal numbers of circuit and district judges. If a complaint is about a district judge, bankruptcy judge, or magistrate judge, the district judge members of the committee will be from districts other than the district of the judge complained about.

(b) *Presiding officer.* At the time of appointing the committee, the chief judge will designate one of its members (who may be the chief judge) as the presiding officer. When designating another member of the committee as the presiding officer, the chief judge may also delegate to such member the authority to direct the Clerk of the Court of Appeals to issue subpoenas related to proceedings of the committee.

(c) *Bankruptcy judge or magistrate judge as adviser.* If the judicial officer complained about is a bankruptcy judge or magistrate judge, the chief judge may designate a bankruptcy judge or magistrate judge, as the case may be, to serve as an adviser to the committee. The chief judge will designate such an adviser if, within two days of notification of the appointment of the committee, the bankruptcy judge, or magistrate judge complained about requests that an adviser be designated. The adviser will be from a district other than the district of the bankruptcy judge or magistrate judge complained about. The adviser will not vote but will have the other privileges of a member of the committee.

(d) *Provision of documents.* The clerk will send to each member of the committee and to the adviser, if any, copies of (1) the complaint form and statement of facts, and (2) any other documents on file pertaining to the complaint (or to that portion of the complaint referred to the special committee).

(e) *Continuing qualification of committee members.* A member of a special committee who was qualified at the time of appointment may continue to serve on the committee even though the member relinquishes the position of chief judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States.

(f) *Inability of committee member to complete service.* In the event that a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge of the circuit will determine whether to appoint a replacement member, either a circuit or district judge as the case may be. However, no special committee appointed under these rules will function with only a single member, and the quorum and voting requirements for a two-member committee will be applied as if the committee had three members.

### Rule 10. Conduct of an investigation.

(a) *Extent and methods to be determined by committee.* Each special committee will determine the extent of the investigation and the methods of

conducting it that are appropriate in light of the allegations of the complaint. If, in the course of the investigation, the committee develops reason to believe that the judge may have engaged in misconduct that is beyond the scope of the complaint, the committee may, with written notice to the judge, expand the scope of the investigation to encompass such misconduct.

(b) *Criminal matters.* In the event that the complaint alleges criminal conduct on the part of a judge, or in the event that the committee becomes aware of possible criminal conduct, the committee will consult with the appropriate prosecuting authorities to the extent permitted by 28 U.S.C. § 372(c)(14) in an effort to avoid compromising any criminal investigation. However, the committee will make its own determination about the timing of its activities, having in mind the importance of ensuring the proper administration of the business of the courts.

(c) *Staff.* The committee may arrange for staff assistance in the conduct of the investigation. It may use existing staff of the circuit executive or may arrange, through the Administrative Office of the United States Courts, for the hiring of special staff to assist in the investigation.

(d) *Delegation.* The committee may delegate duties in its discretion to sub-committees, to staff members, to individual committee members, or to an adviser designated under Rule 9(c). The authority to exercise the committee's subpoena powers may be delegated only to the presiding officer. In the case of failure to comply with such subpoena, the judicial council or special committee may institute a contempt proceeding consistent with 28 U.S.C. § 332(d).

(e) *Report.* The committee will file with the clerk for transmission through the circuit executive to the judicial council a comprehensive report of its investigation, including findings of the investigation and the committee's recommendations for council action. Any findings adverse to the judge will be based on evidence in the record. The report will be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of committee members, and the record of any hearings held pursuant to Rule 11.

(f) *Voting.* All actions of the committee will be by vote of a majority of all of the members of the committee.

**Rule 11. Conduct of hearings by special committee.**

(a) *Purpose of hearings.* The committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the committee is investigating allegations against more than one judge it may, in its discretion, hold joint hearings or separate hearings.

(b) *Notice to judge complained about.* The judge complained about will be given adequate notice in writing of any hearing held, its purposes, the names of any witnesses whom the committee intends to call, and the text of any statements that have been taken from such witnesses. The judge may at any time suggest additional witnesses to the committee.

(c) *Committee witnesses.* All persons who are believed to have substantial information to offer will be called as committee witnesses. Such witnesses may include the complainant and the judge complained about. The witnesses will be questioned by committee members, staff, or both. The judge will be afforded the opportunity to cross-examine committee witnesses, personally or through counsel.

(d) *Witnesses called by the judge.* The judge complained about may also call witnesses and may examine them personally or through counsel. Such witnesses may also be examined by committee members, staff, or both.

(e) *Witness fees.* Witness fees will be paid as provided in 28 U.S.C. § 1821.

(f) *Rules of evidence; oath.* The Federal Rules of Evidence will apply to any evidentiary hearing except to the extent that departures from the adversarial

format of a trial make them inappropriate. All testimony taken at such a hearing will be given under oath or affirmation.

(g) *Record and transcript.* A record and transcript will be made of any hearing held.

(h) *Supporting personnel.* The Clerk of the Court of Appeals will arrange for the attendance at such hearings of deputy clerks, court reporters, and other necessary staff, from the staff of the court of appeals or the staff of a district court proximate to the location of the hearing.

**Rule 12. Rights of judge in investigation.**

(a) *Notice.* The judge complained about is entitled to written notice of the investigation (Rule 4(f)), to written notice of expansion of the scope of an investigation (Rule 10(a)), and to written notice of any hearing (Rule 11(b)).

(b) *Presentation of evidence.* The judge is entitled to a hearing, and has the right to present evidence and to compel the attendance of witnesses and the production of documents at the hearing. Upon request of the judge, the chief judge or his designee will direct the Clerk of the Court of Appeals to issue a subpoena in accordance with 28 U.S.C. § 332(d)(1).

(c) *Presentation of argument.* The judge may, at any time, submit to the clerk written argument for consideration by the special committee, and will be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

(d) *Attendance at hearings.* The judge will have the right to attend any hearing held by the special committee and to receive copies of the transcript and any documents introduced, as well as to receive copies of any written arguments submitted by the complainant to the committee.

(e) *Receipt of committee's report.* The judge will have the right to receive the report of the special committee at the time it is filed with the judicial council.

(f) *Representation by counsel.* The judge may be represented by counsel in the exercise of any of the rights enumerated in this rule. The costs of such representation may be borne by the United States as provided in Rule 14(h).

**Rule 13. Rights of complainant in investigation.**

(a) *Notice.* The complainant is entitled to written notice of the investigation as provided in Rule 4(f). Upon the filing of the special committee's report to the judicial council, the complainant will be notified by the clerk that the report has been filed and is before the council for decision. Although the complainant is not entitled to a copy of the report of the special committee, the judicial council may, in its discretion, release a copy of the report of the special committee to the complainant.

(b) *Opportunity to provide evidence.* The complainant is entitled to be interviewed by a representative of the committee. If it is believed that the complainant has substantial information to offer, the complainant will be called as a witness at a hearing.

(c) *Presentation of argument.* The complainant may at any time submit to the clerk written argument for consideration by the special committee. In the discretion of the special committee, the complainant may be permitted to offer oral argument.

(d) *Representation by counsel.* A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

# CHAPTER V. JUDICIAL COUNCIL CONSIDERATION OF RECOMMENDATIONS OF SPECIAL COMMITTEE

## Rule 14. Action by judicial council.

(a) *Purpose of judicial council consideration.* After receipt of a report of a special committee, the judicial council will determine whether to dismiss the complaint, conclude the proceeding on the ground that corrective action has been taken or that intervening events make action unnecessary, refer the complaint to the Judicial Conference of the United States, or order corrective action.

(b) *Basis of council action.* Subject to the rights of the judge to submit argument to the council as provided in Rule 15(a), the council may take action on the basis of the report of the special committee and the record of any hearings held. If the council finds that the report and record provide an inadequate basis for decision, it may (1) order further investigation and a further report by the special committee or (2) conduct such additional investigation as it deems appropriate.

(c) *Dismissal.* The council will dismiss a complaint if it concludes —

(1) That the claimed conduct, even if the claim is true, is not "conduct prejudicial to the effective and expeditious administration of the business of the courts" and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;

(2) That the complaint is directly related to the merits of a decision or procedural ruling;

(3) That the facts on which the complaint is based have not been demonstrated; or

(4) That, under the statute, the complaint is otherwise not appropriate for consideration.

(d) *Conclusion of the proceeding on the basis of corrective action taken.* The council will conclude the complaint proceeding if it determines that appropriate action has already been taken to remedy the problem identified in the complaint or that intervening events make such action unnecessary.

(e) *Referral to judicial conference of the United States.* The judicial council may, in its discretion, refer a complaint to the Judicial Conference of the United States with the council's recommendations for action. It is required to refer such a complaint to the Judicial Conference of the United States if the council determines that a circuit judge or district judge may have engaged in conduct —

(1) That might constitute ground for impeachment; or

(2) That, in the interest of justice, is not amenable to resolution by the judicial council.

(f) *Order of corrective action.* If the complaint is not disposed of under paragraphs (c) through (e) of this rule, the judicial council will take other action to assure the effective and expeditious administration of the business of the courts. Such action may include, among other measures —

(1) Censuring or reprimanding the judge, either by private communication or by public announcement;

(2) Ordering that, for a fixed temporary period, no new cases be assigned to the judge;

(3) In the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings pursuant to 28 U.S.C. § 631(i);

(4) In the case of a bankruptcy judge, removing the judge from office pursuant to 28 U.S.C. § 152;

(5) In the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements will be waived;

(6) In the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed.

(g) *Combination of actions.* Referral of a complaint to the Judicial Conference of the United States under paragraph (e) or to a district court under paragraph (f)(3) of this rule will not preclude the council from simultaneously taking such other action under paragraph (f) as is within its power.

(h) *Recommendation about fees.* Upon the request of a judge whose conduct is the subject of a complaint, the judicial council may, if the complaint has been finally dismissed, recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge during the investigation, which would not have been incurred but for the requirements of 28 U.S.C. § 372(c) and these rules.

(i) *Notice of action of judicial council.* Council action will be by written order. Unless the council finds that, for extraordinary reasons, it would be contrary to the interests of justice, the order will be accompanied by a memorandum setting forth the factual determinations on which it is based and the reasons for the council action. The memorandum will not include the name of the complainant or of the judge whose conduct was complained about. The order and the supporting memorandum will be provided by the clerk to the complainant, the judge, and any judge entitled to receive a copy of the complaint pursuant to Rule 3(a)(2). However, if the complaint has been referred to the Judicial Conference of the United States pursuant to paragraph (e) of this rule and the council determines that disclosure would be contrary to the interests of justice, such disclosure need not be made. The complainant and the judge will be notified by the clerk of any right to seek review of the judicial council's decision by the Judicial Conference of the United States and of the procedure for filing a petition for review.

(j) *Public availability of council action.* Materials related to the council's action will be made public at the time and in the manner set forth in Rule 17.

(k) *Allegations of criminal conduct.* If a judicial council dismisses, solely for lack of jurisdiction under 28 U.S.C. § 372(c) non-frivolous allegations of criminal conduct by a judge the judicial council's order of dismissal shall inform the complainant that the dismissal does not prevent the complainant from bringing any allegation of criminal conduct to the attention of appropriate federal or state criminal authorities. If in this situation, the allegations of criminal conduct were originally referred to the circuit by a Congressional committee or member of Congress, the judicial council — if no petition for review of the dismissal by the Judicial Conference lies under 28 U.S.C. § 372(c)(10), or if no petition for review is filed — shall notify the Congressional committee or member that the Judiciary has concluded that it lacks jurisdiction under § 372(c). (Amended January 19, 2001.)

**Rule 15. Procedures for judicial council consideration of a special committee's report.**

(a) *Rights of judge complained about.* Within 15 days after the receipt of the report of a special committee, the judge complained about may file a written response with the Clerk of the Court of Appeals, who will forward it to all members of the judicial council and to the circuit executive. The judge will also be given an opportunity to present oral argument to the council, personally or through counsel. The judge may not otherwise communicate with council members about the matter, either orally or in writing.

(b) *Conduct of additional investigation by the council.* If the judicial council decides to conduct additional investigation, the judge complained about will be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The conduct of the investigation will be generally in accordance with the procedures set forth in Rules 10 through 13 for the conduct of an investigation by a special committee. However, if hearings are held, the council may limit testimony to avoid unnecessary repetition of testimony presented before the special committee.

(c) *Voting.* Council action will be taken by a majority of those members of the council who are not disqualified, except that a decision to remove a bankruptcy judge from office requires a majority of all the members of the council.

## CHAPTER VI. MISCELLANEOUS RULES

### Rule 16. Confidentiality.

(a) *General rule.* Consideration of a complaint by the chief judge, a special committee, or the judicial council will be treated as confidential business, and information about such consideration will not be disclosed by any judge, or employee of the judicial branch or any person who records or transcribes testimony except in accordance with these rules.

(b) *Files.* All files related to complaints of misconduct or disability, whether maintained by the clerk, the circuit executive, the chief judge, members of a special committee, members of the judicial council, or staff, will be maintained separate and apart from all other files and records, with appropriate security precautions to ensure confidentiality.

(c) *Disclosure in memoranda of reasons.* Memoranda supporting orders of the chief judge or the judicial council, and dissenting opinions or separate statements of members of the council, may contain such information and exhibits as the authors deem appropriate, and such information and exhibits may be made public pursuant to Rule 17.

(d) *Availability to judicial conference.* In the event that a complaint is referred under Rule 14(e) to the Judicial Conference of the United States, the clerk will provide the Judicial Conference with copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its determination. Upon request of the Judicial Conference or its Committee to Review Circuit Council Conduct and Disability Orders, in connection with their consideration of a referred complaint or a petition under 28 U.S.C. § 372(c)(10) for review of a council order, the clerk will furnish any other records related to the investigation.

(e) *Availability to district court.* In the event that the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 14(f)(3), the clerk will provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its determination. Upon request of the chief judge of the district court, the judicial council may authorize release of any other records relating to the investigation.

(f) *Impeachment proceedings.* The judicial council may release to the legislative branch any materials that are believed necessary to an impeachment investigation of a judge or a trial on articles of impeachment.

(g) *Consent of judge complained about.* Any materials from the files may be disclosed to any person upon the written consent of both the judge complained about and the chief judge of the circuit. In any disclosure the chief judge may require that the identity of the complainant, or of witnesses in an investigation conducted by a special committee or the judicial council, be shielded.

(h) *Disclosure by judicial council in special circumstances.* The judicial council may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that the council concludes that such disclosure is justified by special circumstances and is not prohibited by 28 U.S.C. § 372(c)(14).

Such disclosure may be made to Judiciary researchers engaged in the study or evaluation of experience under 28 U.S.C. § 372(c) and related modes of judicial discipline, but only where such study or evaluation has been specifically approved by the Judicial Conference or by the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders. The judicial council should take appropriate steps (to the extent the Judicial Conference or its Committee has not already done so) to shield the identities of the judge complained against, the complainant, and witnesses from public disclosure, and may impose other appropriate safeguards to protect against the dissemination of confidential information.

(i) *Disclosure of identity by judge complained about.* Nothing in this rule will preclude the judge complained about from acknowledging that he or she is the judge referred to in documents made public pursuant to Rule 17.

(j) *Assistance and consultation.* Nothing in this rule precludes the chief judge or judicial council, for purposes of acting on a complaint filed under 28 U.S.C. § 372(c), from seeking the assistance of qualified staff, or from consulting other judges who may be helpful in the process of complaint disposition. (Amended January 19, 2001.)

**Rule 17. Public availability of decisions.**

(a) *General rule.* A docket-sheet record of orders of the chief judge and the judicial council and the texts of any memoranda supporting such orders and any dissenting opinions or separate statements by members of the judicial council will be made public when final action on the complaint has been taken and is no longer subject to review.

(1) If the complaint is finally disposed of without appointment of a special committee, or if it is disposed of by council order dismissing the complaint for reasons other than mootness or because intervening events have made action on the complaint unnecessary, the publicly available materials will not disclose the name of the judge complained about without his or her consent.

(2) If the complaint is finally disposed of by censure or reprimand by means of private communication, the publicly available materials will not disclose either the name of the judge complained about or the text of the reprimand.

(3) If the complaint is finally disposed of by any other action taken pursuant to Rule 14(d) or (f) except dismissal because intervening events have made action on the complaint unnecessary, the text of the dispositive order will be included in the materials made public, and the name of the judge will be disclosed.

(4) If the complaint is dismissed as moot, or because intervening events have made action on the complaint unnecessary, at any time after the appointment of a special committee, the judicial council will determine whether the name of the judge is to be disclosed.

The name of the complainant will not be disclosed in materials made public under this rule unless the chief judge orders such disclosure.

(b) *Manner of making public.* The records referred to in paragraph (a) will be made public by placing them in a publicly accessible file in the office of the Clerk of the Court of Appeals at 1100 East Main Street, Room 501, Richmond, Virginia 23219. The clerk will send copies of the publicly available materials to the Federal Judicial Center, Thurgood Marshall Federal Judiciary Building,

Washington, DC 20002-8003, where such materials will also be available for public inspection. In cases in which memoranda appear to have precedential value, the chief judge may cause them to be published.

(c) *Decision of judicial conference standing committee.* To the extent consistent with the policy of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, opinions of that committee about complaints arising from this circuit will also be made available to the public in the office of the Clerk of the Court of Appeals.

(d) *Complaints referred to the Judicial Conference of the United States.* If a complaint is referred to the Judicial Conference of the United States pursuant to Rule 14(e), materials relating to the complaint will be made public only as may be ordered by the Judicial Conference. (Amended January 19, 2001.)

**Rule 18. Disqualification.**

(a) *Complainant.* If the complaint is filed by a judge, that judge will be disqualified from participation in any consideration of the complaint except to the extent that these rules provide for participation by a complainant. A chief judge who has identified a complaint under Rule 2(j) will not be automatically disqualified from participating in the consideration of the complaint but may consider in his or her discretion whether the circumstances warrant disqualification.

(b) *Judge complained about.* A judge whose conduct is the subject of a complaint will be disqualified from participating in any consideration of the complaint except to the extent that these rules provide for participation by a judge who is complained about.

(c) *Disqualification of chief judge on consideration of a petition for review of a chief judge's order.* If a petition for review of a chief judge's order dismissing a complaint or concluding a proceeding is filed with the judicial council pursuant to Rule 5, the chief judge will not participate in the council's consideration of the petition. In such a case, the chief judge may file a written communication with the clerk for transmission to all of the members of the judicial council and the circuit executive, with copies provided to the complainant and to the judge complained about. The chief judge may not otherwise communicate with council members about the matter, either orally or in writing.

(d) *Member of special committee not disqualified.* A member of the judicial council who is appointed to a special committee will not be disqualified from participating in council consideration of the committee's report.

(e) *Judge under investigation.* Upon appointment of a special committee, the judge complained about will automatically be disqualified from serving on (1) any special committee appointed under Rule 4(e), (2) the judicial council of the circuit, (3) the Judicial Conference of the United States, and (4) the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States. The disqualification will continue until all proceedings regarding the complaint are finally terminated, with no further right of review.

(f) *Substitute for disqualified chief judge.* If the chief judge of the circuit is disqualified from participating in consideration of the complaint, the duties and responsibilities of the chief judge under these rules will be assigned to the circuit judge in regular active service who is the most senior in date of commission of those who are not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to refer the complaint to a circuit judge from another circuit pursuant to 28 U.S.C. § 291(a), or whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief judge to dispose of the

complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the judicial council.

(g) *Judicial council action where multiple judges are disqualified.* Notwithstanding any other provision in these rules to the contrary, a member of the judicial council who is a subject of the complaint may participate in the disposition thereof if (a) participation by members who are subjects of the complaint is necessary to obtain a quorum of the judicial council, and (b) the judicial council votes that it is necessary, appropriate, and in the interest of sound judicial administration that such complained-against members be eligible to act. Members of the judicial council who are subjects of the complaint may participate in this determination if necessary to obtain a quorum of the judicial council. Under no circumstances, however, shall the judge who acted as chief judge of the circuit in ruling on the complaint under Rule 4 be permitted to participate in this determination. (Amended effective August 13, 1997; amended January 19, 2001.)

**Rule 19. Withdrawal of complaints and petitions for review.**

(a) *Complaint pending before chief judge.* A complaint that is before the chief judge for a decision under Rule 4 may be withdrawn by the complainant with the consent of the chief judge.

(b) *Complaint pending before special committee or judicial council.* After a complaint has been referred to a special committee for investigation, the complaint may be withdrawn by the complainant only with the consent of both (1) the judge complained about and (2) the special committee (before its report has been filed) or the judicial council.

(c) *Petition for review of chief judge's disposition.* A petition to the judicial council for review of the chief judge's disposition of a complaint may be withdrawn by the petitioner at any time before the judicial council acts on the petition.

**Rule 20. Availability of other procedures.**

The availability of the complaint procedure under these rules and 28 U.S.C. § 372(c) will not preclude the chief judge of the circuit or the judicial council of the circuits from considering any information that may come to their attention suggesting that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge all the duties of office by reason of disability.

**Rule 21. Availability of rules and forms.**

These rules and copies of the complaint form prescribed by Rule 2 will be available without charge in the office of the Clerk of the Court of Appeals, 1100 East Main Street, Room 501, Richmond, Virginia 23219-3517, and in each office of the clerk of a district court or bankruptcy court within this circuit.

**Rule 22. Effective date.**

These rules apply to complaints filed on or after January 19, 2001. The handling of complaints filed before that date will be governed by the rules previously in effect.

**Rule 23. Advisory committee.**

The advisory committee appointed by the Court of Appeals for the Fourth Circuit for the study of rules of practice and internal operating procedures

under Fourth Circuit Local Rule 47(b) shall also constitute the advisory committee for the study of these rules, as provided by 28 U.S.C. § 2077(b), and shall make any appropriate recommendations to the circuit judicial council concerning these rules.

## FORMS

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

MAIL THIS FORM TO THE CLERK, UNITED STATES COURT OF APPEALS, 1100 EAST MAIN STREET, ROOM 501, RICHMOND, VIRGINIA 23219-3517. MARK THE ENVELOPE "JUDICIAL MISCONDUCT COMPLAINT" OR "JUDICIAL DISABILITY COMPLAINT." DO NOT PUT THE NAME OF THE JUDGE ON THE ENVELOPE.

1. Complainant's name: _____
   Address: _____
   _____
   Daytime telephone: _____

2. Judge complained about:
   Name: _____
   Court: _____

3. Does this complaint concern the behavior of the judge in a particular lawsuit or lawsuits?
   [ ] Yes [ ] No
   If "yes," give the following information about each lawsuit (use the reverse side if there is more than one):
   Court:
   Docket number:
   Are (were) you a party or lawyer in the lawsuit?
   [ ] Party [ ] Lawyer [ ] Neither
   If a party, give the name, address, and telephone number of your lawyer:
   Docket numbers of any appeals to the Fourth Circuit:

4. Have you filed any lawsuits against the judge?
   [ ] Yes [ ] No
   If "yes," give the following information about each lawsuit (use the reverse side if there is more than one):
   Court:
   Docket number:
   Present status of suit:
   Name, address, and telephone number of your lawyer:
   Court to which any appeal has been taken:
   Docket number of the appeal:
   Present status of the appeal:

5. On separate sheets of paper, not larger than the paper on which this form is printed, describe the conduct or the evidence of disability that is the subject

of this complaint. See Rule 2(b) and 2(d). Do not use more than 5 pages (5 sides). Most complaints do not require that much.

6. You should either

(1) check the first box below and sign this form in the presence of a notary public; or

(2) check the second box and sign the form. You do not need a notary public if you check the second box.

[ ] I swear (affirm) that —

[ ] I declare under penalty of perjury that —

(1) I have read Rules 1 and 2 of the Rules of the Judicial Council of the Fourth Circuit Governing Complaints of Judicial Misconduct or Disability, and

(2) The statements made in this complaint are true and correct to the best of my knowledge.

_____
(Signature)

Executed on _____
(Date)

Sworn and subscribed to
before me _____
(Date)

_____
(Notary Public)

My commission expires:

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Revised April 1, 1991,
with amendments through December 1, 2000.

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**Editor's note.** — For North Carolina court system website, see www.nced.uscourts.gov.

# I. GENERAL RULES

## Rule 1.00. Scope and citation of local rules.

These local rules of practice shall govern the conduct of the United States District Court for the Eastern District of North Carolina except when the conduct of this court is governed by federal statutes and rules. A judge or magistrate judge, for good cause and in his discretion, may alter these rules in any particular case. These rules shall be cited: "Local Rule _____, EDNC."

**Editor's note.** — On December 1, 2000, the Court entered a standing order regarding the effect of recent Amendments to the Federal Rules of Civil Procedure on the Local Rules and practice in the Eastern district. In addition to making various amendatory changes, the Court provided as follows:

Applicability of Federal Rules of Civil Procedure

a. In all cases filed in this Court or removed to this Court on or after December 1, 2000, the Federal Rules of Civil Procedure, as amended, shall apply in full.

b. In actions filed in this Court or removed to this Court prior to December 1, 2000, F.R.Civ.P. 26(d) will not apply. Therefore, all parties may propound discovery at any time after an action has been filed.

c. In actions filed in this Court or removed to this Court prior to December 1, 2000 in which a Request for Discovery Plan has been issued by the Clerk of Court, the parties are not required to make the mandatory initial disclosures required under F.R.Civ.P. 26(a)(1). Moreover, the parties should follow the deadlines set forth in the Court's Request for Discovery Plan, not those set forth in Federal Rule of Civil Procedure 26. All other amended Federal Rules shall apply.

d. Except as ordered by the Court in a specific case, all other portions of the Federal Rules, as amended effective December 1, 2000, shall apply to civil actions filed or removed to this Court prior to December 1, 2000, including the provisions regarding scope of discover (F.R.Civ.P. 26(b)), limit on length of discovery (F.R.Civ.P.

30(d)), and sanctions for failure to disclose (F.R.Civ.P. 37(c)(1)).

**Legal Periodicals.** — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53, and 67, FRCP, and the adoption of Rules 72 to 76, FRCP, noting local rule changes to related rules, and suggesting further changes, see 20 Wake Forest L. Rev. 819 (1984).

## Rule 2.00. Attorneys.

**Rule 2.01.** *Roll of attorneys.*

The bar of this court consists of those heretofore admitted and those hereafter admitted as prescribed by this Local Rule 2.00.

**Rule 2.02.** *Eligibility.*

A member in good standing of the bar of the Supreme Court of North Carolina is eligible for admission to the bar of this court.

**Rule 2.03.** *Procedure for admission.*

Before being presented to the court for taking the required oath, an applicant for admission shall certify in a written application that such applicant:

(a) Is a member in good standing of the bar of the Supreme Court of North Carolina; and,

(b) Has studied the Federal Rules of Civil Procedure and Criminal Procedure, the Federal Rules of Evidence, and the Local Rules of this court.

In addition to these certifications, the written application shall contain the certification of two attorneys who are members in good standing of the bar of this court that the applicant is of good moral character and professional reputation and meets the requirements for admission. An applicant may be admitted to practice in this court by a district judge, bankruptcy judge, or magistrate judge of this court or of the United States District Court for the Middle District or Western District of North Carolina upon oral motion by a member of the bar of this court. If the motion for admission is granted, the applicant shall take the following oath or affirmation:

> I do solemnly swear that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic, and that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will demean myself as an attorney of this court, uprightly and according to law. So help me God.

Following the administration of the oath, the application shall be signed by the judge or magistrate judge and the applicant shall file the application, accompanied by a fee of $30.00, with the clerk. The clerk shall then issue the applicant a certificate of admission to the bar of this court. Upon the filing of a properly certified and executed application accompanied by the admission fee of $30.00, the clerk may accept for filing papers signed by the applicant. However, no applicant shall make an appearance on behalf of a client until the applicant has taken the oath.

**Rule 2.04.** *Representation by local counsel who must sign all pleadings.*

Litigants in civil and criminal actions, except governmental agencies and parties appearing *pro se*, must be represented by at least one member of the bar of this court who shall sign each pleading, motion, discovery procedure or other document filed in this court. If an attorney appears solely to bring the litigant in compliance with this rule, he shall in each instance designate himself "LR 2.04 Counsel." In signing the pleading, motion, discovery request

or other document, counsel certifies that he is an authorized representative for communication with the court about the litigation, and the document conforms to the practice and procedure of this court. However, counsel does not make the certification required by Rule 11 of the Federal Rules of Civil Procedure. Nevertheless, the requirements of Rule 11 must be complied with by out-of-state counsel. Signatures in the following form shall be sufficient to comply with this rule:

_____

James M. Jones
Attorney for Defendant
Jones, Jones and Jones
P.O. Box 500
New York, NY 10050
(212) 555-1212

_____

John B. Counselor
Attorney for Defendant
Abbott, Ball and Counselor
P.O. Box 50
Raleigh, NC 27602
(919) 878-8787
LR 2.04 Counsel

**CASE NOTES**

**Cited** in Stevens v. Lawyers Mut. Liab. Ins. Co., 107 F.R.D. 112 (E.D.N.C. 1985).

**Rule 2.05.** *Appearances by attorneys not admitted in the district.*

Any person who is a member in good standing of the bar of a United States District Court and the bar of the highest court of any state or the District of Columbia and who is neither a resident of this state nor engaged in the practice of law in this state shall be permitted to appear in a particular matter in association with Rule 2.04 local counsel. Pursuant to this rule, counsel may enter a notice of appearance without the necessity of filing a motion to appear *pro hac vice*. The appearance of such a person in a particular matter shall confer jurisdiction upon this court for any alleged misconduct of that person or for any other purpose arising in the course of or in the preparation of such matter.

**Rule 2.06.** *Pleadings, service, and attendance by local counsel in cases where out-of-state attorneys appear.*

Pleadings and other documents filed in a case where an attorney appears who is not admitted to the bar of this court shall contain the individual name, firm name, address, and phone number of both the attorney making a special appearance under this Local Rule and the associated local counsel. In such a case, the service of all pleadings and notices as required shall be sufficient if served only upon the associated local counsel.

**Rule 2.07.** *Withdrawal of appearance.*

No attorney whose appearance has been entered shall withdraw his or her appearance or have it stricken from the record except with leave of the court.

**Rule 2.08.** *Courtroom decorum.*

Counsel shall conduct themselves with dignity and propriety. Counsel shall rise when addressing the court, and all statements to the court shall be made from counsel table or from behind the lectern facing the court. Counsel shall not approach the bench unless requested to do so by the court or unless permission is granted upon the request of counsel.

**Rule 2.09.** *Questioning of witnesses.*

Only one attorney for each party may question a particular witness unless the court allows otherwise. Counsel shall remain seated while questioning witnesses.

**Rule 2.10.** *Professional standards.*

The ethical standard governing the practice of law in this court is the Code of Professional Responsibility of the North Carolina State Bar, Incorporated now in force and as hereafter modified by the Supreme Court of North Carolina, except as may be otherwise provided by specific rule of this court. Counsel are directed to advise the clerk within ten days of disciplinary action taken against them resulting in suspension or disbarment. The disciplinary procedures of this court shall be on file with the clerk and furnished to counsel upon request.

**CASE NOTES**

**Stated** in Furbush v. Otsego Mach. Shop, Inc., 914 F. Supp. 1275 (E.D.N.C. 1996).

**Rule 2.11.** *Admission of attorneys previously admitted to the United States District Courts for the Middle or Western Districts of North Carolina.*

Attorneys already admitted to the bar of either the United States District Court for the Middle District of North Carolina or the United States District Court for the Western District of North Carolina may be admitted to the bar of this court upon tendering the application and fees required by Rule 2.03, together with a copy of the order admitting the attorney to practice in one of the other districts, without the necessity of taking the oath that is otherwise required.

**Rule 3.00. Court schedule and conduct of business.**

**Rule 3.01.** *Headquarters of the clerk.*

The headquarters of the clerk of court shall be in Raleigh.

**Rule 3.02.** *Divisions of the district.*

There shall be four divisions of the court. Headquarters of each division and the counties comprising each division are as follows:

| *Name of Division* | *Headquarters* | *Counties* | |
|---|---|---|---|
| Northern Division | Elizabeth City | Bertie | Hertford |
| | | Camden | Northampton |
| | | Chowan | Pasquotank |
| | | Currituck | Perquimans |
| | | Dare | Tyrrell |
| | | Gates | Washington |

| *Name of Division* | *Headquarters* | *Counties* | |
|---|---|---|---|
| Eastern Division | Greenville | Beaufort | Hyde |
| | | Carteret | Jones |
| | | Craven | Lenoir |
| | | Edgecombe | Martin |
| | | Greene | Pamlico |
| | | Halifax | Pitt |
| Western Division | Raleigh | Cumberland | Vance |
| | | Franklin | Wake |
| | | Granville | Wayne |
| | | Harnett | Warren |
| | | Johnston | Wilson |
| | | Nash | |
| Southern Division | Wilmington | Bladen | Onslow |
| | | Brunswick | Pender |
| | | Columbus | Robeson |
| | | Duplin | Sampson |
| | | New Hanover | |

**Rule 3.03.** *Assignment of cases to a division.*

(a) *Civil actions.* The clerk shall assign all civil actions to a division when the action is filed or removed. If one or more plaintiffs are residents of this District, the clerk shall assign the case to the division in which the first named such plaintiff resides. If no plaintiff resides in the District and one or more defendants reside in the District, the clerk shall assign the action to the division in which the first named such defendant resides. In the event no party resides in the District but the claim is alleged to have arisen in the District or to involve real property in the District, the clerk shall assign the action to the division in which such claim is alleged to have arisen or in which the real property is situated. In all other instances, a case shall be assigned to a division in the discretion of the clerk.

(b) *Criminal actions.* The clerk shall assign all criminal indictments to a division when an indictment is filed or transferred. If the indictment alleges the crime occurred within the District, the clerk shall assign the action to the division in which the crime is alleged to have occurred. In cases where it is not alleged that the crime occurred in the District or in cases in which it is unclear in which division the alleged crime occurred, the clerk shall assign the indictment to the division in which the first named defendant, who resides within this District, resides. In all other instances, an indictment shall be assigned to a division in the discretion of the clerk.

(c) *Residence of corporation.* For the purposes of this Local Rule, a corporate plaintiff shall be deemed to reside in the state in which it was incorporated and in the district and division in which it has its principal office; and, a corporate defendant shall be deemed to reside in the division in which the corporation is alleged (1) to be incorporated and have its principal office, or (2) to be licensed to do business or (3) to be doing business.

(d) *United States as plaintiff.* For the purposes of this Local Rule, in cases where the United States, its agencies or officers acting in an official capacity, is the plaintiff it shall be deemed that such plaintiff does not reside in this district.

**Rule 3.04.** *Court in continuous session.*

This court shall be in continuous session in all divisions of the District on all business days throughout the year. All matters of either a criminal or civil nature not reached at the regular sessions of court are deemed to be in an open

status and subject to being called for disposition before the next regular session of court upon reasonable notice to the interested parties.

**Rule 3.05.** *Correspondence.*

Correspondence addressed to the court shall indicate that copies have been transmitted to all other parties and failure to transmit the same to all other parties may result in sanctions by the court. Such correspondence shall not become a part of the record in the case.

**Rule 3.06.** *Forms of pleadings, motions and documents.*

All pleadings, motions, discovery procedures, memoranda and other papers filed with the clerk or the court shall:

(a) be double-spaced on standard letter size (8½ x 11) paper, with all typed matter appearing in at least 11 point type and not exceeding 6½ by 9½ inches;

(b) state the court and division in which the action is pending;

(c) bear, except for initial filing, the case number assigned by the clerk;

(d) contain the caption of the case;

(e) if applicable, state the title of the pleading, motion, discovery procedure or document and the federal statute or rule number under which the party is proceeding;

(f) contain the individual name, firm name, address, telephone number, fax number and State Bar identification, where applicable, of all attorneys who appear for the filing party, including an attorney making a special appearance pursuant to Local Rule 2.05;

(g) bear the date when signed by counsel;

(h) be signed by counsel as required by Local Rule 2.04;

(i) on all documents, the signature of parties and counsel shall be followed, on the line immediately below, by the typed or printed name in the exact form as the signature. In preparation of documents for signature by a judge or magistrate judge, a blank space shall be provided below the signature line in which the name may be typed or printed; and

(j) have each page numbered sequentially. The following forms are examples to be followed:

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. ____-_____-_____-____

| | | |
|---|---|---|
| (Civil)<br>JAMES T. SMITH,<br>Plaintiff | ) | |
| vs. | ) | OFFER OF JUDGMENT<br>Rule 68, F.R.Civ.P. |
| AARON R. JONES et al.,<br>Defendants | ) | |

OR

| | | |
|---|---|---|
| (Criminal)<br>UNITED STATES OF AMERICA | ) | |
| vs. | ) | MOTION TO TRANSFER<br>PROCEEDING |

) Rule 21(a), F.R.Crim.P.
AARON T. JONES )
Defendant )
(Closing)
This _____ day of January, 1990.

_____

John B. Counselor
Attorney for Defendant
Abbot, Ball and Counselor
Attorneys at Law
200 Main Street
Post Office Box 50
Raleigh, North Carolina 27602
A/C(919) 878-8787

OF COUNSEL:
James M. Jones
Attorney for Defendant
Jones, Jones and Jones
Attorneys at Law
1000 Broadway
Post Office Box 500
New York, New York 10050
A/C(212) 555-1212

**Rule 3.07.** *Filing and service of papers.*

Unless otherwise specifically provided for, the original of all pleadings and other papers required to be filed or served shall be filed with the clerk in the office of the clerk in Raleigh, Fayetteville, New Bern or Wilmington regardless of the division to which the case is assigned. When the law requires a proceeding to be heard and determined by a district court of three judges, pleadings and other documents shall be filed in triplicate. In all cases, whenever a pleading (subsequent to the complaint) or other paper is required to be filed with the clerk or with the court, a copy thereof shall be served upon opposing parties as provided in Rule 5(b), F.R.Civ.P.

**Rule 3.08.** *Discovery materials not to be filed unless ordered or needed.*

Pursuant to F.R.Civ.P. 5(b), discovery materials, including but not limited to disclosures and objections required under F.R.Civ.P. 26(a)(1) and (2), depositions upon oral examination and interrogatories, request for documents, notices to take depositions, expert witness designations, expert witness reports, requests for admissions, and answers and responses thereto, are not to be filed unless by order of the Court or for use in the proceedings. All such papers must be served on other counsel or parties entitled to service of papers filed with the clerk. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered. (Amended effective December 1, 2000.)

**Rule 3.09.** *Change of address.*

All attorneys and *pro se* parties must notify the court within 10 days of any change of address. Failure to notify the court in a timely manner of an address change may result in dismissal of the action or the imposition of such other relief that the court deems just and proper.

CASE NOTES

**Cited** in Great Am. Ins. Co. v. Nye, 64 Bankr. 759 (Bankr. E.D.N.C. 1986).

## Rule 4.00. Motion practice.

### Rule 4.01. *Time for filing.*

All motions in civil cases except those relating to the admissibility of evidence at trial must be filed on or before 30 days following the conclusion of the period of discovery. If an extension of the original period of discovery is approved by the court, the time for filing motions is automatically extended to 30 days after the new date.

### Rule 4.02. *General requirements.*

All motions shall be concise and shall state precisely the relief requested. Motions shall conform to the general motions requirements, standards and practices set forth in the applicable Federal Rules of Procedure and in Local Rule 3.06. Time for the filing of pre-trial motions in criminal cases is governed by Local Rule 44.00.

### Rule 4.03. *Motions relating to discovery and inspection.*

No motions to compel discovery will be considered by the court unless the motion sets forth, by item, the specific question, interrogatory, etc., objected to, along with the grounds supporting or in opposition to the objection. A discovery motion in a criminal action (Rule 16, F.R.Crim.P.) shall state that a request for discovery and inspection was made and denied.

### Rule 4.04. *Supporting memoranda.*

Except for motions which the clerk may grant as specified in Local Rule 9.00, all motions made other than in a hearing or trial shall be filed with an accompanying supporting memorandum in the manner prescribed by Local Rule 5.01. Where appropriate, motions shall be accompanied by affidavits or other supporting documents.

CASE NOTES

**Cited** in Sterling Forest Assocs. v. Barnett-Range Corp., 673 F. Supp. 1394 (E.D.N.C. 1987).

### Rule 4.05. *Responses to motions.*

Any party may file a written response to any motion. The response may be a memorandum in the manner prescribed by Local Rule 5.01 and may be accompanied by affidavits and other supporting documents. When the response is not a memorandum, the written response shall be accompanied by a supporting memorandum in the manner prescribed by Local Rule 5.01 and, when appropriate, by affidavits and other supporting documents. Responses and accompanying documents shall be filed within 20 days after service of the motion in question unless otherwise ordered by the court or prescribed by the applicable Federal Rules of Procedure. Responses and accompanying documents relating to discovery motions shall be filed within ten (10) business days after service of the motion in question unless otherwise ordered by the court.

CASE NOTES

**Stated** in Boon Partners v. Advanced Fin. Concepts, Inc., 917 F. Supp. 392 (E.D.N.C. 1996).

**Cited** in Stevens v. Lawyers Mut. Liab. Ins. Co., 107 F.R.D. 112 (E.D.N.C. 1985); Joyner v. Abbott Labs., 674 F. Supp. 185 (E.D.N.C. 1987); Boon Partners v. Advanced Fin. Concepts, Inc., 917 F. Supp. 392 (E.D.N.C. 1996).

**Rule 4.06.** *Replies.*

(a) *Non-discovery motions.* Replies to responses are discouraged. However, except as provided in Local Rule 4.06(b), a party desiring to reply to matters initially raised in a response to a motion or in accompanying supporting documents shall file the reply within 10 days after service of the response, unless otherwise ordered by the court.

(b) *Discovery motions.* Replies are not permitted in discovery disputes. See Rule 23.06(b).

**Rule 4.07.** *Subsequently decided authority.*

A suggestion of subsequently decided controlling authority, without argument, may be filed at any time prior to the court's ruling and shall contain only the citation to the case relied upon if published or a copy of the opinion if the case is unpublished.

**Rule 4.08.** *Affidavits.*

Ordinarily, affidavits will be made by the parties and other witnesses and not by counsel for the parties. However, affidavits may be made by counsel for a party if the sworn facts are known to counsel or counsel can swear to them upon information and belief, and

(a) the facts relate solely to an uncontested matter; or

(b) the facts relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the facts; or

(c) the facts relate solely to the nature and value of the legal services rendered for the party by such counsel or counsel's law firm; or

(d) the refusal to accept the affidavit would work a substantial hardship on the party and the court finds that its acceptance of the affidavit would not be such as to require that counsel or counsel's law firm be disqualified from continuing to appear for the party.

**Rule 4.09.** *Hearings on motions.*

Hearings on motions may be ordered by the court in its discretion. Unless so ordered, motions shall be determined without hearing.

**Rule 4.10.** *Frivolous or delaying motions.*

Where the court finds that a motion is frivolous or filed for delay, costs may be assessed against the party or counsel filing such motion.

**Rule 4.11.** *Motions for an extension of time to perform an act.*

All motions for an extension of time to perform an act required or allowed to be done within a specified time must show good cause, prior consultation with opposing counsel and the views of opposing counsel. The motion must be accompanied by a separate proposed order granting the motion.

**Editor's note.** — By amendment effective January 1, 1986, Rules 4.00 to 4.08 were renumbered as 4.01 to 4.09, respectively.

By amendment effective February 1, 1989, Rules 4.07 to 4.09 were renumbered as 4.08 to 4.10, respectively.

**CASE NOTES**

**Time for Response.** — The federal rules permit a court to set a time other than that provided in Fed. R. Civ. P., Rule 56(c) in which a party must respond to a motion for summary judgment, to forego any hearing on the motion, and to promulgate local rules to that effect. Byrd v. City of Fayetteville, 110 F.R.D. 71 (E.D.N.C. 1986), aff'd, 819 F.2d 1137 (4th Cir. 1987).

**Failure to Provide Analysis or Caselaw.** — Where defendant, in broad and conclusory fashion, sought specification, through a bill of particulars, of matters not set forth in the indictment which defendant alleged were essential to the preparation of his defense, but provided no hint of legal analysis to support his position and no citation to caselaw or other authority, the motion was filed in direct violation of Rule 4.04. United States v. King, 121 F.R.D. 277 (E.D.N.C. 1988).

Plaintiffs' failure to file a supporting memorandum to accompany any of their other motions as required by Eastern District Local Rule 4.04 justified denial of the motion. Plotkin v. Association of Eye Care Ctrs., Inc., 710 F. Supp. 156 (E.D.N.C. 1989).

**Response to Reply Struck.** — Where plaintiff filed a memorandum in response to defendant's reply and defendant then filed a Motion to Strike this memorandum, as this rule does not authorize the filing of a response to a reply, plaintiff's memorandum in response to defendant's reply was struck pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Simmons v. Al Smith Buick Co., 841 F. Supp. 168 (E.D.N.C. 1993).

**Applied** in Plotkin v. Association of Eye Care Ctrs., Inc., 710 F. Supp. 156 (E.D.N.C. 1989).

**Quoted** in Faircloth v. United States, 837 F. Supp. 123 (E.D.N.C. 1993).

**Cited** in Sterling Forest Assocs. v. Barnett-Range Corp., 643 F. Supp. 530 (E.D.N.C. 1986).

## Rule 5.00. Supporting memoranda.

### Rule 5.01. *Form and content.*

A memorandum shall be in the form prescribed by Local Rule 3.06 and shall contain:

(a) a concise summary of the nature of the case;

(b) a concise statement of the facts that pertain to the matter before the court for ruling;

(c) the argument (brevity is expected) relating to the matter before the court for ruling with appropriate citations in accordance with Local Rules 5.02, 5.03, and 5.04;

(d) copies of any decisions in cases cited as required by Local Rules 5.03 and 5.04; and

(e) where the supporting memorandum opposes a motion for summary judgment a short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

### Rule 5.02. *Citation of published decisions.*

Published decisions cited should include parallel citations, the year of the decision, and the court deciding the case. The following are illustrations:

(1) State Court Citation: *Rawls v. Smith*, 238 N.C. 162, 77 S.E.2d 701 (1953).

(2) District Court Citation: *Smith v. Jones*, 141 F. Supp. 248 (E.D.N.C. 1956).

(3) Court of Appeals Citation: *Smith v. Jones*, 237 F.2d 597 (4th Cir. 1956).

(4) United States Supreme Court Citation: *Smith v. Jones*, 325 U.S. 196, 65 S.Ct. 1120, 89 L.Ed. 1154 (1956). If a petition for certiorari or an appeal was filed in the United States Supreme Court, the disposition of the case in that court should always be shown with parallel citations. For example: *Carson v.*

*Warlick*, 238 F.2d 724 (4th Cir. 1956), *cert. denied,* 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed.2d 664 (1957).

**Rule 5.03.** *Citation of decisions not appearing in certain published reports.*

Decisions published outside the West Federal Reporter System, the official North Carolina reports and the official United States Supreme Court reports (e.g. CCH Tax Reports, Labor Reports, U.S.P.Q., reported decisions of other states or other specialized reporting services) may be cited if the decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed.

**Rule 5.04.** *Citation of unpublished decisions.*

Unpublished decisions may be cited only if the unpublished decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed. The unpublished decision of a United States District Court may be considered by this court. The unpublished decision of a United States Circuit Court of Appeals will be given due consideration and weight but will not bind this court. Such unpublished decisions should be cited as follows: *United States v. John Doe*, 5:94-50-CR (or CV) (E.D.N.C. January 7, 1994) and *United States v. Norman*, No. 74-2398 (4th Cir. June 27, 1975).

**Rule 5.05.** *Length of memoranda.*

Except as otherwise provided by Local Rule 23.06, memoranda in support of or in opposition to a motion (other than a motion regarding discovery) shall not exceed thirty (30) pages in length without prior court approval. Memoranda in support of or in opposition to a discovery motion shall not exceed ten (10) pages in length without prior court approval. Reply memoranda (where allowed) shall not exceed ten (10) pages in length without prior court approval. These limitations apply to memoranda submitted in connection with an appeal in a bankruptcy proceeding.

**CASE NOTES**

**Applied** in United States v. One 1985 Mercedes Benz Auto., 716 F. Supp. 211 (E.D.N.C. 1989).

## Rule 6.00. Jurors.

**Rule 6.01.** *Jury lists.*

When the jury for a session of the court is drawn, the clerk shall furnish a copy of the list to members of the bar of this court upon their request therefor. The list shall set out the name, address, occupation and employer of each juror and, where available, the name, address, occupation and employer of the spouse of each juror. The jurors and their families shall not be contacted, either directly or indirectly, in an effort to secure information concerning the background of any member of the jury panel. When the jurors are seated in the jury box, a chart or list shall be furnished by the clerk to the parties or their counsel, showing the name and seating assignment of each juror.

**Rule 6.02.** *Examination of jurors.*

The court shall conduct the examination of prospective jurors. Counsel shall file prior to trial a list of any *voir dire* questions counsel desires the court to ask

the jury other than routine questions such as (1) the occupations and addresses of jurors and their spouses, (2) the identity and relation of jurors, the parties, counsel and witnesses and (3) the knowledge of the jurors concerning the case.

**Rule 6.03.** *Contact with trial jurors.*

Following the discharge of a jury from further consideration of a case, no attorney or party litigant shall individually or through an investigator or any person acting for such attorney or party litigant ask questions of or make comments to a member of that jury or the members of the family of such a juror that are calculated merely to harass or embarrass such a juror or member of such juror's family or to influence the actions of such a juror or a member of such juror's family in future jury service.

**Legal Periodicals.** — For article, "Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?," see 66 N.C.L. Rev. 509 (1988).

## Rule 7.00. Release of information to news media.

**Rule 7.01.** *Court personnel.*

All court personnel, including but not limited to, the marshal and deputy marshals and office personnel, the clerk and deputy clerks and office personnel, probation officers and office personnel, bailiffs, court reporters, and the judges' and magistrate judges' office personnel, are prohibited from disclosing to any person, where it can reasonably be expected to be disseminated by means of public communication, without authorization of the court, information relating to any pending matter, civil or criminal, that has not been filed as a part of the public records of the court. This proscription applies to the divulgence of any information concerning arguments and hearings held in chambers or otherwise outside the presence of the jury or the public.

**Rule 7.02.** *Copies of public records.*

The members of the news media and others may obtain copies of all public records from the clerk upon payment of copying fees.

**Rule 7.03.** *Criminal matters.*

In addition to the provisions of this Local Rule 7.00, the provisions of Local Rule 45.00 shall apply to all criminal matters.

## Rule 8.00. Photographing and reproducing court proceedings.

The taking of photographs in the courtroom, court offices or in the corridors immediately adjacent thereto, during judicial proceedings or during any recess of the court, and the transmitting or sound-recording of such proceedings for broadcasting by radio or television shall not be permitted. Proceedings designated and conducted as ceremonies, such as naturalization proceedings, the administration of oaths of office to officers of the court, presentation of portraits and other ceremonial occasions, may be photographed in or broadcast from the courtroom, with the permission and under the supervision of the court.

## Rule 9.00. Powers and duties of the clerk.

**Rule 9.01.** *Approval of security.*

The clerk or deputy clerk is authorized to approve all recognizances, stipulations, bonds, guaranties, or undertakings, in the penal sum prescribed by statute or order of the court, whether the security be property, or personal or corporate surety.

**Rule 9.02.** *Seizure of person or property.*

All acts and duties pertaining to the seizure of person or property as provided by the law of the State of North Carolina authorized to be done by a judge or the clerk of the state court may be done in like cases by a judge of this court or the clerk of this court, respectively.

**Rule 9.03.** *Orders and judgments.*

The clerk or deputy clerk is authorized to enter the orders and judgments listed below without further direction of the court. However, such action may be suspended, altered or rescinded by the court for cause shown.

(a) Consent orders for substitution of attorneys.

(b) Orders enlarging time periods in civil actions authorized to be entered by the court by Rule 6(b), F.R.Civ.P.

(c) Orders extending for a reasonable amount of time the period within which an act must be performed under the local rules of this court.

(d) Consent order dismissing an action, except in bankruptcy proceedings and in cases to which Rule 23(c) F.R.Civ.P. and Rule 66, F.R.Civ.P. apply.

(e) Orders cancelling liability on bonds.

(f) Orders changing the time of opening and adjourning court in the absence of the judge.

(g) Judgments by default as provided for in Rule 55(a) and 55(b)(1), F.R.Civ.P.

(h) Orders authorizing service of process by a person other than a United States Marshal pursuant to Rule 4(c), F.R.Civ.P.

(i) Certification of law students and supervising attorneys pursuant to Local Rule 13.00.

(j) Any other motion, rule or order which may be granted of course or without notice.

(k) Pursuant to the provisions of 28 U.S.C. § 956, the clerk or a deputy clerk, when there is need to serve a complaint and attachment upon a vessel, or any other process incident to admiralty and maritime claims, either *in rem* or *in personam*, are empowered to grant and enter an order authorizing any sheriff or any deputy sheriff, or other suitable person, to serve all such process.

**CASE NOTES**

**Stated** in Boon Partners v. Advanced Fin. Concepts, Inc., 917 F. Supp. 392 (E.D.N.C. 1996).

**Rule 9.04.** *Handling of exhibits.*

The clerk shall be the custodian of all exhibits admitted into evidence. Upon ten days notice by mail to counsel for all parties, the clerk may, within 30 days after the entry of final judgment, destroy or otherwise dispose of the exhibits.

**Rule 9.05.** *Deposit of registry funds in interest-bearing accounts.*

Whenever an order of court directs the clerk to place registry funds into interest-bearing accounts, counsel shall confer with the clerk, within five days after receipt of the order, concerning the manner and place of investment. If counsel and the clerk do not agree, the clerk shall seek further direction from the court. No officer or employee of this court shall incur any liability for failure to invest or for improper investment unless counsel have complied with their obligations under this local rule.

**Rule 9.06.** *Court libraries.*

The clerk shall maintain the court libraries in the district. Use of the facilities is limited to judicial officers, court staff and members of the bar of this court. Books shall not be removed from the library without the consent of the person responsible for the maintenance of the particular library, and shall not be removed from the courthouse under any circumstances. A violation of this rule shall be punishable as for contempt of court.

**Rule 9.07.** *Jurisdictional agreements with other courts.*

The clerk shall maintain all jurisdictional agreements entered into by the Chief District Judge of this court and the Chief District Judge of any other United States District Court and a copy of such agreements shall be furnished to counsel upon request.

**Rule 9.08.** *Handling of sealed documents.*

A party desiring to file material under seal must first file a motion seeking leave to file the information under seal. At the time the motion to file the material under seal is filed, the proposed sealed material shall be stamped received and placed in a locked file cabinet. If the motion to file material under seal is allowed, the sealed material shall be filed *nunc pro tunc* as of the date it was originally received. If the motion to file the material under seal is denied, the movant will be given an option of retrieving the material or having it filed publicly *nunc pro tunc* as of the date it was originally received. When the material is filed under seal, the docket will indicate generically the type of document filed under seal but it will not contain a description that would disclose its identity. Within 30 days after the case is closed, counsel must retrieve the sealed documents. Failure to retrieve the sealed documents will result in the documents being unsealed and available for public inspection.

**Rule 10.00. Sureties.**

**Rule 10.01.** *Security.*

Except as otherwise provided by law, every recognizance, stipulation, bond, guaranty, or undertaking shall be with security that consists of either (1) cash or negotiable government bonds, or (2) one or more sureties, as provided by law or the applicable Federal Rules of Procedure. A judge may enter pertinent orders restricting any bonding company or surety company from being accepted as surety upon any bond in any case or matter in this district.

**Rule 10.02.** *Use of real property as security.*

Whenever a surety seeks to justify assets by demonstrating ownership of real property, a judge or magistrate judge shall determine by satisfactory evidence that the property is of sufficient unencumbered value to protect the interests of the adverse party.

**Rule 10.03.** *Prohibited sureties.*

Members of the bar, administrative officers and employees of this court, and the marshal and deputies and assistants thereto shall not act as surety in any matter, criminal or civil, pending in this court.

**Rule 11.00. Civil rights actions by prisoners under 42 U.S.C. § 1983.**

All complaints on behalf of state prisoners seeking relief under 42 U.S.C. § 1983 and federal prisoners challenging conditions of confinement shall be filed with the clerk in compliance with the instructions of the clerk and on the appropriate form available without charge. An original and one copy of the complaint for the court and one copy of the complaint for each defendant named in the action shall be filed.

CASE NOTES

**Cited** in Owens-El v. United States Att'y Gen., 759 F.2d 349 (4th Cir. 1985).

**Rule 12.00. Habeas corpus actions (28 U.S.C. § 2254) and 28 U.S.C. § 2255 motions.**

All petitions on behalf of prisoners seeking relief under 28 U.S.C. § 2254 and 2255 shall be filed with the clerk in compliance with the instructions of the clerk and on the appropriate form available without charge. Such proceedings shall be governed by the rules promulgated by the United States Supreme Court.

**Rule 13.00. Student practice rule.**

**Rule 13.01.** *Compliance with rule.*

Students may participate as counsel in civil and criminal cases in this court subject to their compliance with all of the requirements of this Local Rule 13.00.

**Rule 13.02.** *Eligibility.*

An eligible student must:
(a) be duly enrolled in a law school;
(b) have completed at least three semesters of legal studies;
(c) have knowledge of the Federal Rules of Civil and Criminal Procedure, the Federal Rules of Evidence, the Code of Professional Responsibility, and the Local Rules of this court;
(d) be supervised by a supervising attorney as defined in Local Rule 13.03;
(e) be certified by the Dean of the Law School where the student is enrolled, or the Dean's designee, as being of good character, sufficient legal ability, and adequately trained to fulfill the responsibilities of a legal intern to both the client and the court;
(f) be certified by the court to practice pursuant to this Local Rule 13.00; and,
(g) decline personal compensation for his or her legal services from a client or any other source.

**Rule 13.03.** *Supervising attorney.*

A supervisor must:

(a) either (1) have faculty or adjunct faculty status at a law school at which a portion of the supervisor's duties includes supervision of students in a clinical program; or (2) be a member of the bar of this court for at least two years, who in the determination of the court, is competent to carry out the role of supervising attorney;

(b) be admitted to practice in this court;

(c) be certified by the court as a student supervisor;

(d) be present with the student at all times in court, and at other proceedings in which testimony is taken;

(e) co-sign all pleadings or other documents filed with the court;

(f) assume full personal and professional responsibility for a student's guidance and any work undertaken and for the quality of the student's work, and to be available for consultation with represented clients;

(g) assist and counsel the student in activities mentioned in Local Rule 13.05, and review such activities with the student, all to the extent required for proper practical training of the student and the protection of the client; and

(h) supplement oral or written work of the student as necessary to insure proper representation of the client.

**Rule 13.04.** *Certification of student and supervisor.*

(a) *Student.* The court's certification of a student to practice under this Local Rule 13.00 shall be filed with the clerk and shall remain in effect for 18 months or until the student graduates from law school, whichever is earlier. Certification to appear generally or in a particular case may be withdrawn by the court at any time, in the discretion of the court, and without any showing of cause.

(b) *Supervising attorney.* Certification of the supervising attorney shall be filed with the clerk, and shall remain in effect indefinitely unless withdrawn by the court, in its discretion, and without any showing of cause.

**Rule 13.05.** *Activities.*

A certified student may under the personal supervision of his or her supervisor:

(a) represent any client including federal, state or local governmental bodies, if the client on whose behalf the certified student is appearing has consented in writing to that appearance and the supervising lawyer has given written approval of that appearance;

(b) represent a client in any criminal, civil or administrative matter; however, the court retains the authority to limit a student's participation in any individual case;

(c) in connection with matters in this court, engage in other activities on behalf of the client in all ways that a licensed attorney may, under the general supervision of the supervising lawyer; however, a student shall make no binding commitments on behalf of a client absent prior client and supervisor approval, and in any matters, including depositions, in which testimony is taken the student must be accompanied by the supervising lawyer. Documents or papers which are filed shall be read, approved, and co-signed by the supervising lawyer. The court retains the authority to establish exceptions to such activities; and,

(d) prior to oral participation by a certified student in a hearing or trial, the supervising attorney shall provide the court with a written statement of the scope of participation anticipated on the part of the certified student.

**Rule 14.00. Naturalization.**

Petitions for naturalization will be considered and acted upon, and appropriate ceremonies conducted in connection therewith, on Wednesday of the first week of any regular session of court at which naturalization hearings are set, beginning at 2:00 o'clock P.M., unless otherwise ordered by the court. The court may at other times, in its discretion, for good cause shown, and upon reasonable prior notice by the applicant to the Immigration and Naturalization Service, consider and act upon petitions for naturalization by members of the armed services, seamen on merchant vessels registered under the laws of the United States, and members of the immediate families and dependents of such personnel, and in other exceptional cases.

**Rule 15.00. Sanctions.**

If an attorney or any party fails to comply in good faith with any local rule of this court, the court in its discretion may impose sanctions.

**Rule 16.00. Taxation of juror costs.**

**Rule 16.01.** *Settlement before trial.*

Whenever a civil action scheduled for jury trial is settled or otherwise disposed of in advance of the actual trial, then, except for good cause shown, juror costs for one day shall be assessed equally against the parties and their counsel or otherwise assessed or relieved as directed by the court. Juror costs include attendance fees, per diem, mileage, and parking. No juror costs will be assessed if notice of settlement or other disposition of the case is given to the court one full business day prior to the scheduled trial date. In asbestos-related litigation, notice must be given to the court five full business days prior to the scheduled trial date.

**Rule 16.02.** *Settlement before verdict.*

Except upon a showing of good cause, the court shall assess the juror costs equally against the parties and their counsel whenever a civil action proceeding as a jury trial is settled at trial in advance of the verdict. The judge may, in his discretion, direct that the juror costs be relieved or that they be assessed other than equally among the parties and their counsel.

**Rules 17.00 to 19.00. Reserved for future purposes.**

## II. CIVIL RULES

**Rule 20.00. Minors and incompetents as parties.**

**Rule 20.01.** *Representation.*

Representation of minor and incompetent parties in a civil action shall be in accordance with Rule 17(c), F.R.Civ.P. Appointments of guardians *ad litem* by any state court shall satisfy the requirements of the Federal Rules of Civil Procedure unless the court finds that the interests of the parties so represented are not being adequately protected.

**Rule 20.02.** *Settlement or dismissal of actions.*

No civil action to which a minor or incompetent person is a party shall be compromised, settled, discontinued, or dismissed without an Order of Approval

entered by the court. It shall be the responsibility of counsel for the minor or incompetent parties to prepare a proposed Order of Approval for submission to the court. The Order of Approval shall bear the written consent of (1) counsel for all the parties to the action, (2) the legal representative of minor or incompetent parties, and (3), in the case of minors, at least one of the natural parents or persons standing *in loco parentis*. Unless otherwise ordered by the court, the Order of Approval shall contain statements as to the following:

(a) that all parties are properly represented and are properly before the court; that no questions exist as to misjoinder or nonjoinder of parties; and that the court has jurisdiction over the subject matter and the parties;

(b) if the minor or incompetent parties are plaintiffs, a summary of contentions sufficient to show that the complaint states a claim upon which relief can be granted; if the minor or incompetent parties are defendants, a statement of contentions sufficient to show that no affirmative defenses could clearly be raised in bar of recovery;

(c) a summary of services rendered by counsel for the minor or incompetent parties, along with an opinion as to the fairness and reasonableness of the settlement, if any; and

(d) in cases involving claims for personal injuries asserted by minor or incompetent parties, an estimate of actual and foreseeable medical, hospital and related expenses and a statement by an examining physician setting forth the nature and extent of the plaintiff's injuries, extent of recovery and prognosis.

**Rule 20.03.** *Approval of counsel fees and payment of judgments.*

In its Order of Approval, the court shall approve or fix the amount of the fee to be paid to counsel for the minor or incompetent parties and make appropriate provision for the payment thereof. The Order of Approval shall also provide the manner in which judgments, if any, are to be paid and may make specific provisions for the payment of medical, hospital and similar expenses when allowed by applicable law.

**Rule 21.00. Consent of parties to civil trial jurisdiction of magistrate judges.**

(a) Unless the judge to whom a civil action is assigned directs otherwise, the clerk shall routinely assign to a magistrate judge cases in which all parties consent to the exercise of civil trial jurisdiction pursuant to 28 U.S.C. § 636(c).

(b) Appeals from a judgment of a magistrate judge pursuant to 28 U.S.C. § 636(c)(4) shall lie to the judge to whom the case was originally assigned.

**Rule 22.00. Subsequent litigation by parties proceeding in forma pauperis.**

A plaintiff who has proceeded unsuccessfully *in forma pauperis* and had the costs of that litigation taxed against him must demonstrate that he has paid or made a reasonable effort to pay those costs prior to being authorized to proceed again *in forma pauperis.*

**Rule 23.00. Civil discovery.**

**Rule 23.01.** *Conducting discovery.*

In all civil actions, the parties shall schedule and conduct discovery in accordance with the order entered pursuant to Rule 16, F.R.Civ.P. All discovery motions and requests shall be propounded so as to allow the respondent

sufficient time to answer prior to the time when discovery is scheduled to be completed. To shorten discovery time, it is expected that discovery procedures will proceed concurrently. After the time for completing discovery has expired, further discovery may proceed only by order of the court and may, in no event, interfere with the conduct of either the final pre-trial conference or the trial.

**Rule 23.02.** *Numbering discovery procedures.*

Each time a particular discovery procedure is used, it shall be sequentially numbered (e.g., "First Set," "Second Set," "First Request," "Second Request," etc.) so that it will be distinguishable from a prior procedure.

**Rule 23.03.** *Form of interrogatories, responses and objections.*

All interrogatories shall be served on opposing counsel. Three copies shall be served on counsel for the respondent. There shall be sufficient space following each question in which the respondent shall state the response. If the space provided is not sufficient, additional pages shall be attached. An objection to an interrogatory shall be made by stating the objection and the reason therefore in the space provided for the response. Before serving the interrogatories containing the responses and objections, if any, the responding party shall attach thereto a cover sheet containing a statement (1) that each response separately and fully answers each interrogatory, except those to which objections are made, and (2) the capacity, if any, in which such respondent is acting, which statement shall be signed and verified by the respondent. Where there are objections, there shall be attached to the interrogatories a second sheet, signed by counsel making such objection, stating the number of each such interrogatory and incorporating by reference the reason stated for each objection.

**Rule 23.04.** *Depositions for use at trial.*

Depositions *de bene esse* shall not be regarded as being within the rules applicable to discovery.

**Rule 23.05.** *Deposition exhibits.*

The parties are encouraged to mark all deposition exhibits consecutively during discovery without reference to the deposition taken or the party using the exhibit.

**Rule 23.06.** *Discovery disputes — Expedited briefing schedule.*

Any motion relating to a discovery conflict shall be handled on an expedited basis:

(a) Memoranda in support or in opposition to a discovery motion shall not exceed ten (10) pages in length.

(b) Responses and accompanying documents relating to discovery motions shall be filed within ten (10) days after service of the motion in question unless otherwise ordered by the court.

(c) Replies are not permitted in discovery disputes.

(d) In any instance in which oral argument is scheduled, counsel shall be given the option of oral presentations by telephone in lieu of a live appearance.

**Rule 23.07.** *Exception from Rule 26(a)(1), F.R.CIV.P.* Rescinded effective December 1, 2000.

## Rule 24.00. Final civil pre-trial conference.

**Rule 24.01.** *Scheduling and notice.*

A final pre-trial conference shall be scheduled in every civil action after the time for discovery has expired. The Clerk shall give at least 25 days notice of such conference.

In the Court's discretion and upon request of any party or on the Court's own initiative, a preliminary or "working" pre-trial conference may be scheduled.

**Rule 24.02.** *Preparation by counsel for final pre-trial conference.*

At least ten days prior to the final pre-trial conference, trial counsel for each of the parties shall confer and prepare a proposed final pre-trial order. It shall be the duty of counsel for the plaintiff to arrange for this conference. In the absence of an agreement to the contrary, the conference of attorneys shall be held in the office of the attorney nearest the headquarters of the division to which the action has been assigned. Each counsel shall bring to the conference copies of exhibits to be introduced into evidence, lists of witnesses to be called, and designations of discovery material to be used at trial. (Amended effective December 1, 2000.)

**Rule 24.03.** *Form of pre-trial order.*

The pre-trial order shall be prepared in one sequential document without reference to attached exhibits or schedules and shall contain the following in five separate sections, numbered by roman numerals, as indicated:

(a) *I. Stipulations.* Stipulations covering jurisdiction, joinder, capacity of the parties, all relevant and material facts, legal issues and factual issues.

(b) *II. Contentions.* Contentions covering matters on which the parties have been unable to stipulate, including jurisdiction, misjoinder, capacity of the parties, relevant and material facts, legal issues and factual issues. Claims and defenses as to which no contentions are listed in the pre-trial order are deemed abandoned.

(c) *III. Exhibits.* A list of exhibits that each party may offer at trial, including any map or diagram, numbered sequentially, which numbers shall remain the same throughout all further proceedings. Copies of all exhibits shall be provided to opposing counsel not later than the attorney conference provided for in Rule 24.02. The court may excuse the copying of large maps or other exhibits. Except as otherwise indicated in the pre-trial order, it will be deemed that all parties stipulate that all exhibits are authentic and may be admitted into evidence without further identification or proof. Grounds for objection as to authenticity or admissibility must be set forth in the pre-trial order. When practicable, trial exhibits should carry the same number as in the depositions and references to exhibits in depositions should be changed to refer to the trial exhibit number.

(d) *IV. Designation of pleadings and discovery materials.* The designation of all portions of pleadings and discovery materials, including depositions, interrogatories and requests for admission that each party may offer at trial by reference to document volume, page number, and line. Objection by opposing counsel shall be noted by document volume, page number and line, and reasons for such objections shall be stated. It is not necessary to designate a deposition, or any portion of a deposition, that is to be used solely for cross-examination.

(e) *V. Witnesses.* A list of the names and addresses of all witnesses each party may offer at trial, together with a brief statement of what counsel proposes to establish by their testimony.

**Rule 24.04.** *Conduct of the final pre-trial conference.*

(a) Purpose. To resolve any disputes concerning the contents of the pre-trial order.

(b) Counsel shall be fully prepared to present to the court all information and documentation necessary for completion of the pre-trial order. Failure to do so shall result in the sanctions provided by this rule.

(c) Sanctions. Failure to comply with the provisions of Rule 24.04(b) may result in the imposition of a monetary fine not to exceed $250.00 against the offending counsel and may result in any other sanction allowable by the Federal Rules of Civil Procedure against the parties or their counsel.

(d) Counsel for all parties shall be responsible for preparing the final pre-trial order and presenting it to the Court properly signed by all counsel at a time designated by the Court. Upon approval by the Court, the original shall be filed with the Clerk. Failure to provide a unified pre-trial order may result in sanctions being imposed against all parties to the action. (Amended effective December 1, 2000.)

**Rule 24.05.** *Sample pre-trial order.*

A pre-trial order in the following form shall be sufficient to comply with these rules:

| | | |
|---|---|---|
| JOHN DOE, by his guardian ad litem, JANE DOE<br>Plaintiff | ) | No. 5:94-CV-125-F |
| v. | ) | PRE-TRIAL ORDER |
| XYZ CORPORATION<br>Defendant | ) | |

Date of Conference: August 12, 1990

Appearances: John Y. Lawyer, Raleigh, North Carolina for plaintiff; Sam X. Attorney, Fayetteville, North Carolina for defendant.

I. STIPULATIONS.

A. all parties are properly before the court;
B. the court has jurisdiction of the parties and of the subject matter;
C. all parties have been correctly designated;
D. there is no question as to misjoinder or nonjoinder of parties;
E. plaintiff, a minor, appears through his guardian;
F. Facts:
1. Plaintiff is a citizen of Wake County, North Carolina.
2. Defendant is a New York corporation, licensed to do business and doing business in the State of North Carolina.
G. Legal Issues:
May a nine-year old minor be guilty of contributory negligence?
H. Factual Issues:
1. Was plaintiff injured and damaged by the negligence of the defendant?
2. What amount, if any, is plaintiff entitled to receive of defendant as compensatory damages?

II. CONTENTIONS.

A. Plaintiff
1. Facts:
(a) That Richard Roe was driving defendant's truck as defendant's agent.

(b) That Richard Roe was negligent in that he drove at an excessive speed and while under the influence of intoxicating liquor.

2. Factual Issues:

What amount, if any, is plaintiff entitled to recover of defendant as punitive damages?

B. Defendant

1. Facts:

That Richard Roe, a former employee, took defendant's truck without authorization and, at the time of the accident, was not the agent or employee of defendant.

2. Factual Issues:

Did plaintiff, by his own negligence, contribute to his injury and damage?

III. EXHIBITS.

A. Plaintiff

| Number | Title | Objection |
|---|---|---|
| 1 | Patrol Report | Hearsay |
| 2 | Photo of Plaintiff | |

B. Defendant

| Number | Title | Objection |
|---|---|---|
| 1 | Photo of Scene | |
| 2 | Scale Model | |

IV. DESIGNATION OF PLEADINGS AND DISCOVERY MATERIALS

A. Plaintiff

| Document | Portion | Objection | Reason |
|---|---|---|---|
| Plaintiff's first set of interrogatories | Nos. 1, 8 and 9 | No. 8 | Privilege |
| Deposition of Richard Roe | Vol. 1, line 6, p. 1 thru line 5, p. 6 | Line 6, p. 1 thru line 2, p. 7 | Hearsay |

B. Defendant

None

V. WITNESSES

A. Plaintiff

| Name | Address | Proposed testimony |
|---|---|---|
| John Jones | 615 Rains Street Raleigh, N.C. | Facts surrounding accident, extent of |
| Frank Flake | Selma, N.C. | Speed of defendant's vehicle, intoxication of driver |
| Joe Rock | Temple, AR. | |

B. Defendant

All witnesses listed by plaintiff.

| Name | Address | Proposed testimony |
|---|---|---|
| Sam Smith | 4 Appian Way Rome, Italy | Facts surrounding the theft by driver of the vehicle |

TRIAL TIME ESTIMATE: _____ days

_____
JOHN Y. LAWYER
Counsel for Plaintiff

_____
SAM X. ATTORNEY
Counsel for Defendant

APPROVED BY:

_____
WALLACE W. DIXON
U.S. MAGISTRATE JUDGE

_____, 1994

**Rule 25.00. Attorney preparations for civil trial.**

Five business days preceding the first day of the session at which a civil action is set for trial, counsel for all parties shall file with the clerk:

**Rule 25.01.** *In all cases.*

(a) A concise memorandum of authorities on all anticipated evidentiary questions and on all contested issues of law;
(b) Motions relating to the admissibility of evidence; however, no party shall be required to file a written response to a motion in limine which is filed after the pre-trial conference has taken place.

**Rule 25.02.** *In jury cases.*

(a) A list of all *voir dire* questions as required by Local Rule 6.02;
(b) Requests for Jury Instructions. Those requests to Devitt & Blackmar (3d Ed.), 5th Circuit Pattern Instructions, and North Carolina Pattern Instructions shall be by reference. All other requests shall contain citations to supporting authorities.

**Rule 25.03.** *In non-jury cases.*

Proposed findings of fact and conclusions of law.

**Rule 25.04.** *Late developments in the case.*

Counsel shall immediately inform the court, opposing counsel and counsel in the next succeeding two cases on the calendar of any settlement or of any developments of an emergency which may necessitate a motion for continuance.

CASE NOTES

**Responsibility of Conferring.** — The responsibility for arranging the attorney conference to prepare for final pre-trial rests with the plaintiff. However, it is encumbent upon counsel to confer and prepare for the conference. An attorney opposed only by a pro se litigant is not permitted to sit back blithely and not discharge the responsibility to confer simply because there is not an attorney on the other side. Harrell v. United States, 117 F.R.D. 86 (E.D.N.C. 1987).

**Exchange of Witness Lists.** — One of the most immediate tasks for responsible counsel in preparing for any case is to seek to interview those witnesses involved in the transactions which form the basis for the litigation. The courts clearly recognize the importance of this task by demanding, at a minimum, that coun-

sel exchange witness lists well in advance of trial. United States v. Stroop, 121 F.R.D. 269 (E.D.N.C. 1988).

**Abandonment of Cause of Action.** — Separate cause of action for "emotional distress" in complaint seeking damages for wrongful death was not mentioned in the pretrial order and was deemed abandoned under subdivision (b) of this rule. Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

**Cited** in Southeastern Sav. & Loan Ass'n v. Rentenbach Constructors, Inc., 114 Bankr. 441 (E.D.N.C. 1989).

## Rule 26.00. Civil trials.

### Rule 26.01. *Opening statements.*

At the beginning of the trial, each party (beginning with the party having the burden of proof on the first issue) shall, without argument and in such reasonable time as the court allows, state to the court and the jury the following:

(a) the substance of the claim, counterclaim, crossclaim or defense; and

(b) what counsel contends the evidence will show. Parties not having the burden of proof on the first issue may elect to make an opening statement immediately prior to presenting evidence, rather than at the beginning of the trial.

### Rule 26.02. *Witnesses.*

Counsel may not release a person from a subpoena without notice to opposing counsel and leave of court. A party objecting to the release of a person shall bear all costs incident to such person which arise subsequent to the request for release. The court may, in its discretion and in the interest of justice, permit a party to call and examine a witness not listed in the final pre-trial order.

### Rule 26.03. *Exhibits.*

(a) All exhibits shall be premarked with stickers obtained from the clerk's office with the sequential numbers as listed in the pre-trial order. Each exhibit introduced at trial shall contain the case number of the action on the exhibit sticker and a party designation where there are differing plaintiffs and defendants introducing exhibits.

(b) Copies of all exhibits, properly bound, shall be provided to the court at the beginning of the trial.

(c) The original exhibit shall bear a sticker. After receipt into evidence, it shall remain in the custody of the courtroom deputy, except when being used by a witness or viewed by the jury.

(d) Copies of all exhibits shall bear the photostatic image of the sticker or a typed or printed reproduction thereof.

(e) Counsel are encouraged to provide one or more copies of exhibits for use by the jury.

(f) Upon presentation of an exhibit to a witness, counsel shall announce to the court the exhibit number. The exhibit shall not be handed to opposing counsel. Should opposing counsel contend that a copy has not been provided or that the exhibit has been lost or misplaced, that shall be brought to the attention of the court.

### Rule 26.04. *Closing argument.*

The court will set the times for closing argument after consultation with parties. Unless otherwise ordered by the court, the party with the burden of

proof shall open and close the arguments. The opening argument may not be waived.

**Rule 26.05.** *Taking verdicts and polling the jury.*

The court may take the verdict of the jury in open court in the absence of any party or counsel. Unless the contrary affirmatively appears of record, it will be presumed that the parties were present or by their voluntary absence waived their presence. The jury will not be polled unless a party requests a poll at the time the verdict is taken or unless a poll is ordered by the court.

**Rule 27.00. Civil contempt.**

**Rule 27.01.** *Rights of contemnor.*

In all cases of civil contempt, the contemnor shall have due notice of the contempt charges, opportunity to reply to the charges and notice of the date and place of hearing in open court from which the public shall not be excluded.

**Rule 27.02.** *Summary contempt proceedings.*

In contempt proceedings where the court may act summarily, the contemnor shall have the right to defend against the charges and to offer evidence in the form of affidavits. The movant shall have the right to offer similar evidence.

**Rule 27.03.** *Plenary contempt proceedings.*

In contempt proceedings where the court may not act summarily, the presentation of evidence is governed by Rule 1101 of the Federal Rules of Evidence. In no case of civil contempt, however, shall the parties be entitled to trial by jury, but rather the district judge before whom the matter is tried shall find the facts and enter a judgment or order in accordance with the provisions of the Federal Rules of Civil Procedure applicable to non-jury cases.

**Rule 28.00. Application for costs.**

All applications for costs must be made within 14 days after entry of judgment. Objections to applications for costs must be filed within 10 days after service of the application for costs. Replies are discouraged.

**Rule 29.00.** *Exceptions from discovery provisions.* Rescinded effective December 1, 2000.

## III. ALTERNATIVE DISPUTE RESOLUTION

**Rule 30.00. Court-hosted settlement conferences.**

The Court, upon its own initiative or at the request of any party, may order a settlement conference at a time and place to be fixed by the Court. Upon request by all parties to an action, the Court shall order a settlement conference. A District Judge other than the Judge assigned to the case, or a Magistrate Judge, will *normally* preside at such a settlement conference. At least one attorney for each of the parties who is fully familiar with the case shall attend the settlement conference for each party. Each individual party or a representative of a corporate or governmental agency party with full settlement authority also shall attend the settlement conference. Other interested parties, such as insurers, shall attend through fully authorized

representatives and are subject to the provisions of this Rule. The settlement conference Judge or Magistrate Judge may, however, upon prior written application, allow a party or representative having full settlement authority to be telephonically available. The parties, representatives and attorneys are required to be completely candid with the settlement conference Judge or Magistrate Judge so that he or she may properly guide settlement discussions. The Judge or Magistrate Judge presiding over the settlement conference may make such other and additional requirements of the parties and conduct the proceedings as shall seem proper to the Judge or Magistrate Judge in order to expedite an amicable resolution of the case. The settlement Judge or Magistrate Judge will not discuss the substance of the conference with anyone, including the Judge to whom the case is assigned, and may excuse the parties or the attorneys from the conference any time. During the settlement conference, the settlement Judge or Magistrate Judge also may confer *ex parte* with any parties, representatives or attorneys, to meet jointly or individually with the parties and/or representatives without the presence of counsel, and to elect to have the parties and/or representatives meet alone without the presence of the settlement Judge or Magistrate Judge or counsel with the specific understanding that any conversation relative to settlement will not constitute an admission and will not be used in any form in the litigation or in the event of trial.

**Rule 31.00. Summary trials.**

**Rule 31.01.** *Eligible cases.*

The assigned Judge may, after consultation with counsel, refer for summary jury trial any civil case in which jury trial has been properly demanded. Either or both parties may move the Court to order summary jury trial; however, the Court will not require a party to participate against its will.

**Rule 31.02.** *Selection of cases.*

Cases selected for summary jury trial should be those in which counsel feel that a non-binding verdict by the jury could be helpful in a subsequent settlement negotiation. Since an investment of time by counsel and by the Court is necessary for the procedure, it should be used only in those cases that would take more than seven (7) trial days to try.

**Rule 31.03.** *Procedural considerations.*

Summary jury trial is a flexible ADR process. The procedures to be followed should be determined by the assigned Judge in advance of the scheduled summary jury trial date, in light of the circumstances of the case and after consultation with counsel. The following matters should be considered by the assigned Judge and counsel in structuring a summary jury trial.

a. *Presiding judge.* Either a District Judge or a Magistrate Judge may preside over a summary jury trial. During the process, the summary jury trial judge will ordinarily participate in on-going settlement negotiations and may have ex-parte conferences with each side. For this reason, normally a judge other than the trial judge will be selected to preside over the summary jury trial.

b. *Submission of written materials.* Counsel must submit proposed jury voir dire questions, jury instructions and briefs on any novel issues of law within three (3) working days before the date set for summary jury trial. In addition, counsel may also choose to submit other items, such as a statement of the case, stipulations, and exhibit lists.

c. *Attendance.* Summary jury trials are effective in promoting settlement because, among other reasons, they give parties their "day in court" (meeting a need to voice their position in a public forum), and because they allow parties to see the merits of their opponent's position. It is therefore critical that the parties and all other persons or entities involved in the settlement decision attend the summary jury trial. This includes all individual parties and representatives of corporations and other parties and insurers vested with full settlement authority. Since absence of any decision maker makes the process less likely to proceed, this attendance requirement can be waived only by order of the Court.

d. *Size of jury panel.* The jury shall consist of 6 to 12 members.

e. *Voir dire.* Each counsel may exercise a maximum of 2 peremptory challenges. There will be no alternate jurors. Counsel will be assisted in the exercise of challenges by a brief voir dire examination to be conducted by the Court.

f. *Transcript or recording.* Upon consent of the parties, counsel may arrange for the proceedings to be recorded by a court reporter at his or her own expense. However, no transcript of the proceedings will be admitted in evidence at any subsequent trial unless the evidence would be otherwise admissible under the Federal Rules of Evidence.

g. *Conference between counsel.* Prior to trial, counsel are to confer with regard to the use of physical exhibits, including documents and reports, and reach such agreement as is possible. Prior to the day of the summary jury trial, the court will hear all matters in dispute and make appropriate rulings.

h. *Timing.* The summary jury trial should take no more than 1 and 1/2 days from jury selection to jury deliberation. In consultation with counsel before the summary jury trial, the Court shall establish a scheme of time allotment for presentations by counsel.

i. *Case presentations.* The attorney presentations shall be organized in the manner of a typical trial, except that no witness testimony will be allowed, absent the court's permission. First, the plaintiff shall present an opening statement, followed immediately by defendant's opening statement. Next, plaintiff and defendant shall present their cases-in-chief by informing the jury in more detail than the opening statement who the witnesses are and what their testimony would be. Finally, the plaintiff and then defendant will make closing arguments to the jury. Plaintiff may present a final rebuttal if his or her presentation time limit has not expired. The parties are free to divide their allotted time among the three trial segments as they see fit.

j. *Manner of presentation.* All evidence shall be presented through the attorneys for the parties. The attorneys may summarize and comment on the evidence and may summarize or quote directly from depositions, interrogatories, requests for admissions, documentary evidence and sworn statements of potential witnesses; however, no witness' testimony may be referred to unless the reference is based upon one of the products of the various discovery procedures, or upon a written, sworn statement of the witness, or upon sworn affidavits of counsel that the witness would be called at trial and will not sign an affidavit, and that counsel has been told the substance of the witness' proposed testimony by the witness. Demonstrative evidence, such as videotapes, charts, diagrams, and models may be used unless the Court finds, on objection, that this evidence is neither admissible nor accurately reflects evidence which is admissible.

k. *Objections.* Formal objections are discouraged. Nevertheless, in the event counsel makes a representation not supported by admissible evidence, an objection will be entertained. If such an objection is sustained, the jury will be instructed appropriately.

l. *Jury instructions.* Jury instructions will be given in an abbreviated form, adapted to reflect the nature of the proceeding. The jury will be instructed to

return a unanimous verdict, if possible. Barring unanimity, the jury may be instructed to submit a statement of each juror's findings.

m. *Jury deliberations.* Jury deliberations should be limited in time.

n. *Settlement negotiations.* While the summary jury is deliberating, the presiding Judge should direct the parties to meet and explore settlement possibilities. The Judge may participate in this process.

o. *Continuances.* The proceedings may not be continued or delayed other than for short recesses at the discretion of the Court.

p. *Final determination.* Although ordinarily non-binding in nature, counsel may stipulate among themselves that a consensus verdict by the summary jury will be a final determination on the merits of the case and judgment may be entered thereon by the Court. In addition, counsel may stipulate to any other use of the verdict that will aid in resolution of the case. For example, the parties should consider a bracketed settlement with specific minimum and maximum settlement amounts and being bound by the summary jury's verdict within the brackets.

q. *Trial.* If the case does not settle as the result of the summary jury trial, it should proceed to trial on the scheduled date.

r. *Limitation on admission of evidence.* The assigned Judge shall not admit at a subsequent trial any evidence that there has been a summary jury trial, the nature or amount of any verdict, or any other matter concerning the conduct of the summary jury trial or negotiations related to it, unless:

(1) The evidence would otherwise be admissible under the Federal Rules of Evidence; or

(2) The parties have otherwise stipulated.

s. *Purpose.* These rules shall be construed to secure the just, speedy, effective, and inexpensive conclusion of the summary trial procedure. Bearing in mind that the summary jury trial should be flexible to meet the needs of any case in which it is used, the Judge presiding over the procedure may modify or disregard any of these rules and fashion instead an alternative deemed more likely to produce settlement.

**Rule 31.04.** *Non-jury summary trials.*

The Assigned Judge may, after consultation with counsel, refer any civil case for summary non-jury trial. Either or both parties may move the court to order summary non-jury trial; however, the Court will not require a party to participate against its will. The procedure for a summary non-jury trial shall be directed by the Court on a case-by-case basis.

## Rule 32.00. Mediated settlement conferences.

**Rule 32.01.** *Definition.*

Mediation is a supervised settlement conference presided on by a qualified, certified and neutral mediator to facilitate and promote conciliation, compromise and the ultimate resolution of a civil action.

**Rule 32.02.** *Referral.*

The Court may at the request of the parties, order any action, or portion thereof, to be referred for a mediated settlement conference.

**Rule 32.03.** *Motion to dispense with mediation.*

A party may move, within 10 days after the Court's order referring an action, or portion thereof, to mediation, to dispense with or defer the conference. The Court shall grant the motion only for good cause shown.

**Rule 32.04.** *Referral order.*

The Court's order referring a civil action for a mediated settlement conference shall:
(1) require the mediated settlement conference be held in the case,
(2) establish a deadline for the completion of the conference,
(3) appoint a mediator, and
(4) state the rate of compensation of the appointed mediator.
Provided, however, in lieu of appointing a mediator in the referral order, the Court may direct the parties to notify the Court, within fourteen days of the entry of the Order referring the action for a mediated settlement conference, of the nomination of a mediator agreeable to all parties, together with the rate of the mediator's compensation. Upon notification of a mutually agreeable mediator, the Court will appoint the mediator nominated by the parties at the agreed date, unless the Court finds the mediator nominated is not qualified by training or experience to mediate all or some of the issues in the action. In the event of the failure of the parties to nominate a mediator within fourteen days, the Court shall appoint the mediator and state the rate of compensation of the appointed mediator.

**Rule 32.05.** *Mediators.*

The Court may appoint as mediator any person certified as provided in Local Rule 32.06.

**Rule 32.06.** *Certified mediators.*

(a) *Certification of mediators.* The chief judge shall certify those persons who are eligible and qualified to serve as mediators under this rule, in such numbers as the chief judge shall deem appropriate. Thereafter, the chief judge shall have complete discretion and authority to withdraw the certification of any certified mediator at any time.
(b) *List of certified mediators.* Lists of certified mediators shall be maintained in each division of the Court and shall be made available to counsel and the public upon request.
(c) *Qualifications of certified mediators.* An individual may be certified to serve as a mediator if:
(1) He or she is a former state judge who presided in a court of general jurisdiction and was also a member of the bar in the state in which he presided; or
(2) He or she is a retired federal judicial officer; or
(3) He or she has been certified as a mediator by the Administrative Office of the Courts pursuant to the Rules Implementing Court Ordered Mediated Settlement Conferences adopted by the Supreme Court of North Carolina pursuant to N.C.G.S. § 7A-38(d); or
(4) He or she has been a member of the North Carolina Bar for at least 10 years and is currently admitted to the Bar of this Court.
(d) *Oath required.* Every mediator shall take the oath or affirmation prescribed by 28 U.S.C. § 453 upon qualifying as a mediator.
(e) *Disqualification of a mediator.* Any person selected as a mediator may be disqualified for bias or prejudice as provided in 28 U.S.C. § 144, and shall be disqualified in any case in which such action would be required by a justice, judge, or magistrate judge governed by 28 U.S.C. § 455.
(f) *Compensation of mediators.* Mediators shall be compensated at the rate provided by standing order of the Court, as amended from time to time by the chief judge. Absent agreement of the parties to the contrary, the cost of the mediator's services shall be borne equally by the parties to the mediated settlement conference.

(g) *Limitations on acceptance of compensation or other reimbursement.* Except as provided by these rules, no mediator shall charge or accept in connection with the mediation of any particular case, any fee or thing of value from any other source whatever, absent written approval of the Court given in advance of the receipt of any such payment or thing of value.

(h) *Mediators as counsel in other cases.* Any member of the bar who is certified and designated as a mediator pursuant to these rules shall not for that reason be disqualified from appearing and acting as counsel in any other case pending before the Court.

**Rule 32.07.** *The mediated conference.*

(a) *Where conference is to be held.* Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in a United States District Courthouse. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice to all attorneys and unrepresented parties of the time and location of the conference.

(b) *When conference is to be held.* Unless otherwise ordered by the Court, the mediated settlement conference shall begin no later than 60 days after the court's referral order. It shall be completed within 30 days after it has begun.

(c) *Recesses.* The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

(d) *The mediated settlement conference is not to delay other proceedings.* The mediated settlement conference shall not be cause for the delay of other proceedings in this case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

(e) *Memoranda.* Each party may, at any time after appointment of the mediator, provide the mediator with a memoranda presenting his contentions and positions. The memoranda need not be served on other parties.

(f) *Preparation.* All parties shall be prepared to discuss, in detail and in good faith, the following:

(1) all liability issues;

(2) all damage issues; and

(3) his or her position relative to settlement.

(g) *Settlement documentation.* In the event settlement is reached at the mediated settlement conference, the essential terms and conditions of the settlement should be noted and signed or initialled by all parties and/or counsel before departing the conference. More formal documentation may be prepared later on an agreed timetable if appropriate.

(h) *Proceedings privileged.* All proceedings of the mediated settlement conference, including any statement made by any party, attorney or other participant, shall, in all respects, be privileged and not reported, recorded, placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest. No party shall be bound by anything done or said at the conference unless a settlement is reached, in which event the agreement upon a settlement shall be binding upon all parties to the agreement.

**Rule 32.08.** *Attendance at mediated settlement conference.*

(a) The following persons shall physically attend a mediated settlement conference:

(1) All individual parties; or an officer, director or employee having authority to settle on behalf of a corporate party; or, in the case of a governmental

agency, a representative of that agency with full authority to settle on behalf of the agency;

(2) The party's counsel of record, if any; and

(3) For any insured party against whom a claim is made, a representative of the insurance carrier who is not such carrier's outside counsel and who has full authority to settle the claim.

(b) In the event any party desires to be represented at the settlement conference other than as provided in Local Rule 32.08(a), the party shall promptly apply to the Mediator for leave to appear otherwise. Said application shall be delivered (not filed) to the mediator not later than eleven (11) days prior to the conference and shall contain:

(4) The reasons which make it impracticable for a party or a party's representative to appear as required by Local Rule 32.08(a);

(5) a detailed description of the authority to be exercised at the conference; and

(6) alternative proposals by which full authority may be exercised at the conference.

Such application shall be made only after all other alternatives have been, in good faith, considered and rejected. The application need not be transmitted to the opposing parties. Upon consideration of the application, the mediator, in his discretion, may excuse a party or representative from attending the settlement conference, may allow a party or representative to be available by telephone during the conference, to appear with limited authority or may, notwithstanding the application, require appropriate persons to appear as may be necessary to have full settlement authority at the conference.

**Rule 32.09.** *Authority and duties of mediator.*

(a) *Authority of mediator.* The mediator shall, at all times be in control of the mediated settlement conference and the procedures to be followed subject to the orders of the Court and this Rule.

(b) *Duty of impartiality.* The mediator has a duty to be impartial, and to advise all parties of any circumstances bearing on his or her possible bias, prejudice or lack of impartiality. Any person selected as a mediator shall be disqualified for bias, prejudice or impartiality as provided for by Title 28, U.S.C. § 144 and shall disqualify themselves in any action in which they would be required under Title 28 U.S.C. § 455 to disqualify themselves if they were a judge or magistrate judge. Any party may move the Court to enter an order disqualifying a mediator for good cause. Mediators have a duty to disclose any fact bearing on their qualifications which would be grounds for disqualification. If the Court rules that a mediator is disqualified from hearing a case, an order shall be entered setting forth the name of a qualified replacement. Nothing in this provision shall preclude mediators from disqualifying themselves or refusing any assignment. The time for mediation shall be tolled during any periods in which a motion to disqualify is pending.

(c) *Duties at conference.* The mediator shall define and describe the following to the parties at the beginning of mediated settlement conference:

(1) The process of mediation.

(2) The differences between mediation settlement conference and other forms of conflict resolution.

(3) The costs of the mediated settlement conference.

(4) The fact that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement.

(5) The circumstances under which the mediator may meet alone with either of the parties or with any other person.

(6) Whether and under what conditions communications with the mediator will be held in confidence during the conference.

(7) The inadmissibility of conduct and statements as provided by Rule 408 of the Rules of Evidence.

(8) The duties and responsibilities of the mediator and the parties.

(9) The fact that any agreement reached will be reached by mutual consent of the parties.

(d) *Private consultation.* The mediator may meet and consult privately with any party or parties or their counsel during the conference.

(e) *Declaring impasse.* It is the duty of the mediator to timely determine when mediation is not viable, that an impasse exists, or that mediation should end.

(f) *Reporting results of conference.* The mediator shall report to the Court in writing within 5 days of the conclusion of the mediated settlement conference. The report shall include the parties attending the conference, and whether or not an agreement was reached by the parties. If an agreement is reached, the report shall state whether the action will conclude by consent judgment or voluntary dismissal and shall identify the person designated to file such a consent judgment or dismissal. If an agreement is not reached, the report shall state whether or not there has been compliance with the mediation requirements of this Rule and if not, in what respects compliance was not met.

**Rule 32.10.** *Sanctions.*

In the event a party fails to attend or to participate in good faith in a mediated settlement conference ordered by the Court without good cause, the Court may impose upon the party any lawful sanction, including but not limited to assessments of attorney fees, mediator fees and expenses, expenses incurred by parties attending the conference, contempt, or any other sanction authorized by Rule 37(b) of the Federal Rules of Civil Procedure.

**Rule 32.11.** *Judicial immunity.*

A mediator appointed by the Court pursuant to these rules shall have judicial immunity in the same manner and to the same extent as a judge.

**Rules 33.00 to 40.00. Reserved for future purposes.**

## IV. CRIMINAL RULES

**Rule 41.00. Waiver of appearance in misdemeanor cases Rule 43(c)(2), F.R.CRIM.P.**

A defendant in misdemeanor cases may execute a written waiver of appearance which contains the following statements:

(a) the designation of counsel to appear in behalf of the defendant and the granting to such counsel of full authority to enter on behalf of the defendant a plea of guilty, not guilty, or nolo contendere to the offense charged, or to a lesser offense or offenses in lieu thereof;

(b) a consent to trial by the magistrate judge; and, a waiver of: (1) the right to be tried and sentenced by a district judge, (2) the right to a jury trial, (3) the right to testify in person, and (4) the right to face his or her accusers;

(c) an agreement to be bound by the decisions of the court as in any other case of adjudication and the entry of judgment subject to the right of appeal as in any other case; and,

(d) the circumstances which justify the approval of the written waiver of appearance by the court. The waiver of appearance must (1) be in writing, (2)

be signed by the defendant and his or her counsel, (3) be consented to by the United States Attorney or an Assistant United States Attorney and (4) be approved by the court.

## Rule 42.00. Arraignment.

**Rule 42.01.** *Generally.*

Ordinarily, arraignments shall be conducted by magistrate judges under the provisions of Rule 19(B)(4), F.R.Crim.P. The presence of the United States Attorney at arraignment is not mandatory, and in the absence of the United States Attorney the magistrate judge shall conduct the arraignment in accordance with Rule 10, F.R.Crim.P. When a judge conducts the arraignment, the United States Attorney or an Assistant United States Attorney shall be present.

**Rule 42.02.** *Appearance bond.*

In the event a deed of trust is used to secure an appearance bond for a defendant, the grantor of the deed of trust will be responsible for all costs incurred in subsequently cancelling the deed of trust pursuant to the North Carolina General Statutes.

## Rule 43.00. Criminal pre-trial discovery and inspection.

**Rule 43.01.** *Criminal pre-trial conference.*

Within 20 days after indictment or initial appearance, whichever comes later, the United States Attorney shall arrange and conduct a pre-trial conference with counsel for the defendant.

At the pre-trial conference and upon the request of counsel for the defendant, the government shall permit counsel for the defendant:

(a) to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government;

(b) to inspect and copy or photograph any relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government;

(c) to inspect and copy or photograph any relevant recorded testimony of the defendant before a grand jury;

(d) to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places which are the property of the defendant and which are within the possession, custody or control of the government;

(e) to inspect and copy or photograph the Federal Bureau of Investigation Identification Sheet indicating defendant's prior criminal record; and

(f) to inspect, copy or photograph any exculpatory evidence.

**Rule 43.02.** *Discovery from defendant.*

Thereafter and upon the request of the government, counsel for the defendant shall:

(a) permit the United States Attorney to inspect and copy or photograph any document or other physical object intended to be introduced as an exhibit of the defendant at the trial;

(b) permit the United States Attorney to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular cases, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to the testimony of such witness; and

(c) disclose the substance of any alibi or similar defense intended to be presented by the defendant.

**Rule 43.03.** *Exchange of discovery by mail.*

The United States Attorney and counsel for the defendant, in lieu of the conference, may agree to the exchange of discovery material by mail.

**Rule 43.04.** *Further discovery or inspection.*

In the event that either party thereafter moves to compel compliance with Local Rule 43.01 or for additional discovery or inspection, such motion shall be filed within the time period set by Local Rule 44.00. The motion shall contain:

(a) the statement that the prescribed conference was held;

(b) the date of said conference;

(c) the names of all counsel participating in the conference; and

(d) the statement that agreement could not be reached concerning the discovery or inspection that is the subject of the motion and the reasons given for the same.

**Rule 43.05.** *Duty of disclosure.*

Any duty of disclosure and discovery set forth in Local Rule 43.00 is a continuing one and the United States Attorney and counsel for the defendant shall produce voluntarily any additional relevant information gained by either of them.

**CASE NOTES**

**This rule adds to the government's disclosure obligations under Rule 16, Fed. R. Crim. P.,** and requires the scheduling of a pre-trial conference at which Rule 16 materials should be given to a defendant. United States v. King, 121 F.R.D. 277 (E.D.N.C. 1988).

## Rule 44.00. Time period for filing pre-trial motions in criminal cases.

All pre-trial motions, including but not limited to motions to suppress and motions under Rules 7, 12, 14, 16, and 41, F.R.Crim.P., shall be filed no later then 30 days after indictment or initial appearance, whichever comes later. Responses shall be filed within ten days after the service of such motions. Untimely motions may be summarily disregarded.

**CASE NOTES**

**Stated** in United States v. A-A-A Elec. Co., 607 F. Supp. 266 (E.D.N.C. 1985).

## Rule 45.00. Publicity in criminal matters.

**Rule 45.01.** *Statements by one participating in or associated with an investigation.*

An attorney participating in or associated with the investigation of a

criminal matter shall not make or participate in making any extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
(a) information contained in a public record;
(b) that the investigation is in progress;
(c) the general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim;
(d) a request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto; and
(e) a warning to the public of any dangers.

**Rule 45.02.** *Statements after filing complaint, information, or indictment, issuance of warrant or arrest.*

An attorney or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication that relates to:
(a) the character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused;
(b) the possibility of a plea of guilty to the offense charged or to a lesser offense;
(c) the existence or contents of any confession, admission, or statement given by the accused or the refusal or failure of the accused to make a statement;
(d) the performance or results of any examinations or tests or the refusal or failure of the accused to submit to examination or tests;
(e) the identity, testimony, or credibility of a prospective witness; or
(f) any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

**Rule 45.03.** *Statements that can be made.*

This rule does not preclude an attorney during such period from announcing:
(a) the name, age, residence, occupation, and family status of the accused;
(b) if the accused has not been apprehended, any information necessary to aid in apprehension of the accused or to warn the public of any dangers the accused may present;
(c) a request for assistance in obtaining evidence;
(d) the identity of the victim of the crime;
(e) the fact, time, and place of arrest, resistance, pursuit, and use of weapons;
(f) the identity of investigating and arresting officers or agencies and the length of the investigation;
(g) at the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement;
(h) the nature, substance, or text of the charge;
(i) quotations from or references to public records of the court in the case;
(j) the scheduling or result of any step in the judicial proceedings; or
(k) that the accused denies the charges made against him.

**Rule 45.04.** *Statements during jury selection or trial.*

During the selection of a jury or the trial of a criminal matter, an attorney or a law firm associated with the prosecution or defense of a criminal matter shall

not make or participate in making any extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that the attorney may quote from or refer without comment to public records of the court in the case.

**Rule 45.05.** *Statements after trial, disposition without trial, or sentencing.*

After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, an attorney or a law firm associated with the prosecution or defense shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the sentence.

**Rule 45.06.** *Statements of staff and employees.*

An attorney shall exercise reasonable care to prevent employees and associates from making an extra-judicial statement that the attorney would be prohibited from making under this Local Rule 45.00 and Local Rule 7.00.

**Rule 46.00. Petition for disclosure of presentence or probation records.**

No confidential records of this court maintained by the probation office, including presentence and probation supervision records, shall be sought by any applicant except by written petition to this court establishing with particularity the need for specific information in the records. Whenever a probation officer is served with a subpoena or other judicial process seeking the production or disclosure of presentence and probation records and reports, the probation officer shall petition the Chief Judge of this court in writing for instructions with respect to responding to such process. In no event shall production or disclosure be made except pursuant to an order by a judge.

**Rule 47.00. Time of issuance of subpoenas in criminal cases.**

Subpoenas for witnesses in criminal cases shall be delivered to the Marshal or other person qualified to make service at least seven days prior to the Monday of the week in which the case is set for trial. The failure of the Marshal or other qualified person to serve a subpoena not delivered within this time period shall not constitute sufficient cause for a continuance.

**Rule 48.00. Appearance of counsel in criminal cases.**

**Rule 48.01.** *Obligation to notify the court.*

A defendant who does not apply for representation at government expense, or who is deemed ineligible after application, must inform the court of the identity of retained counsel within 10 days of his first appearance before a judicial officer in this district. Retention of counsel outside this period will not constitute grounds for a continuance of pre-trial proceedings or trial unless the defendant demonstrates due diligence in attempting to retain counsel.

**Rule 48.02.** *Notice of appearance.*

Counsel representing a defendant in a criminal action shall file a Notice of Appearance with the Clerk and serve the U. S. Attorney and other counsel with a copy.

**Rule 49.00. Attorney preparations for criminal trial.**

(a) Unless the parties have previously entered into and executed a written plea agreement, counsel for each party shall file with the Clerk and the assigned judge, on or before the Thursday preceding the first day of the session at which the criminal action is set for trial:
(1) *Voir dire* questions as required by Local Rule 6.02;
(2) requests for jury instructions.
(b) Before jury selection begins, all parties shall file with the court a list of all witnesses each party, in good faith, reasonably anticipates will be called in its evidence-in-chief.

**Rule 50.00. Procedures implementing sentencing guidelines.**

**Rule 50.01.** *Scheduling of sentencing.*

Sentencing proceedings shall be scheduled by the court at the time of adjudication of guilt not earlier than sixty (60) days following the adjudication of guilt.

**Rule 50.02.** *Time for completion of presentence report.*

No later than thirty-five (35) days prior to sentencing, the probation officer shall complete and disclose the presentence investigation report to the defendant, counsel for the defendant, and counsel for the government.

**Rule 50.03.** *Time for filing objections to presentence report.*

Within fourteen (14) days thereafter, counsel shall communicate, in writing, to the probation officer objections to any material information, sentencing classifications, guideline ranges, and policy statements contained in or omitted from the report. A copy shall be served on opposing counsel. The court may conduct a show cause hearing and/or disallow objections in any case where such objections are not timely filed.

**Rule 50.04.** *Procedure for resolving objections to presentence report.*

After receiving objections from counsel, the probation officer shall conduct such further investigation as may be necessary. Counsel shall jointly confer with the probation officer to discuss and attempt to resolve contested issues. Thereafter, the probation officer shall make such revisions to the presentence investigation report as the probation officer deems appropriate. Unresolved contested issues, including the position of counsel for the parties and the opinion of the probation officer, shall be contained in an addendum to the presentence investigation report.

**Rule 50.05.** *Time for filing revised presentence report.*

The revised presentence investigation report and addendum shall be delivered to the judge, the defendant, and counsel not later than seven (7) days prior to the sentencing hearing. The probation officer's sentencing recommendation shall be disclosed only to the judge.

**Rule 50.06.** *Expedited procedures where defendant detained.*

If it appears that a defendant may be detained pending trial and sentencing for a period of time exceeding the sentence likely to be imposed under the guidelines, the court, upon motion of counsel for defendant at the time of adjudication of guilt, may direct the probation office to expedite the sentencing timetable.

**Rule 50.07.** *Court acceptance of presentence report.*

The revised presentence investigation report may be accepted by the court as accurate except as to matters set forth in the addendum which shall be resolved as provided in Section 6A1.3 of the *United States Sentencing Commission Guidelines Manual* (November 1994).

**Rule 50.08.** *Service of presentence report.*

The presentence investigation report shall be deemed to have been disclosed when a copy is physically delivered or three (3) days after a copy is mailed. Such dates shall be certified on the report by the probation officer.

**Rule 50.09.** *Procedure at sentencing.*

Before final judgment is entered in a case, the court shall disclose to the defendant, defense counsel, and the attorney for the government, the court's tentative findings of fact and interpretation of applicable guidelines and shall afford the parties an opportunity to object to said tentative findings of fact and interpretation of the guidelines.

**Rule 50.10.** *Filing of presentence report under seal.*

The final presentence investigation report, addendum, and probation officer's recommendation shall be filed with the Clerk under seal for inclusion in the record and shall be otherwise disclosed only upon order. Defendants and counsel may retain their copies.

**Rule 50.11.** *Role of defense counsel in presentence investigation.*

Upon adjudication of guilt, the probation officer will initiate the presentence investigative process. Counsel for the defendant shall advise the probation officer attending court whether or not the defendant will submit to an interview with the officer and whether or not counsel desires to be present at the interview. Counsel, if attending, and the defendant shall make themselves available for the interview on the day of adjudication with the U. S. Marshal's Service providing, in custody cases, an appropriate location sufficient for accommodating a private interview at the court site or in the immediate vicinity thereof. If extraordinary circumstances prohibit conducting the interview on the day of adjudication, the probation officer will make arrangements to interview the defendant within three (3) working days following adjudication and afford defense counsel notice of the date, time, and location of the interview should counsel desire to attend.

**Rules 51.00 to 59.00. Reserved for future purposes.**

## V. MAGISTRATE JUDGES

**Rule 60.00. Standards of performance.**

In performing duties for the court, a magistrate judge shall conform to all applicable provisions of federal statutes and rules, to the Local Rules and

procedures of this court, and to the requirements specified in any order of reference from a judge.

## Rule 61.00. Assignment of matters to magistrate judges.

### Rule 61.01. *Criminal cases.*

(a) *Misdemeanor cases.* Upon the filing of an information, complaint or violation notice, or the return of an indictment, all misdemeanor cases shall be assigned by the clerk to a magistrate judge, who shall proceed in accordance with the provisions of 18 U.S.C. § 3401 and the Rules of Procedure for the Trial of Misdemeanors before United States Magistrate Judges.

(b) *Felony cases.* Upon the return of an indictment or the filing of an information, all felony cases shall be assigned by the clerk to a magistrate judge for the conduct of an arraignment and such pre-trial conferences as are necessary, and for the hearing and determination of all pre-trial procedural and discovery motions, in accordance with Local Rule 62.04.

CASE NOTES

**Cited** in United States v. Fordham, 674 F. Supp. 196 (E.D.N.C. 1987).

### Rule 61.02. *Civil cases.*

Upon filing, all civil cases shall be assigned by the clerk to a magistrate judge for the conduct of such discovery and pre-trial conferences as are necessary and for the hearing and determination of all pre-trial procedural and discovery motions, in accordance with Local Rule 62.03. Where designated by a judge, the magistrate judge may conduct additional pre-trial conferences and hear motions and perform the duties set forth in Local Rules 62.04, 62.05 and 62.06. Where the parties consent to trial and disposition of a case by a certified magistrate judge under Local Rule 21.00, such case shall, with the approval of the judge to whom it was assigned at the time of filing, be reassigned to a certified magistrate judge for the conduct of all further proceedings and the entry of judgment.

### Rule 61.03. *General.*

Nothing in these rules shall preclude a judge from reserving any proceeding for conduct by a judge, rather than a magistrate judge. The judge, moreover, may by order modify the method of assigning proceedings to a magistrate judge as changing conditions may warrant.

## Rule 62.00. Authority of magistrate judges.

### Rule 62.01. *Duties under 28 U.S.C. § 636(a).*

A magistrate judge is authorized to perform the duties prescribed by 28 U.S.C. § 636(a), and may:

(a) exercise all the powers and duties conferred or imposed upon United States commissioners by law and the Federal Rules of Criminal Procedure;

(b) administer oaths and affirmations, impose conditions of release under 18 U.S.C. § 3146, and take acknowledgements, affidavits, and depositions; and

(c) conduct extradition proceedings, in accordance with 18 U.S.C. § 3184.

**Rule 62.02.** *Disposition of misdemeanor cases — 18 U.S.C. § 3401.*

A magistrate judge may:

(a) try persons accused of, and sentence persons convicted of, misdemeanors committed within this district in accordance with 18 U.S.C. § 3401;

(b) direct the probation service of the court to conduct a presentence investigation in any misdemeanor case; and

(c) conduct a jury trial in any misdemeanor case where the defendant so requests and is entitled to trial by jury under the Constitution and laws of the United States.

**Rule 62.03.** *Determination of non-dispositive pre-trial matters — 28 U.S.C. § 636(b)(1)(A).*

A magistrate judge may hear and determine any procedural or discovery motion or other pre-trial matter in a civil or criminal case, other than the motions which are specified in Local Rule 62.04.

**Rule 62.04.** *Recommendations regarding case-dispositive motions — 28 U.S.C. § 636(b)(1)(B).*

(a) A magistrate judge may submit to a judge a report containing proposed findings of fact and recommendations for disposition by the judge of the following pre-trial motions in civil and criminal cases:

1. Motions for injunctive relief, including temporary restraining orders and preliminary and permanent injunctions;
2. Motions for judgment on pleadings;
3. Motions for summary judgment;
4. Motions to dismiss or permit the maintenance of a class action;
5. Motions to dismiss for failure to state a claim upon which relief may be granted;
6. Motions to involuntarily dismiss an action;
7. Motions for review of default judgments;
8. Motions to dismiss or quash an indictment or information made by a defendant; and
9. Motions to suppress evidence in a criminal case.

(b) A magistrate judge may determine any preliminary matters and conduct any necessary evidentiary hearing or other proceeding arising in the exercise of the authority conferred by this Local Rule 62.04.

**Rule 62.05.** *Prisoner cases under 28 U.S.C. § 2254 and § 2255.*

A magistrate judge may perform any or all of the duties imposed upon a judge by the rules governing proceedings in the United States district courts under 28 U.S.C. § 2254 and § 2255. In so doing, a magistrate judge may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a judge a report containing proposed findings of fact and recommendations for disposition of the petition by the judge. Any order disposing of the petition shall only be made by a judge.

**Rule 62.06.** *Prisoner cases under 42 U.S.C. § 1983.*

A magistrate judge may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a judge a report containing proposed findings of fact and recommendations for the disposition of petitions filed by prisoners challenging the conditions of their confinement.

**Rule 62.07.** *Special master references.*

A magistrate judge may be designated by a judge to serve as special master in appropriate civil cases in accordance with 28 U.S.C. § 636(b)(2) and Rule 53, F.R.Civ.P. Upon the consent of the parties, a magistrate judge may be designated by a judge to serve as special master in any civil case, notwithstanding the limitations of Rule 53(b), F.R.Civ.P.

**Rule 62.08.** *Conduct of trial and disposition of civil cases upon consent of the parties — 28 U.S.C. § 636(c).*

Subject to the provisions of Local Rule 21.00, a certified magistrate judge may conduct any or all proceedings in any civil case which is filed in this court, including the conduct of a jury or non-jury trial, and may order the entry of a final judgment, in accordance with 28 U.S.C. § 636(c). In the course of conducting such proceedings, a magistrate judge may hear and determine any and all pre-trial and post-trial motions, including case-dispositive motions.

**Rule 62.09.** *Other duties.*

A magistrate judge is also authorized to:

(a) exercise general supervision of civil and criminal calendars, conduct calendar and status calls, and determine motions to expedite or postpone the trial of cases for the judges;

(b) conduct discovery conferences, pre-trial conferences, settlement conferences, omnibus hearings, and related pre-trial proceedings in civil and criminal cases;

(c) Conduct arraignments in criminal cases not triable by the magistrate judge and take not guilty pleas in such cases;

(d) receive grand jury returns in accordance with Rule 6(f), F.R.Crim.P.;

(e) accept waivers of indictment, pursuant to Rule 7(b), F.R.Crim.P.;

(f) conduct voir dire and select petit juries for the court;

(g) accept petit jury verdicts in civil cases in the absence of a judge;

(h) conduct necessary proceedings leading to the potential revocation of probation;

(i) issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties, witnesses or evidence needed for court proceedings;

(j) order the exoneration or forfeiture of bonds;

(k) conduct proceedings for the collection of civil penalties of not more than $200.00 assessed under the Federal Boat Safety Act of 1971, in accordance with 46 U.S.C. § 1484(d);

(l) conduct examinations of judgment debtors in accordance with Rule 69, F.R.Crim.P.;

(m) conduct proceedings for initial commitment of narcotics addicts under Title III of the Narcotic Addict Rehabilitation Act;

(n) perform the functions specified in 18 U.S.C. § 4107, 4108 and 4109, regarding proceedings for verification of consent by offenders to transfer to or from the United States and the appointment of counsel therein; and

(o) perform the duties specified by the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. §§ 3001 et seq.;

(p) perform any additional duty consistent with the Constitution and laws of the United States.

CASE NOTES

**Cited** in United States v. Premises Known as Lots 14, 15, 16, 19, 47, & 48, 682 F. Supp. 288 (E.D.N.C. 1987).

## Rule 63.00. Review and appeal.

**Rule 63.01.** *Appeal of non-dispositive matters — 28 U.S.C. § 636(b)(1)(A).*

Any party may appeal from a magistrate judge's order determining a motion or matter under Local Rule 62.03 within ten days after issuance of the magistrate judge's order, unless a different time is prescribed by the magistrate judge or a judge. Such party shall file with the clerk, and serve on the magistrate judge and all parties, a written statement of appeal which shall specifically designate the order, or part thereof, appealed from and the basis for any objection thereto. A judge shall consider the appeal and shall set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law. The judge may also reconsider sua sponte any matters determined by a magistrate judge under this rule.

**Rule 63.02.** *Review of case-dispositive motions and prisoner litigation — 28 U.S.C. § 636(b)(1)(B).*

Any party may object to a magistrate judge's proposed findings, recommendations or report under Local Rules 62.04, 62.05 or 62.06, within ten days after being served with a copy thereof. Such party shall file with the clerk, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Any party may respond to another party's objections within ten days after being served with a copy thereof. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

**Rule 63.03.** *Special master reports — 28 U.S.C. § 636(b)(2).*

Any party may seek review of, or action on, a special master report filed by a magistrate judge in accordance with the provisions of Rule 53(e), F.R.Civ.P.

**Rule 63.04.** *Appeal from judgments in misdemeanor cases — 18 U.S.C. § 3402.*

A defendant may appeal a judgment of conviction by a magistrate judge in a misdemeanor case by filing a notice of appeal and paying a $5.00 filing fee within ten days after entry of the judgment, and by serving a copy of the notice upon the United States Attorney. The scope of appeal shall be the same as on an appeal from a judgment of the district court to the court of appeals.

**Rule 63.05.** *Appeal from judgments in civil cases disposed of on consent of the parties — 28 U.S.C. § 636(c).*

(a) *Appeal to the Court of Appeals.* Upon the entry of judgment in any civil case disposed of by a magistrate judge on consent of the parties under authority of 28 U.S.C. § 636(c) and Local Rule 62.08, an aggrieved party shall appeal directly to the United States Court of Appeals for this circuit in the same manner as an appeal from any other judgment of this court.

(b) *Appeal to a district judge.*

1. *Notice of appeal.* In accordance with 28 U.S.C. § 636(c)(4), the parties may consent to appeal any judgment in a civil case disposed of by a magistrate judge to a district judge, rather than directly to the Court of Appeals. In such case the appeal shall be taken by filing a notice of appeal with and paying a $5.00 filing fee to the clerk within 30 days after entry of the magistrate judge's judgment but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of entry of the judgment. For good cause shown, the magistrate judge or a judge may extend the time for filing the notice of appeal for an additional 20 days. A request for such extension, however, shall be made before the original time period for such appeal has expired. In the event a motion for a new trial is timely filed, the time for appeal from the judgment of the magistrate judge shall be extended to 30 days from the date of the ruling on the motion for a new trial, unless a different period is provided by the Federal Rules of Civil or Appellate Procedure.

2. *Service of the notice of appeal.* The clerk shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record for all parties other than the appellant, or if a party is not represented by counsel to the party at his or her last known address.

3. *Record on appeal.* The record on appeal to a judge shall consist of the original papers and exhibits filed with the court and the transcript of the proceedings before the magistrate judge, if any. Every effort shall be made by the parties, counsel, and the court to minimize the production and costs of transcriptions of the record, and otherwise to render the appeal expeditious and inexpensive, as mandated by 28 U.S.C. § 636(c)(4).

4. *Memoranda.* The appellant shall within 30 days of the filing of the notice of appeal file a typewritten memorandum, together with two additional copies, stating the specific facts, points of law, and authorities on which the appeal is based. The appellees shall file an answering memorandum within 30 days of the filing of the appellant's memorandum. The court may extend these time limits upon a showing of good cause made by the party requesting the extension. Such good cause may include reasonable delay in the preparation of any necessary transcript. If an appellant fails to file his or her memorandum within the time provided by this rule, or any extension thereof, the court may dismiss the appeal.

5. *Disposition of the appeal by a judge.* The judge shall consider the appeal on the record, in the same manner as if the case had been appealed from a judgment of the district court to the court of appeals and may affirm, reverse, or modify the magistrate judge's judgment, or remand with instructions for further proceedings. The judge shall accept the magistrate judge's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the magistrate judge to judge the credibility of the witnesses.

**Rule 63.06.** *Appeals from other orders of a magistrate judge.*

Appeals from any other decisions and orders of a magistrate judge not provided for in this Local Rule 63.00 should be taken as provided by governing statute, rule, or decisional law.

CASE NOTES

**Cited** in American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 109 F.R.D. 263 (E.D.N.C. 1985).

**Rules 64.00 to 79.00. Reserved for future purposes.**

# VI. ADMIRALTY AND MARITIME CLAIMS

## Rule 80.00. Title and scope.

These rules are entitled Admiralty Rules and may be cited as "Local Admiralty Rules" or "LAR". They apply to the maritime and admiralty proceedings as defined in Supplemental Rule A of the Federal Rules of Civil Procedure. The Local Rules of the United States District Court for the Eastern District of North Carolina apply to all civil cases, including admiralty and maritime proceedings, but if a local rule is inconsistent with an admiralty rule, the admiralty rule shall control. As used in these LAR, "court" means a U. S. District Judge or a U. S. District Magistrate Judge.

## Rule 81.00. Process.

(a) *Order authorizing the clerk to issue process of arrest, attachment or garnishment.*

Except in actions by the United States for forfeitures, before the clerk will issue a summons and process of arrest, attachment or garnishment to any party, including intervenors, under Supplemental Rules B and C, the pleadings, the affidavit required by Rule B, and accompanying supporting papers must be reviewed by the court. The clerk may refer a motion under this provision to any magistrate judge or judge of the court who is reasonably available, regardless of the judge to whom the action is assigned. The motion may be heard and the decision thereon communicated to the clerk telephonically. If the court finds the conditions set forth in Rules B or C appear to exist, as appropriate, the court shall authorize the clerk to issue process. Supplemental process or alias process may thereafter be issued by the clerk upon application without further order of the court.

(1) *Order.*

Upon approving the application for arrest, attachment or garnishment, the court will issue an order to the clerk to issue such process. The proposed form of order authorizing the issuance of such process and the proposed process itself shall be submitted to the court or the clerk before the court's review.

(2) *Exigent circumstances.*

If the plaintiff or his attorney certifies by affidavit submitted to the clerk that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant of arrest or process of attachment and garnishment. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for arrest of the vessel or other property without requiring a certification of exigent circumstances.

(b) *Return of process — Supplemental Rules C and D.*

Unless otherwise ordered by the court, all process from this court within the scope of Supplemental Rules C and D, F.R.Civ.P. shall be returnable by claim within ten days after execution of the process and by motion or answer within twenty days following claim.

(c) *Return of process — Supplemental Rule B.*

Unless otherwise ordered by the court, Rule 9(h), F.R.Civ.P., process from this court *in personam* shall be by civil summons returnable twenty days after

service of the process except process within the contemplation of Supplemental Rule B, F.R.Civ.P. which shall be in conformity therewith.

(d) *Registry of vessel information.*

Whenever a vessel is to be served, the party seeking service shall inform the Marshal of the registry of the vessel to be served, provided, however, failure to so inform the Marshal shall not be cause for the Marshal to refuse to serve the said vessel or in any way invalidate service of process.

**Rule 82.00. Issuance of process.**

(a) *Intangible property.*

(1) *Issuance and effect of summons.* The summons issued pursuant to Supplemental Rule C(3) shall direct the person having control of the funds or other intangible property to show cause no later than ten (10) days after service why the funds or other property should not be delivered to the court to abide the judgment. The court, for good cause shown, may shorten or lengthen the time. Service of the summons has the effect of an arrest of the property and brings it within the control of the court.

(2) *Payment to marshal.* The person who is served may deliver or pay over to the Marshal the property or funds proceeded against, or a part thereof, sufficient to satisfy the claim. If such payment is made, the person served is excused from any duty to show cause.

(3) *Manner of showing cause.* The claimant of the property may show cause why the property should not be delivered to the court by serving and filing a claim as provided in Supplemental Rule C(6) within the time allowed to show cause, and by serving and filing an answer to the complaint within twenty (20) days thereafter.

(4) *Effect of failure to show cause.* If a claim is not filed within the time stated in the summons, or an answer is not filed within the time allowed under this Rule, the person who was served shall deliver or pay to the Marshal the property or funds proceeded against, or a part thereof, sufficient to satisfy plaintiff's claim.

(b) *Seizure of property already in custody of an officer of the United States.* In addition to the requirements of Supplemental Rule (C)(3), where property in the custody of an officer or employee of the United States is to be arrested or attached, the Marshal shall deliver a copy of the complaint and warrant for arrest, or summons and process of attachment, to such officer or employee or, if the officer or employee is not found within the district, then to the custodian of the property within the district. The Marshal shall notify such officer, employee or custodian not to relinquish such property from custody until ordered to do so by the court.

(c) *Use of state procedures.* When the plaintiff invokes a state procedure to attach or garnish property under Federal Rule 4(n), the process of attachment and garnishment shall so state.

(d) *"Not within the district" defined.* The phrase "not found within the district" in Supplemental Rule B(1) means that, in an *in personam* action, the defendant cannot be served with the summons and complaint as provided in F.R.Civ.P. 4(d).

**Rule 83.00. Post arrest procedure.**

(a) Whenever property is arrested, attached or garnished, any person claiming an interest in the property shall be entitled to a prompt hearing before the court on notice to the party bringing the arrest, attachment or garnishment and to all other parties who have appeared in the action. The hearing shall be noticed and scheduled as is a hearing on a request for temporary restraining order. At the hearing, the party that obtained the

arrest, attachment or garnishment shall show cause why the arrest, attachment or garnishment order should not be vacated forthwith or other appropriate relief granted.

(b) If the arrest, attachment or garnishment was obtained under a certification of exigent circumstances, the party obtaining the arrest, attachment or garnishment shall have the burden to show that exigent circumstances existed.

(c) This Rule shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603 and 604 or to action by the United States for forfeitures.

**Rule 84.00. Publication.**

(a) Publication required by Supplemental Rule (C)(4), F.R.Civ.P. shall be made once, without further court order, in any one of the following newspapers:

*Elizabeth City division.* Virginian Pilot, Norfolk, Virginia
The News and Observer, Raleigh, North Carolina
*Wilmington division.* Wilmington Morning Star, Wilmington, North Carolina
*All other divisions.* The News and Observer, Raleigh, North Carolina

(b) If the property arrested is not released within ten days after execution of process, publication hereunder shall, unless otherwise ordered, be caused by the plaintiff or intervenor to be made within seventeen days after execution of process.

(c) Such notice shall be substantially as follows, except and unless otherwise provided in actions for the enforcement of forfeitures for violation of any federal statute:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Caption of Case

NOTICE: The United States Marshal, Eastern District of North Carolina, has arrested the (Vessel and appurtenances) (Property) in the above causes, civil and maritime for (nature of claim, i.e. contract, salvage, damage, collision, foreclosure of preferred mortgage, etc.) amounting to ($ (and nature of unliquidated items)). Process returnable on (month, day and year, i.e., thirty days following execution of process as measured by Rule 6(a), F.R.Civ.P.) at the (name of courthouse), (city), (state), and any person claiming any interest therein must appear no later than that date and file written claims, answer or other defense, in person, or by attorney, or default and condemnation will be ordered. DATED at (city of publication), (state). (month, day and year of publication).

(Name)
(Address)
(Attorney(s)) for
(Plaintiff)(Intervenor)

(d) Plaintiff or intervenor will cause to be furnished to the Marshal, at the time process issues in Supplemental Rules B, C and D, F.R.Civ.P. actions, a prepared statement of attachment and garnishment or arrest with blanks for completion of date thereof and for signature below the name and title of such Marshal, together with self-addressed envelope to plaintiff or plaintiff's attorney with sufficient postage affixed. The Marshal will promptly cause same to be completed and mailed after execution of process.

(e) Plaintiff shall effect publication required by Supplemental Rule F(4), F.R.Civ.P. without further court order, in any one of the following newspapers:

*Elizabeth City division.* Virginian Pilot, Norfolk, Virginia

The News and Observer, Raleigh, North Carolina
*Wilmington division.* Wilmington Morning Star, Wilmington, North Carolina
*All other divisions.* The News and Observer, Raleigh, North Carolina

(f) Whenever publication is required by Supplemental Rules C(4) and F(4), F.R.Civ.P. plaintiff or intervenor shall cause to be filed with the clerk, not later than the return date, sworn proof of publication by or on behalf of the publisher or the editor in charge of legal notices of the newspaper in which published, together with a copy of the proof of publication, or publication or reproduction thereof.

**Rule 85.00. Stipulations for costs and security.**

(a) *Seamen.* Seamen suing as provided in 28 U.S.C. § 1916 shall not be required to file a stipulation for costs in the first instance. The court may however, order a stipulation to be given at any time.

In all actions *in rem* brought by seamen in their own names and for their own benefit for wages, salvage, or the enforcement of laws for their health or safety without prepaying costs or fees or furnishing security therefor, pursuant to 28 U.S.C. § 1916, the Marshal may at any time after service of process, attachment, or seizure of a vessel, petition any judge or magistrate judge of this court to require the posting of security for any or all reasonable expenses which have been or may be incurred while the vessel is in the custody of the Marshal. Upon filing such petition for the posting of security, a hearing date shall promptly be set by the court and the Marshal shall give notice of the time and place of such hearing by serving a copy of the notice of hearing together with a copy of the petition upon counsel of record for the parties or upon the parties, and by posting a copy of the same on the vessel.

(b) *Increase or decrease in security.* At any time, any party having an interest in the subject matter of the action may move the court, on due notice and for cause, for greater, better or lesser security; and any such order may be enforced by attachment or otherwise. The court may enter such order on its own motion, with or without notice.

(c) *Deposit required before seizure.* Any party, including any intervenor, who seeks arrest, attachment or garnishment of property in an action governed by Supplemental Rule E and Federal Rule 4(e) shall deposit with the Marshal the sum estimated by the Marshal to be sufficient to pay the fees and expenses of arresting, attaching, or garnishing and keeping the property for at least ten days, or such lesser amount as the Marshal deems sufficient. The Marshal is not required to execute process of arrest, attachment or garnishment until such deposit is made.

(d) *Additional deposits required after seizure.* Any party who has caused the Marshal to arrest, attach or garnish property shall advance additional sums from time to time as required by the Marshal to pay the fees and expenses of the Marshal until the property is released or disposed of as provided in Supplemental Rule E.

(e) *Sanction for failure to make deposit.* Any party who fails to make a deposit when required by the Marshal may be subject to sanctions including the release of the vessel.

**Rule 86.00. Stipulations and undertakings.**

(a) Except in cases instituted by the United States by information, or complaint of information upon seizures for any breach of the revenue, navigation, or other laws of the United States, stipulations or bonds in admiralty and maritime actions need not be under seal and may be executed on behalf of the stipulator or obligor by his/its agent or counsel. Stipulations for costs with corporate surety need not be signed or executed by the party, but

may be signed on his/its behalf by his/its agent or counsel, and shall be sufficient in any event if executed only by the surety approved by the court.

(b) If, before or after commencement of suit, all parties accept any written undertaking to respond on behalf of the vessel or other property sued in return for foregoing the arrest or stipulating to the release of such vessel or other property, the undertaking shall become a party in place of the vessel or other property sued and be deemed referred to under the name of the vessel or other party in any pleading; order or judgment in the action referred to in the undertaking.

**Rule 87.00. Pleadings and parties.**

(a) Every complaint filed as a Rule 9(h), F.R.Civ.P. action shall set forth "In Admiralty" following the designation of the court, in addition to the statement, if any, contained in the body of the complaint pursuant to such rule.

(b) In actions under Supplemental Rule B, C or D, F.R.Civ.P. the business telephone number and address of the plaintiff's counsel or the plaintiff, if plaintiff appears *pro se,* shall be included.

(c) Every complaint in Supplemental Rules B and C, F.R.Civ.P. actions shall state the amount of the debt, damages, or salvage for which the action is brought, and shall include in addition thereto the amounts of unliquidated claims, including attorneys fees. The defendant or claimant may post bond pursuant to Supplemental Rule E(5) based on such allegations.

(d) In cases of salvage, the complaint shall also state to the extent known or estimated the value of the hull, cargo, freight and other property salvaged, the amount claimed, the names of the principal salvers, and that the suit is instituted in their behalf and in the behalf of all other persons interested or associated with them. There shall also be attached to the complaint a list of all known salvers and all persons believed entitled to share in the salvage, and also any agreement of consortship available and known to exist among them or any of them, including a copy of any such agreement.

**Rule 88.00. Verification of pleadings and answers to interrogatories.**

Every complaint and claim in Supplemental Rules B, C and D, F.R.Civ.P. actions shall be verified on oath or solemn affirmation by a party, or an officer of a corporate party. If no party or corporate officer is within the district, verification of a complaint, claim or answers to interrogatories may be made by an agent, attorney-in-fact or attorney of record, who shall state briefly the sources of his or her knowledge, information and belief, declare that the document affirmed is true to the best of his or her knowledge, information and belief, state the reason why verification is not made by the party or a corporate officer, and that he or she is authorized so to act. Any such verification will be deemed to have been made by the party to whom a document might apply as if verified personally. Any interested party may move the court, with or without a request for stay, for the personal oath of a party or all parties, or that of a corporate officer. If required by the court, such verification shall be procured by commission or as otherwise ordered.

**Rule 89.00. Intervention.**

(a) Unless otherwise ordered by the court, anyone having a claim against a vessel or other property previously arrested, attached, or garnished shall file an intervening complaint and not an original complaint, and shall arrest, attach, or garnish the vessel or property and, further, otherwise comply with these Rules in the same manner as the initial arresting, attaching or garnishing party.

(b) Any party intervening in the proceeding shall deposit funds to pay a fair share of expenses for the safekeeping of the property.

**Rule 90.00. Default in action in rem.**

(a) *Notice required.* A party seeking a default judgment in an action *in rem* must show to the satisfaction of the court that due notice of the action and arrest of the property has been given:

(1) By publication, as required in LAR 84; and

(2) By service on the master or other person having custody of the property; and

(3) By delivery under Federal Rule 5(b) to every other person who has not appeared in the action and is known to have an interest in the property.

(b) *Persons with recorded interests.*

(1) If the defendant property is a vessel documented under the laws of the United States, plaintiff must obtain a current certificate of ownership from the Coast Guard and give notice to the persons named therein who appear to have an interest.

(2) If the defendant property is a vessel numbered as provided in the Federal Boat Safety Act, plaintiff must obtain information from the issuing authority and give notice to other persons named in the records of such authority who appear to have an interest.

(c) *Manner of giving notice.* A required notice, other than by publication, of the action and arrest of the property shall be given by delivery under Federal Rule 5(b).

**Rule 91.00. Entry of default.**

After the time limit for filing an answer has expired, the plaintiff may request an entry of default under Federal Rule 55(a). Default will be entered upon showing that:

(a) Notice has been given as required in LAR 91(a);

(b) No one has appeared to claim the property;

(c) The publication requirement under LAR 84 has been fulfilled; and

(d) The time limit for answer has expired.

The plaintiff may move for judgment under Federal Rule 55(b) at any time after default has been entered.

**Rule 92.00. Custody of property.**

(a) *Safekeeping of property when seized.* When a vessel, cargo or other property is seized, the Marshal shall take custody and arrange for adequate and necessary security for its safekeeping which may include, in the Marshal's discretion, the placing of keepers on or near the vessel, or the appointment of a facility or person as custodian of the property in lieu of the Marshal. When a vessel with crew aboard is seized, the removal of such crew shall fall within the discretion of the United States Marshal.

(b) *Cargo handling, repairs and movement of the vessel.* Upon arrest or attachment of the vessel, no cargo handling, repairs or movement of the vessel may be made without a court order except in an emergency situation in the discretion of the Marshal. Written notice shall be given to the Marshal and to all parties who have appeared prior to the application for such order, and the certificate of service of such notice shall be filed with the clerk before application is made to the court. For good cause shown, the court may direct the Marshal to allow the conduct of cargo handling, repairs, movement of the vessel or other operations on a vessel under arrest or attachment. Neither the United States nor the Marshal shall be liable for the consequence of the

undertaking or continuation of any such activities during the arrest or attachment.

(c) *Motion for change in arrangements.* Prior to or after a vessel, cargo or property has been taken into custody by the Marshal, any party then appearing may move the court to dispense with keepers or to remove or place the vessel, cargo or other property at a specified facility, to designate a substitute custodian, or for similar relief. Notice of the motion shall be given to the Marshal and to all parties who have appeared.

(d) *Insurance.* The Marshal may order insurance to protect the Marshal, his deputies, keepers and substitute custodians from liability assumed in arresting and holding the vessel, cargo or other property and performing whatever services are undertaken to protect the vessel, cargo or other property and maintain the court's custody. The party applying for arrest of the vessel, cargo or other property shall reimburse the Marshal for premiums paid for the insurance. The party applying for removal of the vessel, cargo or other property to another location, for designation of a substitute custodian, or for other relief that will require an additional premium shall reimburse the Marshal therefor. The premiums charged for the liability insurance are taxable as administrative costs while the vessel, cargo or other property is *in custodia legis.*

**Rule 93.00. Appraisal.**

(a) *Order for appraisal.* An order for appraisal of property so that security may be given or altered will be entered by the clerk at the written request of any interested party. If the parties do not agree in writing on the selection of the appraiser, the court will appoint the appraiser.

(b) *Appraiser's oath.* The appraiser shall be sworn to the faithful and impartial discharge of duties before any federal or state officer authorized by law to administer oaths, and a copy of the oath shall be filed with the clerk.

(c) *Appraisal.* The appraiser shall give one day's notice of the time and place of making the appraisal to the parties who have appeared in the action. The appraiser shall file the appraisal in writing with the clerk as soon as it is completed and shall serve it on all parties.

(d) *Cost of appraisal.* Absent stipulation of the parties or order of the court to the contrary, the appraiser shall be paid by the party requesting the appraisal. Appraiser's fees shall thereafter be taxed as the court orders.

**Rule 94.00. Sale of property.**

(a) *Publication of notice of sale.* Unless otherwise ordered upon a showing of urgency, impracticality or other good cause, or as provided by law, notice of the sale of property in an action *in rem* shall be published daily, at least twice, the first publication to be at least one calendar week prior to date of sale and the second publication to be at least three calendar days prior to date of sale, unless otherwise ordered by the court.

(b) *Place of sale.* The place of sale will occur at the Federal Courthouse in the division in which the property is located unless the court otherwise directs.

(c) *Payment of bid.* The person whose bid is accepted shall immediately pay the Marshal either the full purchase price if the bid is no more than $500 or a deposit of $500 or ten percent of the bid, whichever is greater, if the bid exceeds $500. The bidder shall pay the balance of the purchase price within three court days following the sale. If an objection to the sale is filed within that time, the bidder is excused from paying the balance of the purchase price until three court days after the sale is confirmed. Payments to the Marshal shall be in cash, certified check or cashier's check. The court may specify different terms in any order of sale.

(d) *Penalty for late payment of balance.* A successful bidder who fails to pay the balance of the bid within the time allowed under these rules or a different time specified by the court shall also pay the Marshal the costs of keeping the property from the date payment of the balance was due to the date the bidder pays the balance and takes delivery of the property. Unless otherwise ordered by the court, the Marshal shall refuse to release the property until this additional charge is paid.

(e) *Penalty for default in payment of balance.* A successful bidder who fails to pay the balance of the bid within the time allowed is in default and the court may at any time thereafter order a sale to the second highest bidder or order a new sale as appropriate. Any sum deposited by the bidder in default shall be forfeited and applied to pay any additional costs incurred by the Marshal by reason of the forfeiture and default, including costs incident to resale. The balance of the deposit, if any, shall be retained in the registry subject to further order of the court, and the court shall be given written notice of its existence whenever the registry deposits are reviewed.

(f) *Report of sale by the marshal.* At the conclusion of the sale, the Marshal shall forthwith file a written report with the court of the fact of sale, the date thereof, the price obtained, the name and address of the successful bidder, and any other pertinent information.

(g) *Time and procedure for objection to sale.* An interested person may object to the sale by filing a written objection with the clerk within three court days following the sale, serving the objection on all parties, the successful bidder and the Marshal, and depositing a sum with the Marshal that is sufficient to pay the expense of keeping the property for at least seven days. Payment to the Marshal shall be in cash, certified check, or cashier's check. The written objection must be endorsed by the Marshal with an acknowledgement of receipt of the deposit prior to filing with the clerk.

(h) *Confirmation of sale without motion.* A sale shall stand confirmed as of course without any affirmative action by the court unless (1) written objection is filed with the court within the time allowed under these rules, or (2) the purchaser is in default for failure to pay the balance due to the Marshal. The purchaser in a sale so confirmed as of course shall present a form of order reflecting the confirmation of the sale for entry by the clerk on the fourth court day following the sale. The Marshal shall transfer title to the purchaser upon presentation of such order by the clerk.

(i) *Confirmation of the sale on motion.* If an objection has been filed or if the successful bidder is in default, the Marshal, the objector, the successful bidder, or a party may move the court for relief. The motion will be heard summarily by the court. The person seeking a hearing on such motion shall apply to the court for an order fixing the date and time of the hearing and directing the manner of giving notice and shall give written notice of the motion to the Marshal, all parties, the successful bidder and the objector. The court may confirm the sale, order a new sale, or grant such other relief as justice requires.

(j) *Disposition of deposits.*

(1) *Objection sustained.* If an objection is sustained, sums deposited by the successful bidder will be returned to the bidder forthwith. The sum deposited by the objector will be applied to pay the fees and expenses incurred by the Marshal in keeping the property until it is resold, and any balance remaining shall be returned to the objector. The objector will be reimbursed for the expense of keeping the property from the proceeds of a subsequent sale.

(2) *Objection overruled.* If the objection is overruled, the sum deposited by the objector will be applied to pay the expense of keeping the property from the day the objection was filed until the day the sale is confirmed, and any balance remaining will be returned to the objector forthwith.

(k) *Title to property.* Failure of a party to give the required notice of the action and arrest of the vessel, cargo or other property or required notice of the

sale may afford grounds for objecting to the sale but does not affect the title of a bona fide purchaser of the property without notice of the failure.

**Rule 95.00. Release of seizures — Custodial cost — General bonds.**

(a) Property seized by the Marshal may be released as follows:

(1) By the Marshal upon the receipt of security by the Marshal, accompanied by the endorsed express authorization for release signed by the party or counsel for the party as provided by Supplemental Rule E(5)(c), F.R.Civ.P. if all costs and charges of the court and its officers shall have first been paid. Monies received as part of any cash stipulation shall be delivered by the Marshal to the clerk for deposit in the registry of the court.

(2) In action entirely for a sum certain, by paying into the court the amount alleged in the complaint to be due, with interest at ten percent per annum thereon from the date claimed to be due to a date 24 months after the date the claim was filed, or by filing an approved stipulation for such alleged amount and interest. In either event, claim of the property shall be filed.

(3) In actions other than possessory, petitory, and partition, by filing, in addition to a claim of the property, an approved stipulation for the amount of the appraised or agreed value of the property seized, with interest (unless otherwise ordered by the court), interlocutory or final, and to pay the amount awarded by the final decree rendered by this court or by any appellate court, with interest.

(4) In possessory, petitory, and partition actions, only upon the order of the court, and on such security and terms as ordered.

(5) Upon the dismissal or discontinuance of the action or upon the written consent of the attorney for the party on whose behalf the property is detained, if all costs and charges of the court and its officers shall have first been paid.

(b) The Marshal shall not deliver any property so released until costs and charges of the Marshal shall first have been paid.

(c) In any general bond as provided for by Supplemental Rule E(5)(b), F.R.Civ.P. the vessel will be identified by name, nationality, dimension, official number or registration number, hailing port and port of documentation, to the extent applicable. The owner of such vessel shall also file complete designated United States address for communications to the owner or designated agent, which shall be by mail. Execution of process against the vessel so stayed under Supplemental Rule E(5)(b), F.R.Civ.P. shall be endorsed to the Marshal as stayed pursuant to the rule. Such process shall be served by the Marshal together with a copy of the complaint on the master or other person in whose charge or custody the vessel is found and the Marshal shall make his or her return thereof. If no master or other person in charge of custody is found aboard the vessel, the Marshal shall so make his or her return accordingly, and the clerk shall advise by mail the owner or designated agent, at the address furnished pursuant to this rule, of the nature of the action, any amount claimed, the plaintiff, the name and address of plaintiff's attorney, the case number, and the return day thirty days from the date of the Marshal's attempt. The clerk will maintain a current list of vessels subject to a general bond and file said bonds alphabetically by name of vessel and endorsed as provided by Supplemental Rule E(5)(b), F.R.Civ.P.

**Rule 96.00. Taxation of costs.**

If costs shall be awarded to either or any party, then the reasonable premium or expenses paid on all bonds or stipulations or other security by the party in whose favor such costs are allowed shall be taxed as a part of the costs of the case. In addition thereto, if costs shall be awarded to either or any party, then the reasonable expenses paid by a party incidental to or arising out of the

attachment or arrest of any property in the proceedings or while said property is "in custodia legis" shall be taxed as a part of the costs of the case.

**Rule 97.00. Stay of execution or of release of property after judgment or dismissal.**

No execution of judgment shall issue nor shall seized property be released pursuant to judgment or order of dismissal, until ten days after its entry. Upon the filing of a motion for new trial or notice of appeal or motion to set aside default within said ten-day period, a further stay shall exist for a period not to exceed thirty days from the entry of judgment or dismissal to permit the entry of an order fixing the amount of a supersedeas bond and the filing of same.

**Rule 98.00. Possessory actions — Short day return.**

In all possessory actions upon special order of the court, process may be made returnable upon a short day. The answer shall be filed within such time as may be specifically ordered by the court, and a day of hearing then fixed, unless otherwise ordered. The hearing of possessory suits shall be given preference.

**Rule 99.00. Claims after sale — How limited.**

Claims upon the proceeds of sale of property under a final decree, except for seamen's wages, shall not be admitted in behalf of lienors who file their claims after the sale, to the prejudice of lienors who filed their claims before the sale, but shall be limited to remnants and surplus, unless for cause shown it shall be otherwise ordered.

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# RULES OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Effective September 1, 1988.
Revised August 1, 1991.
With amendments through March 28, 2001.


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**Editor's note.** — For North Carolina court system website, see www.nceb.uscourts.gov.

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IN RE:
LOCAL BANKRUPTCY RULES ORDER

It appearing that local bankruptcy rules would facilitate the administration of bankruptcy cases in this district, and would assist the court in the management of contested matters and adversary proceedings; and

It further appearing that Bankruptcy Rule 9029 permits the United States District Court to authorize the bankruptcy judges to make rules of practice and procedure not inconsistent with the Official Bankruptcy Rules; and

It further appearing that by order of Chief United States District Judge W. Earl Britt, dated October 8, 1987, the bankruptcy judges of this district are authorized, subject to the requirements of Rule 83 of the Federal Rules of Civil Procedure, to make rules of practice and procedure not inconsistent with the Bankruptcy Rules, consistent with the authority of the district court to modify or abrogate any rules so adopted as appears appropriate. It further appearing that appropriate notice was given with an opportunity to comment; now therefore,

IT IS ORDERED that the bankruptcy rules attached hereto are hereby adopted and shall be referred to as Local Bankruptcy Rules, Eastern District of North Carolina, and shall be numbered in such a way as to refer to the Official Bankruptcy Rules.

Entered this 1st day of September, 1988.

s/Thomas M. Moore
*Chief Judge*

s/A. Thomas Small
*Judge*

# PREFACE

The Local Bankruptcy Rules for the United States Bankruptcy Court for the Eastern District of North Carolina are adopted to facilitate the administration of bankruptcy cases, to assist the court in the management of contested matters and adversary proceedings and to provide for variations in the local practice in this court.

The numbering system for the Local Bankruptcy Rules is patterned after the Bankruptcy Rules which became effective August 1, 1983. Each local rule is keyed to an appropriate Bankruptcy Rule number and is numbered with a decimal to such Bankruptcy Rule number. For example, a local rule relating to Bankruptcy Rule 7001 will be numbered as Local Bankruptcy Rule No. 7001.1. This numbering system should facilitate the use of the local rules.

The Local Bankruptcy Rules will be cited as: "Local Bankruptcy Rule No. ____, EDNC".

# PART I. COMMENCEMENT OF CASE; PROCEEDINGS RELATING TO PETITION AND ORDER FOR RELIEF

## Rule 1002.1. Petition — General.

The required number of copies of petitions requesting relief under the Code is as follows:

(1) Chapter 7 — original and one
(2) Chapter 11 — original and five
(3) Chapter 12 — original and two
(4) Chapter 13 — original and one

## Rule 1003.1. Involuntary petition.

The number of copies shall be as specified in Rule 1002.1.

## Rule 1006.1. Fees — Installment payments.

(a) An application for permission to pay the filing fees in installments shall contain the following:

(1) reasons why the debtor cannot pay the full fee at the time of filing;

(2) a statement that the debtor's attorney has received no payment for fees and will accept none until the filing fees are paid in full;

(3) a statement that the debtor does not owe any outstanding fees to the court on account of any other prior case;

(4) signatures of both the debtor and the debtor's attorney.

(b) Following the filing of a petition and an application, each application will be reviewed by the court and an order entered granting or denying the application. Should the application be denied, the debtor shall have ten (10) days from the date of the order to pay the full fee. If the full fee is not paid within ten (10) days of the order, the petition may be dismissed by the court without any further prior notice.

(c) Final installments of the filing fee shall be paid within ten (10) days following the date first set for the meeting of creditors called pursuant to 11 U.S.C. § 341, unless otherwise ordered by the court upon appropriate motion for extension and for cause shown.

(d) The debtor and the debtor's attorney are responsible for knowing the dates the payments are due. No reminders will be provided from the court of the due date. Upon failure to make any payment as scheduled, the petition is subject to dismissal after hearing on notice to the debtor and trustee.

## Rule 1007.1. Lists, schedules and statements; Time limits.

(a) *Schedules and statements required.* In the instance of an accelerated chapter 11 case when the schedules and statements are not filed with the voluntary petition, a copy of the schedules and statements shall be filed within 15 days thereafter and served directly upon the bankruptcy administrator and the Internal Revenue Service. If the debtor is a corporation or limited partnership, then a copy of the schedules and statements shall be filed also within fifteen (15) days upon the following:

(1) Securities & Exchange Commission
Branch of Reorganization
Suite 1000
3475 Lennox Road, N.E.
Atlanta, Georgia 30327-1323
or at the most current address on file with the clerk, and

(2) Secretary of the Treasury
Washington, D.C. 20220
A certificate of service shall be attached to the original schedules and statements filed with the court reflecting that service has been made on each party.

(b) *Twenty (20) largest unsecured creditors.* The clerk of court is authorized to lodge for filing any voluntary chapter 11 reorganization petition that is not accompanied by the list of 20 largest unsecured creditors.

(c) *Dismissal of case for failure to comply with Rule 1007(c) Federal Rules of Bankruptcy Procedure.* In the event the schedules and statements are not filed with the petition in a voluntary case, they shall be filed within 15 days thereafter, unless a motion to extend the time for filing the schedules and statements is filed prior to the expiration of the 15 days. If the schedules and statements are not filed within 15 days of the filing of the petition and no motion to extend the time for filing is received by the clerk of court within the 15-day period, then the clerk of court may summarily dismiss the petition. A copy of this local rule shall be served on the debtor and his counsel at the time of the filing of a petition which is unaccompanied by the schedules and statements.

### Rule 1007.2. Mailing — List or Matrix.

A petition requesting relief under chapters 7, 11, 12, or 13 shall be accompanied by a mailing matrix containing the complete mailing address, including zip code, for the following:

(1) all creditors listed in the petition, alphabetically arranged;

(2) Bankruptcy Administrator, Post Office Box 3758, Wilson, NC 27895-3758 or most current address, in chapters 7 and 11;

(3) Internal Revenue Service, 320 Federal Place, ATTN: Special Procedures Staff, Greensboro, NC 27402 or the most current address on file with the clerk — except in chapters 7, 12 and 13 when the IRS is **not** listed as a creditor;

(4) North Carolina Department of Revenue, Office Services Division, Bankruptcy Unit, Post Office Box 1168, Raleigh, NC 27602-1168 or the most current address on file with the clerk — except in chapters 7, 12 and 13 when the Department of Revenue is **not** listed as a creditor; and

(5) Employment Security Commission, Post Office Box 26504, Raleigh, NC 27611 or the most current address on file with the clerk — except in chapters 7, 12 and 13 when the ESC is **not** listed as a creditor.

(6) If the United States is a party, other than for taxes, the matrix should include the United States Attorney, 310 New Bern Avenue, Suite 800, Federal Building, Raleigh, NC 27601-1461 or the most current address on file with the clerk (EXAMPLE: FHA, FmHA, VA, SBA).

(7) If the debtor is a corporation, list the name, current mailing address, and title of each officer, director, insider, and managing executive.

(8) If the debtor is a partnership, list the name and current mailing address of each member of the partnership.

The matrix shall be prepared in the format approved by the clerk and its content shall be certified as accurate by the filing attorney or party. The party shall be responsible for any errors in or omissions from the listing.

### Rule 1009.1. Amendments to Lists and Schedules.

Any amendment to a petition, list, schedule or statement shall be accompanied by a certificate of service in the form of a statement of the date and manner of service and of the names and addresses of the persons served and certified as correct by the person making the service.

**Rule 1071.1. Divisions — Bankruptcy Court.**

*Divisions of the district.* There shall be six divisions of the court. The headquarters of each division and the counties comprising each division are as follows:

| Name of Division | Headquarters | Counties | |
|---|---|---|---|
| Elizabeth City | Wilson | Bertie | Hertford |
| | | Camden | Pasquotank |
| | | Chowan | Perquimans |
| | | Currituck | Tyrrell |
| | | Dare | Washington |
| | | Gates | |
| Fayetteville | Wilson | Cumberland | Sampson |
| | | Robeson | |
| New Bern | Wilson | Beaufort | Lenoir |
| | | Carteret | Martin |
| | | Craven | Onslow |
| | | Hyde | Pamlico |
| | | Jones | Pitt |
| Raleigh | Raleigh | Franklin | Vance |
| | | Granville | Wake |
| | | Harnett | Warren |
| | | Johnston | |
| Wilmington | Wilson | Bladen | Duplin |
| | | Brunswick | New Hanover |
| | | Columbus | Pender |
| Wilson | Wilson | Edgecombe | Northampton |
| | | Greene | Wayne |
| | | Halifax | Wilson |
| | | Nash | |

**Rule 1073.1. Assignment of Cases.**

In accordance with the divisions established in Local Bankruptcy Rule 1071.1, the clerk shall assign all cases to a division when the case is filed. The place of filing shall be determined by the the debtor's domicile, residence, principal place of business or location of the debtor's principal assets immediately preceding the filing of the bankruptcy case. In cases involving an affiliate, a general partner or partnership, related cases may be filed in the division where the original case was filed.

In adversary proceedings when there is no pending bankruptcy case in this district, the division will be assigned at the discretion of the clerk.

## PART II. OFFICERS AND ADMINISTRATION; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS

**Rule 2002.1. Notice to creditors and other interested parties.**

(a) *Amended or supplemental schedules.* The § 341 meeting will be sched-

uled and the clerk of court, or such other person as the clerk of court may designate, will notify the creditors listed on the matrix filed with the petition. If additional creditors are added either through schedules being filed after notice has been given or through amendments to the schedules, the debtor shall serve the § 341 notice on the creditors and file a certificate of service with the clerk of court within three (3) days after notice.

(b) *Notice fee.* The notice fee required pursuant to 28 U.S.C. § 1930 shall be collected by the clerk for each notice mailed by the office of the clerk of court only as required under Rule 2002(a), (b), (d), (e), (f) and (n), Federal Rules of Bankruptcy Procedure, in chapter 7 and 13 cases filed prior to December 1, 1992. In a chapter 7 case, the fee shall be payable from the estate and only to the extent there is an estate. In chapter 11, 12 and 13 cases, the fee shall be payable at confirmation pursuant to 11 U.S.C. § 1129(a)(12), 11 U.S.C. § 1225(a)(2), and 11 U.S.C. § 1325(a)(2).

In the event a debtor files a request for conversion to another chapter or a voluntary dismissal, payment of the fee shall be a condition of the conversion or dismissal.

(c) *Guide to service and notice requirements.* The chart attached to these rules shall serve as a guide for the giving of notice to creditors and other parties in interest.

**Rule 2003.1. Meeting of creditors and equity security holders.**

(a) The bankruptcy administrator shall retain and preserve the taped recordings of the meeting of creditors required by 11 U.S.C. § 341(a) for a period of two years from the date of the meeting. After the expiration of two years from the date of the meeting, the bankruptcy administrator is authorized to erase or otherwise destroy the taped recordings.

(b) Upon the request of any entity, the bankruptcy administrator may certify and provide a copy of the recording of the meeting of creditors at the entity's expense.

**Rule 2014.1. Employment of professional persons.**

The chapter 11 debtor may not employ any professional person including but not limited to any attorney, accountant, appraiser, business consultant, broker, agent, or auctioneer without first obtaining approval of the court.

**Rule 2015.1. Duty of trustee or debtor in possession to keep records, make reports, and give notice of case.**

The standing chapter 13 trustees are authorized to charge a search fee when answering inquiries which require a search of the records for each name or item searched in the amount established under 28 U.S.C. § 1930(b), and to use the funds as a part of operating expenses. The trustees shall include in the chapter 13 trustee's annual report the amount of any search fees received.

**Rule 2015.2. Duty of Chapters 7 and 11 trustee to give notice.**

The chapters 7 and 11 trustee shall prepare and mail notices required under Rule 2002(a)(2), (3), (4), (7) and Rule 2002(f)(3) and (9), Federal Rules of Bankruptcy Procedure.

The trustee shall provide 15 days notice to creditors and other parties in interest within which to object to any proposed use, sale or lease of property under Rule 6004(b), Federal Rules of Bankruptcy Procedure. The trustee shall prepare and file with the clerk of court within three (3) days thereafter a certificate of service showing when and to whom the notices were mailed.

**Rule 2015.5. Trustees — Chapter 13 search fees.**

The standing chapter 13 trustees are authorized to charge a search fee when answering inquiries which require a search of the records for each name or item searched in the amount established under 28 U.S.C. § 1930(b), and to use the funds as a part of operating expenses. The trustees shall include in the chapter 13 trustee's annual report the amount of any search fees received.

**Rule 2016.1. Compensation of attorneys in Chapter 13 Cases.**

(a) *AMOUNT OF STANDARD BASE FEE.* The standard base fee in a Chapter 13 case is $1,400.00.

(b) *SERVICES INCLUDED IN THE BASE FEE.* The standard base fee includes the basic services reasonably necessary to properly represent the debtor before the Bankruptcy Court during the first twelve (12) months after filing the case.

(c) *APPLYING FOR A HIGHER BASE FEE.* Applications for approval of a base fee higher than the standard base fee must be filed by the debtor's attorney within sixty (60) days after the conclusion of the creditor's meeting under Section 341 of the Bankruptcy Code.

(d) *NON-BASE FEE SERVICES DEFINED.* The following services are not covered by the standard base fee, and additional compensation for these services may be awarded by the Court:

(A) Motion for authority to sell real property.

(B) Application to incur debt.

(C) Prosecution or defense of adversary proceedings.

(D) Filing of formal motions or responses pertaining to four or more matters arising during the first year of the case, including but not limited to the services listed below in subsection (f).

(E) Any other service that, in the discretion of the court, reasonably warrants additional compensation.

(e) *APPROVAL OF NON-BASE FEES.* Except as specified in subsection (f), applications for fees for any non-base fee services provided to a Chapter 13 debtor must be approved by the Court. Notice of each application for fees and expenses in any amount under $1000.00 must be sent to each debtor, the Trustee, and the Bankruptcy Administrator. Notice of each application for fees and expenses of $1000.00 and above must be given to all parties in interest.

(f) *PRESUMPTIVE NON-BASE FEES/APPROVAL/NOTICE.* The following fees for non-base fee services are presumptively reasonable. Applications for these fees must be filed with a notice verifying completion of the service and a certificate of service evidencing service of the notice on each debtor, the Trustee and the Bankruptcy Administrator. The applications will automatically be approved by the Court.

(A) Motion to use interrogatories, and interrogatories. ..... $150.00
(B) Motion for turnover. ..... $250.00
(C) Adversary proceeding for turnover. ..... $500.00
(D) Uncontested lien avoidance. ..... $500.00
(E) Motion to avoid judicial lien. ..... $200.00
(F) Motion to modify plan post-confirmation. ..... $250.00
(G) Motion to substitute collateral. ..... $350.00
(H) Motion for authority to sell property. ..... $250.00
(I) Application to incur debt. ..... $200.00
(J) Defense of motion for relief from stay and/or co-debtor stay. ... $350.00
(K) Handling of an insurance inquiry received more than twelve (12) months after the Chapter 13 case is filed. ..... $50.00
(L) Defense of motion to dismiss. ..... $200.00
(M) Motion for hardship discharge. ..... $350.00

(N) Objection to claims. ..... $200.00
(O) Notice to abandon property. ..... $100.00
Alternatively, the debtor's attorney may apply to the Court for approval of non-base fees on a "time and expense" basis pursuant to Bankruptcy Rule 2016, 11 U.S.C. § 330, and subsection (c) above.

(g) *DISCLOSURE OF FEE PROCEDURES.* Every attorney for a Chapter 13 debtor must disclose to the debtor the procedures applicable in this district to awards of attorneys' fees in Chapter 13 cases.

(h) *INTERIM APPROVAL OF PARTIAL BASE FEE.* An attorney fee of $400.00 for services provided to the debtor up to and including the petition date is authorized and shall be considered part of the base fee. Any amount in excess of $400.00 collected by the attorney prior to filing the Chapter 13 petition must be held in the attorney's client trust account pending further order of the Court or approval of the fees in accordance with this Rule.

(i) *PAYMENT OF ATTORNEY FEES/MODIFICATION OF PLAN.* The following will be treated and paid as administrative expenses of the Chapter 13 case:

(A) The standard base fee, less any partial base fee paid prior to filing the Chapter 13 petition; and

(B) Any additional amounts awarded in excess of the standard base fee or for non-base fee services.

These fees shall be paid by the Trustee at the rate of $100.00 per month unless the Court directs otherwise. The Trustee may, without application to the Court, modify the Chapter 13 plan to extend the duration of the plan and/or increase the monthly amount of the plan payment in order to provide the funds necessary to pay attorney fees. The Trustee must notify the debtor and the debtor's attorney of the plan modification. (Enacted March 28, 2000)

**Rule 2070.1. Estate administration — Deposit of estate funds pursuant to 11 U.S.C. § 345: Reporting requirements and collateralization of deposits exceeding $100,000.00.**

(a) *Initial deposit reports.* Promptly after making the initial deposit or investment of the estate's funds, the trustee or the debtor in possession shall file a report with the bankruptcy administrator that identifies the depository or describes the investment and states the amount of any deposit or investment.

(b) *Reports required from entities holding estate funds.*

(1) An entity with which estate funds have been deposited or invested shall file a monthly report with the bankruptcy administrator in a format prescribed by the bankruptcy administrator indicating the amount credited to each bankruptcy estate account as of the date of the report.

(2) Whenever the total of deposited or invested estate funds not insured or guaranteed by the United States or backed by the full faith and credit of the United States reaches 95 percent of the amount of the bond or securities posted, the entity with which such funds are deposited or invested shall file a written statement with the bankruptcy administrator setting forth the total amount of such deposits not so insured, guaranteed or backed by the full faith and credit of the United States and the amount of the existing bond or securities.

(3) In the event that an entity holding estate funds fails to comply with the reporting requirements set forth in this rule, the bankruptcy administrator may direct the debtor in possession or the trustee to immediately withdraw all funds on deposit or invested with the entity with all interest payable thereon.

(c) *Collateralization of deposits.*

(1) If the monies of an estate which are on deposit exceed $100,000, or such other amount as may be insured by the Federal Deposit Insurance Corpora-

tion, the depository must post a bond or deposit securities of the kind specified in 31 U.S.C. § 9303 for any amount in excess of $100,000 with the Federal Reserve Bank. Court approval of the bond or deposit of securities must be obtained for a deposit or investment for which a bond is required under § 345(b) of the Code.

(2) Securities accepted for deposit in lieu of a surety on a depository bond shall be deposited in the custody of the Federal Reserve Bank in Richmond or such other branch as may be approved by the bankruptcy administrator.

(3) Upon deposit of securities by the depository with the Federal Reserve Bank, a copy of the document evidencing the deposit shall be transmitted to the bankruptcy administrator.

(d) *Deficiency in amount of bond or deposited securities.* Whenever the bond and any deposited securities do not or will not constitute adequate security because of existing and expected deposits o investments, the depository or entity with which an investment is made shall increase the amount of the bond or the deposited securities within a time fixed by the bankruptcy administrator. If, within the time fixed, the depository or entity with which an investment is made fails to increase the amount of the bond or the deposited securities to an amount adequate for existing and expected deposits or investments, the bankruptcy administrator may direct the trustee or debtor in possession to withdraw all funds on deposit or invested with the entity together with all interest payable thereon.

## PART III. CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

### Rule 3001.1. Claims and Equity Security Interests — General.

(a) *WHERE TO FILE A CLAIM:*

(1) In chapter 7 and 11 cases, all claims shall be filed with the clerk of court in accordance with Rule 5005, Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rule 5001-2.

(2) In chapter 12 and 13 cases, all claims shall be filed with the appropriate standing trustee as provided in Local Bankruptcy Rule No. 5005-1.

(b) *TIME FOR FILING CLAIMS IN A CHAPTER 11 CASE:* In a chapter 11 case, a proof of claim shall be filed within ninety (90) days after the date first set for the meeting of creditors pursuant to 11 U.S.C. § 341(a), except as provided in Rule 3002(c)(1) of the Federal Rules of Bankruptcy Procedure or otherwise extended by the court.

(c) *DEBTORS' NOTICE OF DISPUTED, CONTINGENT OR UNLIQUIDATED CLAIMS:* In addition to the duties set forth in Local Bankruptcy Rule 4002-1(b), the debtor shall notify each creditor whose claim is scheduled as contingent, disputed, or unliquidated of that fact within fifteen (15) days after filing the schedule of assets and liabilities or within fifteen (15) days after addition of any creditors to the petition. Failure to notify a creditor that its claim is listed as disputed, contingent, or unliquidated shall result in the creditor's claim being deemed filed in the amount listed as disputed, contingent, or unliquidated, as though a proof of claim had been filed by the creditor. The debtor shall file a certificate of service with the clerk of court within three (3) days after service has been made.

(d) *FILING OF CLAIMS BY DEBTOR OR TRUSTEE:* . In Chapter 13 cases, if a creditor fails to file a proof of claim on or before the first date set for the § 341(a) meeting of creditors, the debtor or trustee may do so in the name of the creditor within 30 days after service by the Chapter 13 Trustee of the List of Claims Filed in the debtor's case. If the debtor or trustee does file a proof

on behalf of a creditor, the creditor may file an amended proof pursuant to Rule 3002 or Rule 3003(c), which shall supercede the proof filed by the debtor or trustee. (Amended effective March 28, 2001.)

### Rule 3002.1. Filing proof of claim or interest.

(a) In chapters 7 and 11 cases, all claims shall be filed with the clerk of court in accordance with Rule 5005, Federal Rules of Bankruptcy Procedure.

(b) In chapter 12 and 13 cases, all claims shall be filed with the appropriate standing trustee as provided in Local Bankruptcy Rule No. 5005.1, Eastern District of North Carolina.

### Rule 3003.1. Filing proof of claim or equity security interest in Chapter 9 municipality or Chapter 11 reorganization cases.

The debtor shall notify each creditor whose claim is scheduled as contingent, disputed, or unliquidated of that fact within fifteen (15) days after filing the schedule of assets and liabilities or within fifteen (15) days after addition of any creditors to the petition. Failure to notify a creditor that its claim is listed as disputed, contingent, or unliquidated shall result in the creditor's claim being deemed filed in the amount listed as disputed, contingent, or unliquidated, as though a proof of claim had been filed by the creditor. The debtor shall file a certificate of service with the clerk of court within three (3) days after service has been made.

CASE NOTES

**Applicability to Divorce Action.** — Where debtor listed pending divorce action against spouse appellee as a "chose in action" under the asset schedule, listing the value as "undetermined," and where debtor did not schedule spouse as a creditor, but did place her name and address on the original mailing matrix, appellee was not aware that her marital rights were being extinguished and, therefore, was not bound by the confirmed Chapter 11 plan. Hoffman v. Hoffman, 157 Bankr. 580 (E.D.N.C. 1992), aff'd, 998 Bankr. 1009 (1993).

### Rule 3003.2. Time for filing claims in a Chapter 11 case.

In a chapter 11 case, a proof of claim shall be filed within ninety (90) days after the date first set for the meeting of creditors called pursuant to 11 U.S.C. § 341(a) of the Code, except as otherwise extended by order of the court.

### Rule 3010.1. Payments to creditors in Chapter 13 individual's debt adjustment cases.

Rule 3010(b), Federal Rules of Bankruptcy Procedure, is amended to the extent that standing chapter 13 trustees are authorized to make payments to creditors in amounts smaller than $15.00 without waiting until that creditor's dividends accumulate to $15.00. The decision as to whether to make smaller payments shall be solely in the discretion of the trustee as to what is in the best interest of the individual estate.

### Rule 3012.1. Valuation of security.

After notice, a chapter 13 trustee may recommend the value of a creditor's security at the § 341 meeting and, unless an objection is filed within twenty (20) days after notice of the recommendation, the court may accept the recommendation of value for the purpose of distribution under the plan.

**Rule 3017.1. Notices required to be sent by Chapter 11 debtors.**

The debtor in possession in a chapter 11 case shall be responsible for mailing the following notices and documents to creditors, after having their form and content approved by the clerk of court, and for filing a certificate of mailing with the clerk of court within three (3) days of the date of the mailing:

(1) notice of the meeting of creditors;

(2) notice of the hearing on disclosure statement;

(3) the plan, approved disclosure statement and the notice regarding balloting and date for hearing on confirmation;

(4) confirmation order; and

(5) any other notices as the court or clerk of court shall direct in a particular matter.

## PART IV. THE DEBTOR: DUTIES AND BENEFITS

**Rule 4001.1. Automatic stay — Relief from.**

*Standing modification of the automatic stay.* The automatic stay provided in 11 U.S.C. § 362(a) is modified in bankruptcy cases as follows:

(a) In chapter 13 cases, affected secured creditors may:

(1) contact the debtor about the status of insurance coverage on property used as collateral;

(2) if there are direct payments to creditors, contact the debtor about any payment in default.

(3) send to the debtor statements, payment coupons or other correspondence that the creditor sends to its non-debtor customers.

(b) In chapter 11 and 12 cases, the Internal Revenue Service and the North Carolina Department of Revenue may contact the debtor or the trustee and the debtor's depository to verify that all required tax deposits are being made and reported and that all tax returns are being filed and remittances paid in the manner prescribed by law. The debtor or trustee and the debtor's designated depository shall assist the Internal Revenue Service and the North Carolina Department of Revenue with the monitoring and verification of the provisions of this rule.

(c) In chapters 7 and 13 cases, the Internal Revenue Services is authorized:

(1) to make income tax refunds, in the ordinary course of business, directly to the chapter 7 and 13 debtors unless otherwise ordered by the court or otherwise instructed by the chapter 7 trustee or the standing chapter 13 trustee;

(2) to offset against any refund due a debtor any taxes due the United States government;

(3) to assess any tax liability satisfied by offsetting any refunds, when such liability has not been assessed previously;

(4) to assess tax liabilities shown on voluntarily filed returns and other agreed-to liabilities.

(d) In chapter 13 cases, secured creditors seeking relief from the automatic stay on grounds of post-petition default by the debtor must specify in a motion that they seek relief on grounds of the debtor's default and must set forth, with specificity, the payments alleged to be in default. (Amended March 28, 2001.)

**Rule 4001.2. Secured Creditor Duties.**

A secured creditor must respond promptly to a chapter 13 debtor's reasonable requests for account information (Enacted March 28, 2001.)

**Rule 4002.1. Debtor duties.**

(a) The debtor filing a petition requesting relief under chapter 7 of the Code shall comply with the following:

(1) *Statement of intention.* A chapter 7 debtor who is required to file a statement of intention pursuant to 11 U.S.C. § 521(2)(A) shall serve a copy of the statement upon the creditor whose claim is secured by the property which is the subject of the statement. The debtor shall file a certificate of service with the clerk of court within three (3) days of the filing of the statement.

(2) *Failure to perform statement of intention.* If a chapter 7 debtor should fail to perform the intention as required by 11 U.S.C. § 521(2)(B), the court may, upon motion of the affected creditor, ex parte order the lifting of the stay of 11 U.S.C. § 362(a) and order the debtor to turn over the property to such creditor.

(b) *Duties of chapter 11 debtor in possession.*

(1) The debtor shall:

(A) *Monthly report.* File with the bankruptcy administrator monthly accountings, the first report being due within thirty (30) days after the filing of the petition and subsequent reports on or before the fifteenth day of each month thereafter. The debtor shall serve a copy of all monthly reports on the attorney and the chairman for the unsecured creditors committee. Such report shall be in a format prescribed by the bankruptcy administrator.

(B) *Books of account.* Close the present books of account as of the close of business on the date on which the petition is filed and shall open new books of account and a bank account in a court approved depository as of the opening of business on the next succeeding business day. In the new books of account, the debtor shall keep proper records of earnings, expenses, receipts and disbursements, and all obligations incurred and business transactions. The debtor shall preserve proper vouchers for all payments made on account of the disbursements. If the debtor is authorized to sue cash collateral, separate cash collateral accounts must be established and maintained pursuant to 11 U.S.C. § 363(c)(4).

(C) *Proof of insurance coverage.* Keep the property of the debtor insured in a manner and to the extent as amy be deemed necessary and prudent with loss payable clauses, in the case of pledged or mortgaged property, in favor of the appropriate secured creditors as their interests may appear. Within five (5) days of the filing of the petition, the debtor shall file with the bankruptcy administrator a verified statement or written evidence that worker's compensation, general liability, fire, theft and motor vehicle insurance are in full force and effect, together with all other insurance coverage ordinarily used in the debtor's operations.

(D) *Tax accounts.* Segregate and hold separate from all other funds, all monies withheld from employees or collected from others for taxes, including social security taxes, under any law of the United States or any state or subdivision thereof. The debtor shall deposit the funds so withheld or collected, together with the debtor's share of social security taxes in a separate bank account simultaneously with the collection or withholding. The debtor shall pay from the bank account to the appropriate taxing authority the amounts due at the times and in the manner prescribed by law.

(E) *Banking institution.* Advise the bankruptcy administrator, within ten (10) days of the filing of the petition, of the name of the bank to be used as the debtor's depository.

(F) *Filing of plan and disclosure statement.* File a plan or reorganization and a disclosure statement within one hundred twenty (120) days of the date of the filing of the petition commencing the case, unless otherwise ordered.

(G) *Physical inventory.* Procure a physical inventory, if applicable, upon the filing of the petition and file the inventory with the bankruptcy administrator

within thirty (30) days of the filing of the petition or such other time as the court may direct.

(H) *Projected operating statement.* File with the bankruptcy administrator, within ten (10) business days of the filing of the petition commencing the case, a projected operating statement for the next thirty (30) days of operation under chapter 11. The statement must contain:

(i) The estimated costs of operation for the next succeeding thirty (30) days;

(ii) The estimated profit or loss for the period;

(iii) The amount of cash available for the operation;

(iv) How the debtor intends to fund the cost of operation for the next thirty (30) days; and

(v) Any other and additional information that is pertinent to determine the desirability of continuing the debtor's business.

(I) *Relationship with secured creditors and unsecured creditors committee.* promptly respond to reasonable inquiries of secured creditors, the unsecured creditors committee, and any court appointed consultant.

(2) The debtor shall **not**:

(A) *Payment to professionals.* prior to confirmation of a plan of reorganization, compensate or remunerate itself, or any of its partners, officers, directors or shareholders in any manner without prior approval of the court. Any application for approval of compensation should set forth the name and proposed position of the individual sought to be employed along with a detailed description of the duties the individual is to perform, the number of hours each week the individual will devote to those duties and the reasons why the employment of the individual is necessary to the successful reorganization of the debtor. Also, the application should set forth the amount of compensation sought on a weekly or monthly basis and disclose all perquisites, benefits and consideration of any kind the individual is to receive, e.g., use of company vehicles, payment of life or health insurance premiums, reimbursement of expenses. The salary history of the individual for the year immediately preceding the filing of the petition shall be disclosed. The application shall be signed under oath. The court may reconsider applications to compensate principals sua sponte or at the request of the bankruptcy administrator, any creditor or other party in interest.

(B) *Payment of prepetition debt.* pay prepetition unsecured debt without approval of the court.

(c) *Duties of chapter 12 debtor.*

(1) The debtor shall:

(A) *Monthly reports.* file with the chapter 12 trustee monthly reports, the first report being due within thirty (30) days after the petition is filed. Subsequent reports are due no later than the fifteenth day of each month thereafter. The reports shall contain:

(i) monthly receipts from every source;

(ii) monthly disbursements by accounting classification;

(iii) expenses charged and not paid;

(iv) crop inventory (if applicable);

(v) livestock inventory (if applicable);

(vi) tax deposit statement (if applicable).

(B) *Books of account.* close the present books of account as of the close of business on the date on which the petition is filed and open new books of account and a bank account as of the opening of business on the next succeeding business day. In the new books of account, the debtor shall keep proper records of earnings, expenses, receipts, disbursements, and all obligations incurred and transactions had in the operation of the business. The debtor shall preserve proper vouchers for all payments made on account of the disbursements.

(C) *Proof of insurance coverage.* keep the property of the debtor insured in a manner and to the extent as may be deemed necessary with loss payable clauses, in the case of pledged or mortgaged property, in favor of the appropriate secured creditors as their interests may appear.

(D) *Tax accounts.* segregate and hold separate and apart from all other funds, all monies withheld from employees or collected from others for taxes, including social security taxes, under any law of the United States or any state or subdivision thereof. The debtor shall deposit the funds so withheld or collected, together with the debtor's share of social security taxes, in a separate bank account simultaneously with the collection or withholding. The debtor shall pay from the bank account to the appropriate taxing authorities the amounts due at the times and in the manner prescribed by law.

(E) *Banking institution.* advise the bankruptcy administrator within ten (10) days of the filing of the petition commencing the case under chapter 12 the name of the bank to be used as the debtor's depository.

(F) *Filing of plan.* file a plan of reorganization within ninety (90) days of the filing of the petition pursuant to 11 U.S.C. § 1221.

(G) *Relationship with creditors.* promptly respond to reasonable inquiries of creditors.

(2) The debtor shall **not**:

(A) *Payments to principals.* prior to confirmation of a plan of reorganization, compensate or remunerate itself or any of its partners, officers, directors or shareholders in any manner without prior approval of the court. Any application for approval of compensation should set forth the name and proposed position of the individual sought to be employed along with a detailed description of the duties the individual is to perform, the number of hours each week the individual will devote to those duties and the reasons why employment of the individual is necessary to th successful reorganization of the debtor. Also, the application should set forth the amount of compensation sought on a weekly or monthly basis and disclose all perquisites, benefits and consideration of any kind the individual is to receive, e.g., use of company vehicles, payment of life or health insurance premiums, reimbursement of expenses. The salary history of the individual for the year immediately preceding the filing of the petition shall be disclosed. The application shall be signed under oath.

(B) *Payment of prepetition debt.* pay prepetition unsecured debt without approval of the court.

(d) *Duties of chapter 13 debtor.* The debtor filing a petition requesting relief under chapter 13 of the Code shall comply with the following:

(1) *Payments under plan.* The debtor shall begin making the payments called for in the proposed plan on the first day of the first month following the month in which the chapter 13 case is filed. The payments shall be made directly to the standing chapter 13 trustee.

(2) *Direct payments to creditors.* If secured claims are to be paid outside the plan, the debtor must continue to make the regular scheduled payments to the secured creditor prior to confirmation.

(3) *Disposition of property:* The debtor shall not dispose of any property by sale or otherwise without prior approval of the trustee and an order of the court.

(4) *Obtaining credit.* The debtor shall not purchase additional property or incur additional debt for more than $5,000 without prior approval from the court. The debtor must give notice of the application to purchase additional property or to incur additional debt to the chapter 13 trustee who must respond within 5 days of receipt of the notice. If no objection is filed, the court may approve the application without a hearing.

(5) *Adequate protection.* When a case is dismissed prior to confirmation, the court may require the debtor to provide adequate protection to one or more

secured creditors by directing the chapter 13 trustee to make adequate protection payments from funds received under paragraph (d)(1) of this rule.

(6) *Collision insurance.* If the collision insurance coverage lapses on a vehicle subject to a secured claim, the debtor shall immediately refrain from driving the vehicle.

**CASE NOTES**

**Cited** in In re Neal, 106 Bankr. 90 (Bankr. E.D.N.C. 1989).

## Rule 4002.2. Duties of Chapter 7 debtor.

The debtor filing a petition requesting relief under chapter 7 of the Code shall comply with the following:

(1) *Statement of intention.* A chapter 7 debtor who is required to file a statement of intention pursuant to 11 U.S.C. § 521(2)(A) shall serve a copy of the statement upon the creditor whose claim is secured by the property which is the subject of the statement. The debtor shall file a certificate of service with the clerk of court within three (3) days of the filing of the statement.

(2) *Failure to perform statement of intention.* If a chapter 7 debtor should fail to perform the intention as required by 11 U.S.C. § 521(2)(B), the court may, upon motion of the affected creditor, ex parte order the lifting of the stay of 11 U.S.C. § 362(a) and order the debtor to turn over the property to such creditor.

## Rule 4002.3. Duties of Chapter 11 debtor in possession.

(a) The debtor shall:

(1) *Monthly report.* File with the bankruptcy administrator monthly accountings, the first report being due within 30 days after the filing of the petition and subsequent reports on or before the 15th day of each month thereafter. The debtor shall serve a copy of all monthly reports on the attorney and the chairman for the unsecured creditors committee. Such report shall be in a format prescribed by the bankruptcy administrator.

(2) *Books of account.* Close the present books of account as of the close of business on the date on which the petition is filed and shall open new books of account and a bank account in a court approved depository as of the opening of business on the next succeeding business day. In the new books of account, the debtor shall keep proper records of earnings, expenses, receipts and disbursements, and all obligations incurred and business transactions. The debtor shall preserve proper vouchers for all payments made on account of the disbursements. If the debtor is authorized to use cash collateral, separate cash collateral accounts must be established and maintained pursuant to 11 U.S.C. § 363(c)(4).

(3) *Proof of insurance coverage.* Keep the property of the debtor insured in a manner and to the extent as may be deemed necessary and prudent with loss payable clauses, in the case of pledged or mortgaged property, in favor of the appropriate secured creditors as their interests may appear. Within five (5) days of the filing of the petition, the debtor shall file with the bankruptcy administrator a verified statement or written evidence that worker's compensation, general liability, fire, theft and motor vehicle insurance are in full force and effect, together with all other insurance coverage ordinarily used in the debtor's operations.

(4) *Tax accounts.* Segregate and hold separate from all other funds, all monies withheld from employees or collected from others for taxes, including social security taxes, under any law of the United States or any state or subdivision thereof. The debtor shall deposit the funds so withheld or collected,

together with the debtor's share of social security taxes in a separate bank account simultaneously with the collection or withholding. The debtor shall pay from the bank account to the appropriate taxing authority the amounts due at the times and in the manner prescribed by law.

(5) *Banking institution.* Advise the bankruptcy administrator, within ten (10) days of the filing of the petition, of the name of the bank to be used as the debtor's depository.

(6) *Filing of plan and disclosure statement.* File a plan of reorganization and a disclosure statement within 120 days of the date of the filing of the petition commencing the case.

(7) *Physical inventory.* Procure a physical inventory, if applicable, upon the filing of the petition and file the inventory with the bankruptcy administrator within thirty (30) days of the filing of the petition or such other time as the court may direct.

(8) *Projected operating statement.* File with the bankruptcy administrator, within ten (10) working days of the filing of the petition commencing the case, a projected operating statement for the next thirty (30) days of operation under chapter 11. The statement must contain:

A. the estimated costs of operation for the next succeeding thirty (30) days;

B. the estimated profit or loss for the period;

C. the amount of cash available for the operation;

D. how the debtor intends to fund the cost of operation for the next thirty (30) days; and

E. any other and additional information that is pertinent to determine the desirability of continuing the debtor's business.

(9) *Relationship with secured creditors and unsecured creditors committee.* Promptly respond to reasonable inquiries of secured creditors, the unsecured creditors committee, and any court appointed consultant.

(b) The debtor shall not:

(1) *Payment to professionals.* Prior to confirmation of a plan of reorganization, compensate or remunerate itself, or any of its partners, officers, directors or shareholders in any manner without prior approval of the court. Any application for approval of compensation should set forth the name and proposed position of the individual sought to be employed along with a detailed description of the duties the individual is to perform, the number of hours each week the individual will devote to those duties and the reasons why employment of the individual is necessary to the successful reorganization of the debtor. Also, the application should set forth the amount of compensation sought on a weekly or monthly basis and disclose all perquisites, benefits and consideration of any kind the individual is to receive, e.g., use of company vehicles, payment of life or health insurance premiums, reimbursement of expenses. The salary history of the individual for the year immediately preceding the filing of the petition shall be disclosed. The application shall be signed under oath.

(2) *Payment of pre-petition debt.* Pay pre-petition unsecured debt without approval of the court.

**Rule 4002.4. Duties of Chapter 12 debtor.**

(a) The debtor shall:

(1) *Monthly reports.* File with the chapter 12 trustee monthly reports, the first report being due within thirty (30) days after the petition is filed. Subsequent reports are due no later than the 15th day of each month thereafter. The reports shall contain:

A. monthly receipts from every source;

B. monthly disbursements by accounting classification;

C. expenses charged and not paid;
D. crop inventory (if applicable);
E. livestock inventory (if applicable);
F. tax deposit statement (if applicable).

(2) *Books of account.* Close the present books of account as of the close of business on the date on which the petition is filed and open new books of account and a bank account as of the opening of business on the next succeeding business day. In the new books of account, the debtor shall keep proper records of earnings, expenses, receipts, disbursements, and all obligations incurred and transactions had in the operation of the business. The debtor shall preserve proper vouchers for all payments made on account of the disbursements.

(3) *Proof of insurance coverage.* Keep the property of the debtor insured in a manner and to the extent as may be deemed necessary with loss payable clauses, in the case of pledged or mortgaged property, in favor of the appropriate secured creditors as their interests may appear.

(4) *Tax accounts.* Segregate and hold separate and apart from all other funds, all monies withheld from employees or collected from others for taxes, including social security taxes, under any law of the United States or any state or subdivision thereof. The debtor shall deposit the funds so withheld or collected, together with the debtor's share of social security taxes, in a separate bank account simultaneously with the collection or withholding. The debtor shall pay from the bank account to the appropriate taxing authorities the amounts due at the times and in the manner prescribed by law.

(5) *Banking institution.* Advise the bankruptcy administrator within ten (10) days of the filing of the petition commencing the case under chapter 12 the name of the bank to be used as the debtor's depository.

(6) *Filing of plan.* File a plan of reorganization within ninety (90) days of the filing of the petition pursuant to 11 U.S.C. § 1221.

(7) *Relationship with creditors.* Promptly respond to reasonable inquiries of creditors.

(b) The debtor shall not:

(1) *Payments to principals.* Prior to confirmation of a plan of reorganization, compensate or remunerate itself or any of its partners, officers, directors or shareholders in any manner without prior approval of the court. Any application for approval of compensation should set forth the name and proposed position of the individual sought to be employed along with a detailed description of the duties the individual is to perform, the number of hours each week the individual will devote to those duties and the reasons why employment of the individual is necessary to the successful reorganization of the debtor. Also, the application should set forth the amount of compensation sought on a weekly or monthly basis and disclose all perquisites, benefits and consideration of any kind the individual is to receive, e.g., use of company vehicles, payment of life or health insurance premiums, reimbursement of expenses. The salary history of the individual for the year immediately preceding the filing of the petition shall be disclosed. The application shall be signed under oath.

(2) *Payment of pre-petition debt.* Pay pre-petition unsecured debt without approval of the court.

**Rule 4003.1. Exemptions.**

If the debtor is an individual and desires to claim exemptions, the debtor shall file a claim for exempt property pursuant to 11 U.S.C. § 522(b)(1) on Local Form No. 2, which is available from the clerk of court. The debtor's filing of Local Form No. 2 must be referenced in Schedule C, Property Claimed as Exempt.

**Rule 4003.2. Extension of time for objections to exemptions.**

The court may grant any party in interest an extension of time for objecting to the debtor's claim of exempt property. The request for extension shall be by motion which shall contain the reasons for requesting the extension. The motion must be filed before the time for objecting expires.

## PART V. COURTS AND CLERKS' OFFICES

**Rule 5001.1. Office hours, divisions of the district, assignment of cases to a division.**

(a) *Office hours.* The office of the clerk of court with the clerk of court or a deputy clerk in attendance shall be open to the public from 8:30 a.m. until 4:30 p.m. on all days except Saturdays, Sundays and the legal holidays listed in Rule 6(a), Federal Rules of Civil Procedure, or as otherwise ordered.

(b) *Divisions of the district.* There shall be six divisions of the court. The headquarters of each division and the counties comprising each division are as follows:

| Name of Division | Headquarters | Counties | |
|---|---|---|---|
| Elizabeth City | Wilson | Bertie | Hertford |
| | | Camden | Pasquotank |
| | | Chowan | Perquimans |
| | | Currituck | Tyrrell |
| | | Dare | Washington |
| | | Gates | |
| Fayetteville | Wilson | Cumberland | Sampson |
| | | Robeson | |
| New Bern | Wilson | Beaufort | Lenoir |
| | | Carteret | Martin |
| | | Craven | Onslow |
| | | Hyde | Pamlico |
| | | Jones | Pitt |
| Raleigh | Raleigh | Franklin | Vance |
| | | Granville | Wake |
| | | Harnett | Warren |
| | | Johnston | |
| Wilmington | Wilson | Bladen | Duplin |
| | | Brunswick | New Hanover |
| | | Columbus | Pender |
| Wilson | Wilson | Edgecombe | Northampton |
| | | Greene | Wayne |
| | | Halifax | Wilson |
| | | Nash | |

(c) *Assignment of cases to a division.* The clerk shall assign all cases and proceedings to a division when the action is filed or removed. The place of filing shall be determined by the debtor's domicile, residence, principal place of business or location of the debtor's principal assets immediately preceding the filing of the bankruptcy case. In cases involving an affiliate, a general partner

or partnership, related cases may be filed in the division where the original case was filed.

In adversary proceedings when there is no pending bankruptcy case in this district, the division will be assigned in the discretion of the clerk. (Amended effective January 2, 1992.)

**Rule 5003.1. Duties of the clerk.**

*Orders and judgments.* The clerk of court is authorized to enter the orders and judgments listed below without further direction of the court. However, such action may be suspended, altered or rescinded by the court for cause shown:

(1) consent orders for the substitution of attorneys;

(2) orders setting status conferences and preliminary conferences;

(3) orders extending for a reasonable amount of time the period within which to file a response or answer to a complaint (first request only);

(4) orders continuing trial with consent of all parties;

(5) stipulations of dismissal or consent orders dismissing a proceeding;

(6) judgments by default as provided for in Rule 55(a) and 55(b)(1), Federal Rules of Civil Procedure; and

(7) orders canceling liability on bonds.

**Rule 5005.1. Filing papers — Requirements.**

(a) *Claims.* In chapter 12 and 13 cases, proofs of claim shall be filed directly with the appropriate standing trustee to whom the case is assigned. The address of the proper standing trustee will be shown on the notice of the meeting of creditors. Claims will be dated and stamped as "received" as of the date they arrive in the office of the trustee, and the claim shall be deemed filed with the court as of that date.

The staff of the standing chapter 12 and 13 trustee shall prepare a claims register for each case referred to that trustee and the claims register shall be transferred to the clerk of court and made a part of the permanent record at the closing of the case, together with the original claims.

(b) *Papers filed with the clerk.* All pleadings (including but not limited to complaints, answers, motions and applications) and all proposed orders shall be tendered by the party submitting the documents to the clerk of court, rather than directly to the judge unless otherwise specifically directed. The clerk of court shall first accomplish any necessary processing of the document before the document is forwarded to any judge of this court for consideration.

(c) *Filing by facsimile.*

(1) *Filing.* The following documents may be filed by facsimile transmission to the clerk.

(A) motions for a continuance stipulated to by all parties;

(B) withdrawal of motions that are scheduled for hearing; and

(C) any other filings allowed by the court.

(2) *Faxed document serves as original.* A document filed by facsimile serves as an original, and subjects the signer to the same penalties as an original document, including penalties of Rule 9011, Federal Rules of Bankruptcy Procedure.

**Rule 5008.1. Deposit of estate funds pursuant to 11 U.S.C. § 345: Reporting requirements and collateralization of deposits exceeding $100,000.00.**

(a) *Initial deposit reports.* Promptly after making the initial deposit or investment of the estate's funds, the trustee or the debtor in possession shall

file a report with the bankruptcy administrator that identifies the depository or describes the investment and states the amount of any deposit or investment.

(b) *Reports required from entities holding estate funds.*

(1) An entity with which estate funds have been deposited or invested shall file a monthly report with the bankruptcy administrator in a format prescribed by the bankruptcy administrator indicating the amount credited to each bankruptcy estate account as of the date of the report.

(2) Whenever the total of deposited or invested estate funds not insured or guaranteed by the United States or backed by the full faith and credit of the United States reaches 95 percent of the amount of the bond or securities posted, the entity with which such funds are deposited or invested shall file a written statement with the bankruptcy administrator setting forth the total amount of such deposits not so insured, guaranteed or backed by the full faith and credit of the United States and the amount of the existing bond or securities.

(3) In the event that an entity holding estate funds fails to comply with the reporting requirements set forth in this rule, the bankruptcy administrator may direct the debtor in possession or the trustee to immediately withdraw all funds on deposit or invested with the entity with all interest payable thereon.

(c) *Collateralization of deposits.*

(1) If the monies of an estate which are on deposit exceed $100,000, or such other amount as may be insured by the Federal Deposit Insurance Corporation, the depository must post a bond or deposit securities of the kind specified in 31 U.S.C. § 9303 for any amount in excess of $100,000 with the Federal Reserve Bank. Court approval of the bond or deposit of securities must be obtained for a deposit or investment for which a bond is required under § 345(b) of the Code.

(2) Securities accepted for deposit in lieu of a surety on a depository bond shall be deposited in the custody of the Federal Reserve Bank in Richmond or such other branch as may be approved by the bankruptcy administrator.

(3) Upon deposit of securities by the depository with the Federal Reserve Bank, a copy of the document evidencing the deposit shall be transmitted to the bankruptcy administrator.

(d) *Deficiency in amount of bond or deposited securities.* Whenever the bond and any deposited securities do not or will not constitute adequate security because of existing and expected deposits or investments, the depository or entity with which an investment is made shall increase the amount of the bond or the deposited securities within a time fixed by the bankruptcy administrator. If, within the time fixed, the depository or entity with which an investment is made fails to increase the amount of the bond or the deposited securities to an amount adequate for existing and expected deposits or investments, the bankruptcy administrator may direct the trustee or debtor in possession to withdraw all funds on deposit or invested with the entity together with all interest payable thereon.

## PART VI. COLLECTION AND LIQUIDATION OF THE ESTATE

### Rule 6005.1. Appraisers and auctioneers.

(a) *Employment of auctioneer without application to the court.* In a chapter 7 case where the gross sales proceeds of an auction conducted pursuant to this rule are reasonably anticipated by the trustee to be less than $50,000, the trustee may elect to employ an auctioneer without application to the court and

shall be authorized without application to the court to pay the auctioneer a commission of fifteen percent (15%) of gross sales inclusive of all expenses of the auction, which are to be paid from the auctioneer's commission.

(b) *Conditions precedent to employment.* The trustee may employ and compensate an auctioneer without application to the court on the basis set out in (a) above only if the following conditions are satisfied in advance:

(1) the auctioneer to be employed under (a) above must have been employed in a chapter 7 case in this district as an auctioneer by order of this court within the prior twelve months;

(2) the auctioneer must be licensed and in good standing with the North Carolina Auctioneer's Commission consistent with North Carolina General Statute Section 85-B-3 and 4;

(3) the auctioneer must execute and deliver to the trustee the same affidavit that would be required in support of an application for employment of auctioneer otherwise filed with the court;

(4) the auctioneer must not have been censured or suspended by the bankruptcy administrator; and

(5) the affidavit executed by the auctioneer must affirmatively set out compliance with the conditions of (2) and (4) above.

The trustee shall be entitled to rely on the truth and accuracy of the affidavit submitted by the auctioneer.

(c) *Report by trustee.* The trustee shall prepare a report of sale that includes a report of such fees paid to the auctioneer, and shall be accompanied by the auctioneer's affidavit. The trustee shall file such report of sale with the clerk and serve copies on the bankruptcy administrator.

(d) *Report by auctioneer.* An auctioneer employed to conduct a sale on behalf of the bankruptcy estate shall file a report of sale following the conclusion of any sale within the time and in the format as prescribed by the bankruptcy administrator.

# PART VII. ADVERSARY PROCEEDINGS

## Rule 7003.1. Commencement of an adversary proceeding.

All complaints initiating adversary proceedings in bankruptcy cases shall be accompanied by an Adversary Proceeding Cover Sheet (Form B 104), conforming substantially to Form No. 4 contained in these rules, which has been completed fully by the plaintiff.

## Rule 7012.1. Motions in adversary proceedings.

(a) *General requirements.* All motions shall state with particularity the facts supporting the motion and shall state the relief requested. All motions, except those seeking a shortening or extension of any time period, shall be filed with an accompanying memorandum.

(b) *Responses to motions.* Any party may file a written response to any motion within twenty (20) days after service of the motion in question unless otherwise ordered by the court or prescribed by the applicable rules of bankruptcy procedure. The response may be a memorandum and may be accompanied by affidavits or other supporting documents. When the response is not a memorandum, the written response shall be accompanied by a supporting memorandum. In the event no response is filed, the court may proceed to rule on the motion.

(c) *Hearings on motions.* Hearings on motions may be ordered by the court in its discretion.

**Rule 7016.1. Preliminary conference.**

(a) *Scheduling and notice.* A preliminary conference may be scheduled at the discretion of the court. The clerk of court shall give at least twenty (20) days notice of the conference.

(b) *Preparation by counsel for preliminary conference.* Counsel shall be prepared to discuss at the conference the following:

(1) the issues raised by the pleadings;

(2) issues concerning jurisdiction, venue, or the authority of the bankruptcy court;

(3) whether the parties, if the proceeding is a non-core proceeding, have consented to the bankruptcy judge hearing and determining the proceeding pursuant to 28 U.S.C. § 157(c)(2);

(4) the disposition of pending motions;

(5) the necessity, desirability, and timing of amendments to pleadings, joinder of additional parties, the filing of additional motions and discovery;

(6) the possibility of settlement;

(7) the need for additional pre-trial conferences;

(8) the timing and form of disclosures under Bankruptcy Rule 7026(a)(1), (as amended December 1, 1993), including a statement of when disclosures under (a)(1) were made or should be made;

(9) changes that should be made in the limitations on discovery imposed by the Federal Rules of Civil Procedure (as amended December 1, 1993); and

(10) whether use of expert witnesses is contemplated, and if so, whether and when the disclosure of expert information as required by Bankruptcy Rule 7026(a)(2) should be required.

(c) *Preliminary conference report.* At least one week prior to the preliminary conference, counsel shall file with the clerk of court a joint report containing information concerning all the items to be discussed at the preliminary conference (see paragraph (b) of this rule).

(d) *Disclosures.* Unless counsel agree to disclosures at an earlier date, disclosures required to be made by Rule 7026(a) and (b) shall be made at the time and under the circumstances directed by the court in the scheduling order entered after receipt of the preliminary conference report.

**Rule 7016.2. Final pre-trial conference.**

(a) *Scheduling and notice.* A final pre-trial conference shall be scheduled at the discretion of the court. The clerk of court shall give at least thirty (30) days notice of the conference.

(b) *Preparation by counsel for final pre-trial conference.* At least ten (10) days prior to the final pre-trial conference, trial counsel for each of the parties shall confer and prepare a proposed final pre-trial order. In the event no pre-trial conference is scheduled, counsel shall confer, prepare and submit a proposed final pre-trial order to the court no later than ten days prior to the scheduled trial. It shall be the duty of the counsel for the plaintiff to arrange for this conference. The conference of attorneys shall be held in a mutually agreeable location or may be conducted by telephone conference. Each counsel shall bring to the conference or be responsible for the exchange of copies of exhibits to be introduced into evidence, lists of witnesses to be called and designations of discovery material to be used at the trial. The disclosure of witnesses and exhibits under this section supersedes the requirements of timing and format otherwise required by Bankruptcy Rule 7026(a)(3).

(c) *Pre-trial order.* The pre-trial order shall be prepared in one sequential document without reference to attached exhibits or schedules and shall contain the following in five separate sections, numbered by Roman numerals, as indicated:

(1) *I. Stipulations.* Stipulations covering jurisdiction, joinder, capacity of the parties, all relevant and material facts, legal issues and factual issues.

(2) *II. Contentions.* Contentions covering matters on which the parties have been unable to stipulate, including jurisdiction, misjoinder, capacity of the parties, relevant and material facts, legal issues and factual issues. Claims and defenses as to which no contentions are listed in the pre-trial order are deemed abandoned.

(3) *III. Exhibits.* A list of exhibits that each party may offer at trial, including any map or diagram, numbered sequentially, which numbers shall remain the same throughout all further proceedings. Copies of all exhibits shall be provided to opposing counsel not later than the attorney conference provided for in Rule 7016.2(b). The court may excuse the copying of large maps or other exhibits. Except as otherwise indicated in the pre-trial order, it will be deemed that all parties stipulate that all exhibits are authentic and may be admitted into evidence without further identification or proof. Grounds for objection as to authenticity or admissibility must be set forth in the pre-trial order.

(4) *IV. Designation of pleadings and discovery materials.* The designation of all portions of pleadings and discovery materials, including depositions, interrogatories and request for admissions that each party may offer at trial by reference to document, volume, page number, and line. Objection by opposing counsel shall be noted by document, volume, page number and line, and reasons for such objections shall be stated.

(5) *V. Witnesses.* A list of the names and addresses of all witnesses each party may offer at trial, together with a brief statement of what counsel proposes to establish by their testimony.

(d) *Pre-trial conference.*

(1) *Purpose.* To resolve any disputes concerning the contents of the pre-trial order.

(2) Counsel shall be prepared to present to the court all necessary information and documentation necessary for completion of the pre-trial order. Failure to do so shall result in the sanctions provided by this rule.

(3) *Sanctions.* Rule 16(f) of the Federal Rules of Civil Procedure which provides for sanctions if a party or party's attorney fails to obey a scheduling or pre-trial order, or if no appearance is made on behalf of a party at a scheduling or pre-trial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, is applicable to adversary proceedings pursuant to Rule 7016, Federal Rules of Bankruptcy Procedure.

(4) *Form of pre-trial order.* A pre-trial order should be submitted in detail sufficient to comply with these rules. A sample pre-trial order is shown as Exhibit A of these rules.

**Rule 7016.3. Trials.**

(a) *Opening statements.* At the beginning of the trial, each party (beginning with the party having the burden of proof on the first issue) shall, without argument and in such reasonable time as the court allows, state to the court the following:

(1) the substance of the claim, counterclaim, crossclaim or defense; and

(2) what counsel contends the evidence will show. Parties not having the burden of proof on the first issue may elect to make an opening statement immediately prior to presenting evidence, rather than at the beginning of the trial.

(b) *Witnesses.* Counsel may not release a person from a subpoena without notice to opposing counsel and leave of court. A party objecting to the release of a person shall bear all costs incident to the person which arise subsequent to the request for release. The court, in its discretion and in the interest of

justice, may permit a party to call and examine a witness not listed in the final pre-trial order.

(c) *Exhibits.*

(1) All exhibits shall be pre-marked with stickers obtained from the office of the clerk of court with the sequential numbers as listed in the pre-trial order.

(2) Copies of all exhibits, properly bound, shall be provided to the court at the beginning of the trial.

(3) The original exhibit shall bear a sticker. After receipt into evidence, it shall remain in the custody of the courtroom deputy, except when being used by a witness.

(4) Copies of all exhibits shall bear the photostatic image of the sticker or a typed or printed reproduction thereof.

(5) Upon presentation of an exhibit to a witness, counsel shall announce to the court the exhibit number. The exhibit shall not be handed to opposing counsel. Should opposing counsel contend that a copy has not been provided or that the exhibit has been lost or misplaced, it shall be brought to the attention of the court.

(d) *Closing argument.* The court will set the times for closing argument after consultation with parties. Unless otherwise ordered by the court, the party with the burden of proof shall open and close the arguments. The opening argument may not be waived.

**Rule 7026.1. General provisions governing discovery.**

Transcripts of depositions upon oral examination and interrogatories, requests for production of documents, requests for admissions, and answers and responses thereto are not to be filed unless by order of the court or for use in the proceeding. All such papers must be served on other counsel or parties entitled to service of papers filed with the clerk of court. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the court if needed or so ordered.

**Rule 7041.1. Dismissal of actions for lack of prosecution.**

Except where a complaint objecting to a discharge has been filed, an adversary proceeding may be dismissed by the court for lack of prosecution as follows:

(1) where no service of process has been made and certified to the court within thirty (30) days after the filing of the complaint; or

(2) where no responsive pleadings have been filed and plaintiff has not moved for entry of default within thirty (30) days after the time for filing responsive pleadings has expired.

Dismissal under this local rule shall be without prejudice unless the delay has resulted in prejudice to an opposing party.

**Rule 7067.1. Deposit in court.**

In the event a depository intended by the court to receive registry funds is not able, immediately upon the court's receipt of the registry funds, to pledge sufficient collateral for receipt of those funds, the funds may be retained temporarily in non-interest bearing U. S. Treasury accounts as necessary to arrange for their deposit in interest-bearing accounts.

**Exhibit A**

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| IN RE: | | |
| JOE SMITH<br>Debtor | ) | CASE NO.: 86-02272-MN4 |
| ABC CORP.<br>Plaintiff | ) | |
| v. | ) | ADVERSARY PROCEEDING NO.:<br>M-86-0078-AP |
| JOE SMITH<br>Defendant. | ) | |

**FINAL PRE-TRIAL ORDER**

DATE OF CONFERENCE: May 5, 1986

Appearance: John Y. Lawyer, Raleigh, North Carolina, for plaintiff; Sam X. Attorney, Fayetteville, North Carolina, for defendant.

**I. STIPULATIONS**

A. All parties are properly before the court.

B. The court has jurisdiction of the parties and of the subject matter.

C. This is a core proceeding, or in the alternative, both parties have consented to hearing by the bankruptcy court.

D. All parties have been correctly designated.

E. There is no question as to misjoinder or nonjoinder of parties.

F. Facts:

1. Plaintiff is a New York Corporation, licensed to do business and doing business in the State of North Carolina.

2. Defendant is a citizen of Wake County, North Carolina.

G. Legal Issues: The legal issue is whether the debt owed by the defendant to the plaintiff is nondischargeable under 11 U.S.C. § 523(a)(2)(B).

H. Factual Issues:

1. Did the defendant receive money, property, services, or an extension, renewal, or refinancing of credit through the use of a statement in writing that was materially false?

2. Did the written statement relate to the defendant's or an insider's financial condition?

3. Did the plaintiff reasonably rely on the written statement?

4. Did the defendant make or publish the written statement with the intent to deceive plaintiff?

**II. CONTENTIONS**

A. **Plaintiff**

1. Facts:

(a) Plaintiff loaned defendant $XXX,XXX.XX based on written property appraisals that defendant had falsified materially.

(b) The written appraisals were on real property owned by the defendant.

(c) Plaintiff had no factual reason not to accept the appraisal and, therefore, reasonably relied on the appraisal.

(d) Defendant had the appraisal done simply for its use in obtaining the loan from plaintiff.

2. Law:

(a) The falsified property appraisal used by the defendant in obtaining a loan from the plaintiff has created a nondischargeable debt under 11 U.S.C. § 523(A)(2)(B).

B. **Defendant**

1. Facts:

(a) Defendant did not falsify the property appraisals he used in obtaining the loan from the plaintiff.

(b) Plaintiff is experienced as a commercial lender in the area and has made loans on property appraisals for 50 years.

(c) Defendant had the appraisal done at the plaintiff's request.

2. Law:

(a) The loan from plaintiff was not obtained through the use of a false appraisal and, therefore, the debt is dischargeable.

## III. EXHIBITS

A. **Plaintiff:**

| Number | Title | Objection |
|---|---|---|
| 1 | Appraisal of Bob Hope | Hearsay |
| 2 | Deed of Trust dated 1/4/84 | None |
| 3 | Promissory Note dated 1/4/84 | None |
| 4 | Personal Financial Statement dated 12/3/83 | None |

B. **Defendant:**

| Number | Title | Objection |
|---|---|---|
| 1 | Appraisal of Joe Smith | Hearsay |
| 2 | Debtor's Bankruptcy Petition | None |

## IV. DESIGNATION OF PLEADINGS AND DISCOVERY MATERIALS

A. **Plaintiff:**

| Document | Portion | Objection | Reason |
|---|---|---|---|
| Plaintiff's first set of interrogatories | Nos. 1, 8 and 9 | No. 8 | Privilege |
| Deposition of Richard Roe | Vol. 1, line 6, p. 1 thru line 5, p. 6 | Line 6, p. 1, thru line 2, p. 7 | Hearsay |

B. **Defendant:**

None

## V. WITNESSES

A. **Plaintiff:**

| Name | Address | Proposed Testimony |
|---|---|---|
| Frank Flake | Selma, N. C. | Loan officer — facts surrounding the loan |

B. **Defendant:**

All witnesses listed by plaintiff:

| Name | Address | Proposed Testimony |
|---|---|---|
| Sam Smith | Apex, N. C. | Facts surrounding value of real property in the debtor's area |

TRIAL TIME ESTIMATE: _____ days

_____
JOHN Y. LAWYER
Counsel for Plaintiff

_____
SAM X. ATTORNEY
Counsel for Defendant

APPROVED BY:

_____
U. S. BANKRUPTCY JUDGE
DATED: _____

# PART VIII. APPEALS TO DISTRICT COURT OR BANKRUPTCY APPELLATE PANEL

[Reserved]

# PART IX. GENERAL PROVISIONS

**Rule 9004.1. General requirements of form; Number of copies of other documents.**

(a) *Caption.* All pleadings, motions, discovery procedures, memoranda and other papers filed with the clerk or the court shall state the court and division in which the action is pending.

(b) *Number of copies of other documents.* The number of documents required to be filed with the clerk of court other than those provided for in the rules of bankruptcy procedure or local bankruptcy rules is as follows:

(1) any person requesting filed copies of documents for his office records must submit copies, in addition to those called for in the rules of bankruptcy procedure or local bankruptcy rules, together with a stamped, self-addressed envelope;

(2) any order or judgment that is tendered to the court for consideration shall have attached a sufficient number of copies for service on all parties required to receive notice of the order or judgment. Orders tendered without sufficient copies may not be considered until the required number of copies has been tendered;

(3) application for compensation .... original plus one;

(4) motions, applications, answers, responses and other general pleadings ..... original plus one. (Amended effective January 2, 1992.)

**Rule 9007.1. Designation of parties to provide notice.**

The clerk of court is authorized to designate the parties who shall provide the notice to creditors and parties in interest as required under the rules of bankruptcy procedure and the local bankruptcy rules.

### Rule 9010.1. Representation and appearances; Powers of attorney.

Local Rule No. 2.00 of the Local Rules of Court for the United States District Court, Eastern District of North Carolina, entitled "Attorneys," is applicable in this court, with the following exceptions:

(1) an individual may represent himself;

(2) an entity may be represented at a meeting of creditors by its officers and agents; however, all courtroom appearances, except as previously indicated, pleadings, motions, and objections must be by an attorney admitted to practice before this court.

### Rule 9010.2. Extent of an attorney's duty to represent.

Any attorney who files a bankruptcy petition for or on behalf of a debtor shall remain the attorney of record for all purposes including the representation of the debtor in all matters that arise in conjunction with the proceeding until the case is closed or the attorney is relieved upon application and court order. In the event additional fees are required, they must be applied for pursuant to Rule 2016, Federal Rules of Bankruptcy Procedure.

CASE NOTES

**Attorneys who, after filing bankruptcy petition, are indifferent** to the needs of their clients are not entitled to compensation. In re Wright, 48 Bankr. 172 (Bankr. E.D.N.C. 1985).

### Rule 9013.1. Motions: Form and service.

(a) *Form.* All pleadings, motions, discovery procedures, memoranda and other papers filed with the clerk or the court shall contain the individual name, firm name, address, telephone number and State Bar identification number, where applicable, of all attorneys who appear for the filing party.

(b) *Service on trustee and attorney for debtor in possession.* Any and all filings (except claims) in all proceedings and cases must be served on the trustee (including the standing chapter 12 and 13 trustee) for the debtor whether or not the trustee is a party to the proceeding. In chapter 11 cases, the attorney for the debtor in possession is to be served in like manner.

(c) *Service on bankruptcy administrator.* Any and all filings (except claims) in all chapter 7 and 11 cases must be served on the bankruptcy administrator.

(d) *Certificate of service.* Each pleading or document to be served on any party indicated in paragraphs (a) and (b) above shall have attached a certificate reflecting that service has been made on that party.

### Rule 9014.1. Contested matters.

(a) *Requirements of motion.* A motion shall be accompanied by all exhibits and attachments referred to in the motion, together with a notice of motion and certification of service. The notice of motion shall give notice of the filing of the motion, allow for a specific response time to the motion and shall conform substantially to Local Form No. 1 in these rules.

(b) *Content of motion.* Motions seeking relief other than as to the debtor or the trustee shall recite the name and address of the party against whom relief is sought.

(c) *Time for response.* A response and accompanying affidavits, if any, to any motion shall be filed within fifteen (15) days from the date of the service of motion, unless otherwise ordered or provided in the rules of bankruptcy procedure or local bankruptcy rules.

(d) *Service of motion.* The moving party shall serve copies of the motion, together with all exhibits and attachments, accompanied by a notice of motion

in the manner prescribed in Rule 7004, Federal Rules of Bankruptcy Procedure, contemporaneously with the filing of the original motion and notice with the clerk of court, and shall attach a certificate of service to the original motion and notice to be filed with the clerk of court.

(e) *Response.* Any party against whom relief is sought may file a written response to the motion. The response may be accompanied by affidavits and other supporting documents and shall be served on all interested parties and service shall be certified to the court.

(f) *Content of response.* All responses shall contain sufficient information to reasonably disclose the basis for the party's position and what specific issues are contested. If a response is not in compliance with this provision, the court in its discretion may resolve the matter without a hearing.

(g) *Hearing on motion.* Unless a hearing is requested in the motion or in the response, motions may be determined without a hearing. A hearing on a motion may be ordered by the court in its discretion.

(h) *Frivolous or delaying motions.* Where the court finds that a motion is frivolous or filed for delay, costs may be assessed against the party or counsel filing the motion. Any party filing a request for a hearing shall appear at the hearing set by the court in support of the request or costs may be assessed.

(i) *Disclosure requirements inapplicable.* The disclosure requirements imposed by Bankruptcy Rule 7026(a) are inapplicable to contested matters.

**Rule 9019.2. Mediated settlement conference.**

(a) *Order for mediated settlement conference.*

(1) *Order by court.* The court may, by written order, require parties and their representatives to attend a pretrial mediated settlement conference in any adversary proceeding pending in the court.

(2) *Timing of the order.* The court may issue the order at any time after the time for the filing of answers has expired.

(3) *Content of order.* The court's order shall:

(A) require that a mediated settlement conference be held in the case;

(B) establish a deadline for the completion of the conference;

(C) state clearly that the parties have the right to select their own mediator as provided by section (b);

(D) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to section (b); and

(E) state that the parties shall required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) *Motion to dispense with mediated settlement.* A party may move the court, within ten (10) days after the court's order, to dispense with the conference. The motion shall state the reasons the relief is sought, and shall be filed with the clerk of court and served on all opposing parties. Any party may file a written objection specifically stating his or her reasons for opposing the motion. The judge will rule upon such motion without a hearing.

(5) *Motion for court ordered mediated settlement conference.* In cases not ordered to mediated settlement conference, any party may move the court to order such a conference. The motion shall state the reasons why the order should be allowed and shall be served on nonmoving parties. Objections may be filed in writing with the court within ten (10) days after the date of the service of the motion. Thereafter, the judge shall rule upon the motion without a hearing.

(6) *Motion to authorize the use of other settlement procedures.* Within ten (10) days of the court's mediation order, any party may move the court to authorize the use of some other settlement procedure in lieu of a mediated

settlement conference. The motion shall state the reasons the authorization is requested and that all parties consent to the motion. The court may order the use of any agreed upon settlement procedure. The deadline for completion of the authorized settlement procedure shall be as provided by rules authorizing the procedure or, if none, the deadline shall be as ordered for the mediated settlement conference.

(b) *Selection of mediator.*

(1) *Selection of certified mediator by agreement of parties.* The parties appearing of record may select a mediator certified pursuant to the rules of the Supreme Court of North Carolina. The plaintiff shall file with the court an approved Designation for Mediator notice form indicating Selection of Certified Mediator by Agreement within twenty-one (21) days of the court's order. This notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and the parties have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to the rules of the Supreme Court.

(2) *Nomination and court approval of noncertified mediator.* The parties may select a mediator who does not meet the certification requirements of the Supreme Court but who, in the opinion of the parties and the judge, is otherwise qualified by training or experience to mediate the action.

If the parties select a noncertified mediator, the plaintiff or plaintiff's attorney shall file with the judge an approved Designation of Mediator notice form indicating Nomination for Noncertified Mediator within twenty-one (21) days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties have agreed upon the selection and rate of compensation. The judge shall rule on the nomination without a hearing.

(3) *Appointment of mediator by the court.* If the parties cannot agree upon the selection of a mediator, the plaintiff shall submit a Designation of Mediator form indicating a Motion for Court Appointment of Mediator to the judge on behalf of the parties. The motion must be filed within twenty-one (21) days after the court's order and shall state that the parties and their attorneys have had a full and frank discussion concerning the selection of a mediator and have been unable to agree.

The motion shall state whether any party prefers a certified attorney mediator, and if so, the judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified, nonattorney mediator, and if so, the judge shall appoint a certified, nonattorney mediator if one is on the list of certified mediators desiring to mediate cases in the district. If no preference is expressed, the judge may appoint a certified attorney mediator or a certified nonattorney mediator.

Upon receipt of a Motion for Court Appointment of Mediator,or in the event the plaintiff has not filed a Notice of Selection of Certified Mediator or Nomination of Noncertified Mediator with the court within twenty-one (21) days of the court's order, the judge shall appoint a mediator certified pursuant to these Rules. Only mediators that have indicated their desire to mediate cases in the Eastern District shall be appointed.

(4) *Mediator information directory.* To assist the parties in the selection of a mediator by agreement, a central directory of information on all certified mediators who wish to mediate cases in the Eastern District will be collected and maintained by the clerk of court.

(5) *Disqualification of mediator.* Any party may move for an order disqualifying the mediator. If the mediator is disqualified, a replacement mediator

shall be selected or appointed pursuant to this rule. Nothing in this provision shall preclude mediators from disqualifying themselves upon written notice to the judge and the parties.

(c) *The mediated settlement conference.*

(1) *Where conference is to be held.* Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the United States Bankruptcy Courthouse or other public or community building in the Eastern District. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

(2) *When conference is to be held.* The court's order issued pursuant to section (a)(2) shall state a date of completion for the conference. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

(3) *Request to extend date of completion.* A party, or the mediator, may request the judge to extend the deadline for completion of the conference. The request shall state the reasons the continuance is sought and shall be served by the movant upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the judge.

The judge may grant the request and enter an order setting a new date for the completion of the conference, which date may be set at any time prior to trial. The order shall be served on all parties and on the mediator by the person who sought the extension.

(4) *Recesses.* The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

(5) *Mediated settlement conference is not to delay other proceedings.* The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the judge.

(d) *Dues of parties, representatives, and attorneys.*

(1) *Attendance.* The following persons shall physically attend the entire mediated settlement conference until an agreement is reduced to writing and signed as provided by section (d)(3) or an impasse has been declared, unless excused by the judge or by the mediator with approval of all parties and attorneys:

(A) *Parties.*

(i) All individual parties;

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action; and

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(B) *Insurance company representatives.* A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each carrier shall be represented at the conference by an officer, employee, or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of the carrier or

who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have decision-making authority.

(C) *Attorneys.* At least one counsel of record for each party or other participant whose counsel has appeared in the action.

(2) *Notifying lien holders.* Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify the lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request the lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

(3) *Finalizing agreement.* Upon reaching agreement, either before or during the mediation conference, the settlement shall be immediately reduced to writing and signed by the parties, their counsel, and others with settlement authority. By stipulation of the parties, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed with the Court by such persons as the parties shall designate.

(4) *Reporting settlement.* Upon reaching a settlement agreement before or during the conference, the parties and others with settlement authority, shall provide a copy of the executed written agreement to the mediator within seven (7) days of the settlement. The mediator shall attach a copy of the written agreement to the Report of Mediator filed pursuant to section (f)(2)(D) of these rules. Failure of the parties to provide a copy of the written agreement to the mediator on a timely basis may result in sanctions.

(e) *Sanctions for failure to attend.* If any person required to attend the conference pursuant to section (d) of these rules fails to attend without good cause, the judge may impose an appropriate monetary sanction, including but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and losses of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so after notice and a hearing, and in a written order making findings of fact and conclusions of law.

(f) *Authority and duties of mediator.*

(1) *Authority of mediator.*

(A) *Control of conference.* The mediator shall at all times be in control of the conference and the procedures to be followed.

(B) *Private consultation.* The mediator may meet and consult privately with any participant or counsel during the conference.

(C) *Scheduling the conference.* The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

(2) *Duties of mediator.*

(A) *Generally.* The mediator shall define and describe the following to the parties at the beginning of the conference:

(i) the process of mediation;

(ii) the differences between mediation and other forms of conflict resolution;

(iii) the costs of the mediated settlement conference;

(iv) that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(v) the circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(vi) whether and under what conditions communications with the mediator will be held in confidence during the conference;

(vii) the inadmissibility of conduct and settlements as provided by applicable Rules of Evidence.

(viii) the duties and responsibilities of the mediator and the participants; and

(ix) the fact that any agreement reached will be reached by mutual consent.

(B) *Disclosure.* The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(C) *Declaring impasse.* It is the duty of the mediator to timely determine that an impasse exists and that the conference should end.

(D) *Reporting results of conference.* The mediator shall submit a Report of Mediator to the judge which indicates the results of the conference. This report shall be filed within 2 weeks of the conclusion of the conference or upon the receipt of a copy of a written settlement agreement, whichever comes first.

If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file the consent judgment or dismissals. The mediator's report shall inform the court of the absence of any party, attorney, or insurance representative who was absent without permission from the conference.

The mediator shall attach the written settlement agreement prepared by the parties to the Report of Mediator.

(E) *Scheduling and holding the conference.* It is the duty of the mediator to schedule the conference and to conduct and conclude the conference prior to the conference completion deadline set out in the court's order. Deadlines for completion of the conference shall be strictly observed by the mediator unless the time limit is changed by a written order of the judge.

(3) *Failure of mediator to comply with section (f).* The judge may withhold future appointments of any mediator who does not fully comply with the requirement of section (f).

(4) *Sanctions for failure to pay mediator's fee.* Except when excused by these rules or by order of the court, failure of a party to make timely payment of the party's share of a mediator's fee at the conclusion of the conference may result in the imposition of sanctions.

(g) *Compensation of the mediator.*

(A) *By agreement.* When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(B) *By court order.* When the mediator is appointed by the court, the mediator shall be compensated by the parties at an hourly rate set by the judge.

(C) *Payment of compensation by parties.* Unless otherwise agreed to by the parties or ordered by the court, costs of the mediated settlement conference shall be paid in equal shares by the parties. Multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the costs shall pay them equally unless the court otherwise orders.

(h) *Communications with court.* All communications concerning mediated settlement conferences should be addressed to the bankruptcy administrator.

**Rule 9029.1. Sanctions.**

(a) *Failure to comply with local rules.* If any attorney or party willfully fails to comply with any local rule of this court, the court, in its discretion, may impose sanctions.

(b) *Sanctions under § 362(h).* When determining sanctions under 11 U.S.C. § 362(h), the court shall consider whether the moving party notified and gave the offending unity to cure the alleged violation.

**CASE NOTES**

**Applied** in In re Chavis, 213 Bankr. 462 (Bankr. E.D.N.C. 1997).

# LOCAL FORMS

**Form 1.**

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA

IN THE MATTER OF: CASE NO.:
SS#
ID#
DEBTOR(S) CHAPTER:

NOTICE OF MOTION
AND
CERTIFICATE OF SERVICE

TO: THE DEBTOR(S), ATTORNEY FOR THE DEBTOR(S), TRUSTEE AND OTHER PARTIES IN INTEREST

NOTICE IS HEREBY GIVEN of the Motion to (nature of motion) filed simultaneously herewith by _____ (moving party) _____ in the above captioned case; and

FURTHER NOTICE IS HEREBY GIVEN that if you fail to respond or otherwise plead or request a hearing in writing within _____ days from the date of this notice, the relief requested in the motion may be granted without further hearing or notice; and

FURTHER NOTICE IS HEREBY GIVEN that if a response and a request for a hearing is filed in writing by the debtor(s), trustee, or other parties in interest named herein within the time indicated, a hearing will be conducted on the motion and response thereto at a date, time and place to be later set by this Court and all interested parties will be notified accordingly.

DATE OF NOTICE: (must be same date of service)

_____
Signature

CERTIFICATE OF SERVICE

I, _____, of _____
_____ certify:

That I am, and at all times hereinafter mentioned was, more than eighteen (18) years of age;

That on the _____ day of _____, _____, I served copies of the foregoing motion and notice of motion on [include address(es)]

by (describe the mode of service)

I certify under penalty of perjury that the foregoing is true and correct.

Executed on: _____ _____
Date Signature

**Form 2.**

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA

IN THE MATTER OF:
Debtor(s)

CASE NUMBER:

SCHEDULE C — PROPERTY CLAIMED AS EXEMPT

I, _____, claim the following property as exempt pursuant to 11 U.S.C. § 522(b)(2)(A) and (B) and the laws of the State of North Carolina, and non-bankruptcy Federal law:

1. NCGS 1C-1601(a)(1) (NC Const., Article X, Section 2) REAL OR PERSONAL PROPERTY USED AS A RESIDENCE OR BURIAL PLOT (exemption not to exceed $10,000)

| Description of Property and Address | Market Value | Mortgage Holder or Lien Holder | Amount of Mortgage or Lien | Net Value |
|---|---|---|---|---|

VALUE OF REAL ESTATE CLAIMED AS EXEMPT: $ .00

2. NCGS 1C-1601(a)(3) MOTOR VEHICLE (exemption in one vehicle not to exceed $1,500)

| Model, Year Style of Auto | Market Value | Lien Holder | Amount of Lien | Net Value |
|---|---|---|---|---|

VALUE OF MOTOR VEHICLE CLAIMED AS EXEMPT: $ .00

3. NCGS 1C-1601(a)(4) (NC Const., Article X, Section 1) PERSONAL OR HOUSEHOLD GOODS (net value not to exceed $3,500 plus $750 for first four dependents).

The number of dependents for exemption purposes is _____.

| Description of Property | Market Value | Lien Holder | Amount of Lien | Net Value |
|---|---|---|---|---|
| Clothing & personal | | | | |
| Kitchen appliances | | | | |
| Stove | | | | |
| Refrigerator | | | | |
| Freezer | | | | |

| Description of Property | Market Value | Lien Holder | Amount of Lien | Net Value |
|---|---|---|---|---|
| Washing machine | | | | |
| Dryer | | | | |
| China | | | | |
| Silver | | | | |
| Jewelry | | | | |
| Living room furniture | | | | |
| Den furniture | | | | |
| Bedroom furniture | | | | |
| Dining room furniture | | | | |
| Lawn furniture | | | | |
| Television | | | | |
| ( )Stereo ( )Radio | | | | |
| ( )VCR | | | | |
| ( )Video Camera | | | | |
| Musical Instruments | | | | |
| ( )Piano ( )Organ | | | | |
| Air conditioner | | | | |
| Paintings/Art | | | | |
| Lawn mower | | | | |
| Yard tools | | | | |
| Crops | | | | |
| Recreational equipment | | | | |

VALUE CLAIMED AS EXEMPT: $ .00

4. NCGS 1C-1601(a)(5) TOOLS OF TRADE (total net value not to exceed $750 in value).

| Description of Property | Market Value | Lien Holder | Amount of Lien | Net Value |
|---|---|---|---|---|

VALUE CLAIMED AS EXEMPT $ .00

(attach additional sheets if necessary)

5. NCGS 1C-1601(a)(6) LIFE INSURANCE (NC Const., Article X, Section 5)

| Description | Insured | Policy Number | Beneficiary | Cash Value |
|---|---|---|---|---|

6. NCGS 1C-1601(a)(7) PROFESSIONALLY PRESCRIBED HEALTH AIDS (Debtor or Debtor's Dependents, no limit on value).

Description

7. NCGS 1C-1601(a)(8) COMPENSATION FOR PERSONAL INJURY OR DEATH OF A PERSON UPON WHOM THE DEBTOR WAS DEPENDENT FOR SUPPORT. COMPENSATION NOT EXEMPT FROM RELATED LEGAL, HEALTH OR FUNERAL EXPENSE.

8. NCGS 1C-1601(a)(2) ANY PROPERTY (total net value not to exceed $3,500 less any amount used under NCGS 1C-1601(1) and after reduction for overages in categories 2, 3, and 4).

| Description of Property & Address | Market Value | Lien Holder | Amount of Lien | Net Value |
|---|---|---|---|---|

9. TENANCY BY THE ENTIRETY. The following property is claimed as exempt pursuant to 11 U.S.C. § 522(b)(2)(B) and the law of the State of North Carolina pertaining to property held as tenants by the entirety.

| Description of Property & Address | Market Value | Lien Holder | Amount of Lien | Net Value |
|---|---|---|---|---|

VALUE OF ENTIRETIES PROPERTY CLAIMED AS EXEMPT $ .00

10. OTHER EXEMPTIONS CLAIMED UNDER LAWS OF THE STATE OF NORTH CAROLINA:

| | | Amount |
|---|---|---|
| a. | Aid to the Aged, Disabled and Families with Dependent Children NCGS 108A-36 | _____ |
| b. | Aid to the Blind NCGS 111-18 | _____ |
| c. | Yearly Allowance for Surviving Spouse NCGS 30-15, NCGS 30-33 | _____ |
| d. | North Carolina Local Government Employees Retirement benefits NCGS 128-31 | _____ |
| e. | North Carolina Teachers and State Employees Retirement benefits NCGS 135-9 | _____ |
| f. | Firemen's Relief Fund pensions NCGS 118-49 | _____ |
| g. | Fraternal Benefit Society benefits NCGS 58-283 | _____ |
| h. | Workers Compensation benefits NCGS 97-21 | _____ |
| i. | Unemployment benefits, so long as not commingled and except for debts for necessities purchased while unemployed NCGS 96-17 | _____ |
| j. | Group insurance proceeds NCGS 58-213 | _____ |
| k. | Partnership property, except on a claim against the partnership NCGS 59-55 | _____ |
| l. | Wages of debtor necessary for support of family NCGS 1-362 | _____ |
| | TOTAL PROPERTY CLAIMED AS EXEMPT | $ .00 |

11. EXEMPTIONS CLAIMED UNDER NON-BANKRUPTCY FEDERAL LAW:

| | | Amount |
|---|---|---|
| a. | Foreign Service Retirement and Disability Payments 22 U.S.C. § 1104 | _____ |

| | | Amount |
|---|---|---|
| b. | Social Security benefits 42 U.S.C. § 407 | |
| c. | Injury or death compensation payments from war risk hazards 42 U.S.C. § 1717 | |
| d. | Wages of fishermen, seamen, and apprentices 46 U.S.C. § 601 | |
| e. | Civil Service Retirement benefits 5 U.S.C. §§ 729, 2265 | |
| f. | Longshoremen and Harbor Workers Compensation Act death and disability benefits 33 U.S.C. § 916 | |
| g. | Railroad Retirement Act annuities and pensions 45 U.S.C. § 228(L) | |
| h. | Veterans benefits 45 U.S.C. § 352(E) | |
| i. | Special pension paid to winners of Congressional Medal of Honor 38 U.S.C. § 3101 | |
| j. | Federal Homestead lands, on debts contracted before the issuance of the patent 43 U.S.C. § 175 | |
| | VALUE OF PROPERTY CLAIMED AS EXEMPT | $ .00 |

12. The following tangible personal property was purchased by the debtor within 90 days of the filing of the bankruptcy petition:

| Description | Market Value | Lien Holder | Amount of Lien | Net Value |
|---|---|---|---|---|

13. The debtor's property is subject to the following claims:

a. Of the United States or its agencies as provided by federal law.
b. Of the State of North Carolina or its subdivisions for taxes or appearance bonds.
c. Of a lien by a laborer.
d. Of a lien by a mechanic.
e. For payment of obligations contracted for the purchase of specific property.
f. For repair or improvement of specific property.
g. For contractual security interests in specific property, except debtor's household goods on which there exists a nonpossessory, nonpurchase money security interest.
h. For statutory liens, other than judicial liens.
i. For child support or alimony, ordered pursuant to Chapter 50 of the General Statutes of North Carolina.

| Claimant | Nature of Claim | Amount of Claim | Description of Property | Value of Property | Net Value |
|---|---|---|---|---|---|

None of the property listed in paragraph 12 has been included in this claim of exemptions.

None of the claims listed in paragraph 13 is subject to this claim of exemptions.

DATE: _____

Debtor

UNSWORN DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF INDIVIDUAL TO SCHEDULE C — PROPERTY CLAIMED AS EXEMPT

I, _____, declare under penalty of perjury that I have read the foregoing Schedule C — Property Claimed as Exempt, consisting of _____ sheets, and that they are true and correct to the best of my knowledge, information and belief.

Executed on: _____ _____
Debtor

## Form 3.

| B 104 (Rev. 8/87) **ADVERSARY PROCEEDING COVER SHEET** (Instructions on Reverse) | ADVERSARY PROCEEDING NUMBER (Court Use Only) |
|---|---|

| PLAINTIFFS | DEFENDANTS |
|---|---|
| | |
| **ATTORNEYS** (Firm Name, Address, and Telephone No.) | **ATTORNEYS** (If Known) |
| | |

**PARTY** (Check one box only) ☐ 1 U.S. PLAINTIFF ☐ 2 U.S. DEFENDANT ☐ 3 U.S. NOT A PARTY

**CAUSE OF ACTION** (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

**NATURE OF SUIT**
(Check the one most appropriate box only.)

| | | |
|---|---|---|
| ☐ 454 To Recover Money or Property | ☐ 455 To revoke an order of confirmation of a Chap. 11 or Chap. 13 Plan | ☐ 456 To obtain a declaratory judgment relating to any of foregoing causes of action |
| ☐ 435 To Determine Validity, Priority, or Extent of a Lien or Other Interest in Property | ☐ 426 To determine the dischargeability of a debt 11 U.S.C. §523 | |
| ☐ 458 To obtain approval for the sale of both the interest of the estate and of a co-owner in property | ☐ 434 To obtain an injunction or other equitable relief | ☐ 459 To determine a claim or cause of action removed to a bankruptcy court |
| ☐ 424 To object or to revoke a discharge 11 U.S.C. §727 | ☐ 457 To subordinate any allowed claim or interest except where such subordination is provided in a plan | ☐ 498 Other (specify) |

| **ORIGIN OF PROCEEDINGS** (Check one box only.) | ☐ 1 Original Proceeding | ☐ 2 Removed Proceeding | ☐ 4 Reinstated or Reopened | ☐ 5 Transferred from Another Bankruptcy Court | ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 |
|---|---|---|---|---|---|

| **DEMAND** | NEAREST THOUSAND $ | OTHER RELIEF SOUGHT | ☐ JURY DEMAND |
|---|---|---|---|

**BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES**

| NAME OF DEBTOR | BANKRUPTCY CASE NO. |
|---|---|

| DISTRICT IN WHICH CASE IS PENDING | DIVISIONAL OFFICE | NAME OF JUDGE |
|---|---|---|

**RELATED ADVERSARY PROCEEDING (IF ANY)**

| PLAINTIFF | DEFENDANT | ADVERSARY PROCEEDING NO. |
|---|---|---|

| DISTRICT | DIVISIONAL OFFICE | NAME OF JUDGE |
|---|---|---|

**FILING FEE** (Check one box only.) ☐ FEE ATTACHED ☐ FEE NOT REQUIRED ☐ FEE IS DEFERRED

| DATE | PRINT NAME | SIGNATURE OF ATTORNEY (OR PLAINTIFF) |
|---|---|---|
| | | |

B-104
(Rev. 8/87)

**ADVERSARY PROCEEDING COVER SHEET (Reverse Side)**

This cover sheet must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney) and submitted to the Clerk of the court upon the filing of a complaint initiating an adversary proceeding.

The cover sheet and the information contained on it *do not* replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. This form is required for the use of the clerk of the court to initiate the docket sheet and to prepare necessary indices and statistical records. A separate cover sheet must be submitted to the clerk of the court for each complaint filed. The form is largely self explanatory.

**Parties.** The names of the parties to the adversary proceeding *exactly* as they appear on the complaint. Give the names and addresses of the attorneys if known. Following the heading "Party," check the appropriate box indicating whether the United States is a party named in the complaint.

**Cause of Action.** Give a brief description of the cause of action including all federal statutes involved. For example, "Complaint seeking damages for failure to disclose information, Consumer Credit Protection Act, 15 U.S.C. §1601 et seq.," or "Complaint by trustee to avoid a transfer of property by the debtor, 11 U.S.C. §544."

**Nature of Suit.** Place an "X" in the appropriate box. Only one box should be checked. If the cause fits more than one category of suit, select the most definitive.

**Origin of Proceedings.** Check the appropriate box to indicate the origin of the case:

1. Original Proceeding.
2. Removed from a State or District Court.
4. Reinstated or Reopened.
5. Transferred from Another Bankruptcy Court.

**Demand.** On the next line, state the dollar amount demanded in the complaint in thousands of dollars. For $1,000 enter "1," for $10,000 enter "10," for $100,000 enter "100," if $1,000,000, enter "1000." If $10,000,000 or more, enter "9999." If the amount is less than $1,000, enter "0001." If no monetary demand is made, enter "XXXX." If the plaintiff is seeking non-monetary relief, state the relief sought, such as injunction or foreclosure of a mortgage.

**Bankruptcy Case in Which This Adversary Proceeding Arises.** Enter the name of the debtor and the docket number of the bankruptcy case from which the proceeding now being filed arose. Beneath, enter the district and divisional office where the case was filed, and the name of the presiding judge.

**Related Adversary Proceedings.** State the names of the parties and the six digit adversary proceeding number from any adversary proceeding concerning the same two parties or the same property currently pending in any bankruptcy court. On the next line, enter the district where the related case is pending, and the name of the presiding judge.

**Filing Fee.** Check one box. The fee must be paid upon filing unless the plaintiff meets one of the following exceptions. The fee is not required if the plaintiff is the United States government or the debtor. If the plaintiff is the trustee or a debtor in possession, and there are no liquid funds in the estate, the filing fee may be deferred until there are funds in the estate. (In the event no funds are ever recovered for the estate, there will be no fee). There is no fee for adding a party after the adversary proceeding has been commenced.

**Signature.** This cover sheet must be signed by the attorney of record in the box on the right of the last line of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is *pro se*, that is, not represented by an attorney, the plaintiff must sign.

The name of the signatory must be printed in the box to the left of the signature. The date of the signing must be indicated in the box on the far left of the last line.

# MISCELLANEOUS INFORMATION

## LIST OF COUNTY CODES FOR NORTH CAROLINA

| North Carolina, Eastern | | North Carolina, Middle | | North Carolina, Western | |
|---|---|---|---|---|---|
| 37013 | Beaufort | 37001 | Alamance | 37003 | Alexander |
| 37015 | Bertie | 37025 | Cabarrus | 37005 | Alleghany |
| 37017 | Bladen | 37033 | Caswell | 37007 | Anson |
| 37019 | Brunswick | 37037 | Chatham | 37009 | Ashe |
| 37029 | Camden | 37057 | Davidson | 37011 | Avery |
| 37031 | Carteret | 37059 | Davie | 37021 | Buncombe |
| 37041 | Chowan | 37063 | Durham | 37023 | Burke |
| 37047 | Columbus | 37067 | Forsyth | 37027 | Caldwell |
| 37049 | Craven | 37081 | Guilford | 37035 | Catawba |
| 37051 | Cumberland | 37093 | Hoke | 37039 | Cherokee |
| 37053 | Currituck | 37105 | Lee | 37043 | Clay |
| 37055 | Dare | 37123 | Montgomery | 37045 | Cleveland |
| 37061 | Duplin | 37125 | Moore | 37071 | Gaston |
| 37065 | Edgecombe | 37135 | Orange | 37075 | Graham |
| 37069 | Franklin | 37145 | Person | 37087 | Haywood |
| 37073 | Gates | 37151 | Randolph | 37089 | Henderson |
| 37077 | Granville | 37153 | Richmond | 37097 | Iredell |
| 37079 | Greene | 37157 | Rockingham | 37099 | Jackson |
| 37083 | Halifax | 37159 | Rowan | 37109 | Lincoln |
| 37085 | Harnett | 37165 | Scotland | 37111 | McDowell |
| 37091 | Hertford | 37167 | Stanly | 37113 | Macon |
| 37095 | Hyde | 37169 | Stokes | 37115 | Madison |
| 37101 | Johnston | 37171 | Surry | 37119 | Mecklenburg |
| 37103 | Jones | 37197 | Yadkin | 37121 | Mitchell |
| 37107 | Lenoir | | | 37149 | Polk |
| 37117 | Martin | | | 37161 | Rutherford |
| 37127 | Nash | | | 37173 | Swain |
| 37129 | New Hanover | | | 37175 | Transylvania |
| 37131 | Northampton | | | 37179 | Union |
| 37133 | Onslow | | | 37189 | Watauga |
| 37137 | Pamlico | | | 37193 | Wilkes |
| 37139 | Pasquotank | | | 37199 | Yancey |
| 37141 | Pender | | | | |
| 37143 | Perquimans | | | | |
| 37147 | Pitt | | | | |
| 37155 | Robeson | | | | |
| 37163 | Sampson | | | | |
| 37177 | Tyrrell | | | | |
| 37181 | Vance | | | | |
| 37183 | Wake | | | | |
| 37185 | Warren | | | | |
| 37187 | Washington | | | | |
| 37191 | Wayne | | | | |
| 37195 | Wilson | | | | |

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# LOCAL RULES OF CIVIL, CRIMINAL, AND BANKRUPTCY PRACTICE OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Revised effective January 17, 2001

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## THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CHIEF JUDGE
Frank W. Bullock, Jr.
P.O. Box 3223
Greensboro, NC 27402

DISTRICT JUDGE
N. Carlton Tilley, Jr.
P.O. Box 3443
Greensboro, NC 27402

DISTRICT JUDGE
William L. Osteen, Sr.
P.O. Box 3485
Greensboro, NC 27402

DISTRICT JUDGE
James A. Beaty, Jr.
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251 North Main Street
Winston-Salem, NC 27101

******

SENIOR JUDGE
Eugene A. Gordon
P.O. Box 3285
Greensboro, NC 27402

SENIOR JUDGE
Hiram H. Ward
Suite 246, Federal Building
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Winston-Salem, NC 27101

Richard C. Erwin
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251 N. Main Street
Winston-Salem, NC 27101

******

MAGISTRATE JUDGE
Russell A. Eliason
Suite 224, Federal Building
Winston-Salem, NC 27101

MAGISTRATE JUDGE
P. Trevor Sharp
P.O. Box 3195
Greensboro, NC 27402

CLERK
J.P. Creekmore
P.O. Box 2708
Greensboro, NC 27402

## THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CHIEF JUDGE
William L. Stocks
P.O. Box 3603
Greensboro, NC 27402

******

BANKRUPTCY JUDGE
Catharine R. Carruthers
P.O. Box 805
Winston-Salem, NC 27101-0805

******

RECALLED JUDGE
James B. Wolfe, Jr.
P.O. Box 1708
Greensboro, NC 27402

******

CLERK
William L. Schwenn
P.O. Box 26100
Greensboro, NC 27420-6100

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE**
**MIDDLE DISTRICT OF NORTH CAROLINA**

| | | |
|---|---|---|
| IN THE MATTER OF LOCAL RULES OF CIVIL AND CRIMINAL PRACTICE IN THIS COURT | ) ) ) ) | ORDER ADOPTING LOCAL RULES OF CIVIL AND CRIMINAL PRACTICE |

For good cause appearing to the Court,

IT IS ORDERED that:

1. The following Local Rules of Civil and Criminal Practice in the United States District Court for the Middle District of North Carolina be and they hereby are adopted, effective at 12:01 a.m, on the 1st day of July, 1997. At that time these local rules shall supersede local rules therefore in effect and shall apply to all pending cases, unless the Court finds that their application in a specific case would result in injustice or hardship.
2. These rules are adopted in compliance with and pursuant to the authority of Rule 83, Fed.R.Civ.P.; Rule 57, Fed.R.Crim.P.; and other federal rules and statutes providing for district court local rules.
3. These rules conform to the uniform numbering system prescribed by the Judicial Conference of the United States. Each local rule is numbered according to its corresponding Federal Rule. Local rules for which there are no corresponding Federal Rules are correlated with the respective Federal Rule on local rulemaking. (Fed.R.Civ.P. 83; Fed.R.Crim.P. 57)
4. Pursuant to Bankruptcy Rule 9029, the Court authorizes the Bankruptcy Judges of this district to adopt Local Rules of Practice and Procedure for the Bankruptcy Court.
5. The Clerk is directed to make appropriate arrangements to see that these rules are published promptly and that copies of the rules are made available for distribution to the bar and the public.

This the 4th day of June, 1977.

s/Frank W. Bullock, Jr.
Chief United States District Judge

s/N. Carlton Tilley, Jr.
United States District Judge

s/William L. Osteen
United States District Judge

s/James A. Beaty, Jr.
United States District Judge

s/Hiram H. Ward
Senior United States District Judge

s/Richard C. Erwin
Senior United States District Judge

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE**
**MIDDLE DISTRICT OF NORTH CAROLINA**

IN RE )
) ORDER
Local Bankruptcy Rules )

It appearing that local bankruptcy rules would facilitate the administration of bankruptcy cases in this district and would assist the court in the management and orderly disposition of contested matters and adversary proceedings; and

It further appearing that Rule 9029 of the Federal Rules of Bankruptcy Procedure permits the United States District Court to authorize bankruptcy judges to make and amend local rules of practice and procedure for the bankruptcy court which are consistent with Acts of Congress and the Federal Rules of Bankruptcy Procedure; and

It further appearing that by order of the United States District Court for the Middle District, dated June 4, 1997, the bankruptcy judges of this district are authorized, subject to the requirements of Rule 83 of the Federal Rules of Civil Procedure, to make and amend local rules of practice and procedure not inconsistent with Acts of Congress and the Federal Rules of Bankruptcy Procedure; and

It further appearing that appropriate public notice and an opportunity to comment regarding the rules attached hereto has been given; now, therefore

IT IS ORDERED that the local bankruptcy rules attached hereto are hereby adopted and shall be effective from and after June 4, 1997, with respect to all cases and proceedings before the United States Bankruptcy Court for the Middle District of North Carolina. Such rules shall be referred to as Local Bankruptcy Rules, Middle District of North Carolina.

This the 4th day of June, 1997.

s/William L. Stocks
Chief Bankruptcy Judge
s/Catherine L. Carruthers
Bankruptcy Judge

# PART I. LOCAL RULES OF CIVIL PRACTICE

## I. SCOPE OF RULES—ONE FORM OF ACTION

### Rule LR1.1. Scope of rules.

These rules shall govern the procedure and practice in all proceedings before this court, except for proceedings before the bankruptcy court. As used in these rules, the terms "judge" and "court" refer to either a United States District Judge or United States Magistrate Judge, unless the context or any rule of law indicates otherwise.

**Editor's note.** — For website, see www.ncmd.uscourts.gov.

### Rule LR1.2. Philosophy of rules.

These rules shall be construed and enforced in such manner as to avoid technical delay, encourage civility, permit just and prompt determination of all proceedings, and promote the efficient administration of justice.

## II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS; PLEADINGS; MOTIONS AND ORDERS

### Rule LR3.1. Commencement of actions.

(a) *Civil docket cover sheet.* A civil docket cover sheet, in a form supplied by the clerk, must be completed and submitted in triplicate with any complaint commencing an action or any notice of removal from state court.

(b) *Records to be removed.* Upon removal of an action from state court, the removing party shall cause a complete copy of the state court file to be filed in this court.

### Rule LR5.1. Additional copies for court use.

In addition to the original, a copy of the following documents shall be delivered to the clerk for use by the court when the original is filed:

(1) A brief.

(2) Proposed findings of fact and conclusions of law.

(3) Requests for jury instructions.

If word processing equipment is used, in addition to the hard copy, submit a 3-½ inch disk utilizing WordPerfect software or ASCII format for briefs on dispositive motions, trial briefs, and proposed voir dire questions and jury instructions. If the software package used is other than WordPerfect, identify the type of software used. On the disk label, write the case name, case number, and list the documents included. If counsel's name is affixed to the jacket in which the disk is enclosed, the disk may be retrieved from the clerk's office after the case is closed. Failure to retrieve the disk will result in its destruction by the Clerk's office in accordance with LR83.5(c) and LCrR57.3(c).

### Rule LR5.2. No filing of discovery papers.

Depositions and deposition notices, interrogatories, requests for documents, requests for admission, and answers and responses thereto shall not be filed unless the court so orders or unless the court will need such documents in a pretrial proceeding. All discovery papers must be served on other counsel or

parties. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the court when needed or ordered. Any party seeking to compel discovery or other pretrial relief based upon discovery material which has not been filed with the clerk must identify the specific portion of the material which is directly relevant and ensure that it is filed as an attachment to the application for relief.

**Rule LR6.1. Extensions of time and continuances of hearings.**

(a) *Motions for an extension of time to perform an act.* All motions for an extension of time to perform an act required or allowed to be done within a specified time must show good cause, prior consultation with opposing counsel, and the views of opposing counsel. Extensions will not be allowed unless the motion is made before the expiration of the specified time, except upon a showing of excusable neglect. Consent orders extending time may be signed by the clerk to the extent provided by LR77.2.

(b) *Motions for continuance.* All motions to continue a pretrial conference, hearing on a motion, or the trial of an action must be presented through the clerk's office for the court's consideration reasonably in advance of the hearing date and must reflect the views of opposing counsel.

## III. PLEADINGS AND MOTIONS

**Rule LR7.1. Form of pleadings and papers.**

(a) *Form.* Pleadings, motions, briefs, and other papers submitted for filing must be typewritten, printed, or legibly handwritten on letter size paper. The pages shall be unfolded and shall be bound at the top and numbered at the bottom, without manuscript cover. The margin at the top of each page shall not be less than one and one-quarter inches, and bottom, left and right margins shall be set at not less than one inch. Typewritten documents should be double spaced. Mechanically reproduced copies which bear an original signature will be accepted by the court as originals.

The text of every document shall be printed in a font size of 11 or larger, so that the type size and face shall be no smaller than that contained in the United States Reports beginning with Volume 453. There shall be no more than 27 lines of regularly spaced text on a page.

(b) *Identification of Documents.* All papers submitted for filing shall follow the heading format set out in the Appendix of Forms, Fed.R.Civ.P., and papers submitted subsequent to the original complaint shall bear the case number.

(c) *Telephone numbers and addresses.* Parties or attorneys signing papers submitted for filing must state their telephone numbers, as well as their addresses, and the N.C. State Bar number of attorneys who are admitted to practice before this court.

(d) *Exhibits to pleadings or papers.* Bulky or voluminous materials should not be submitted for filing with a pleading or paper, or incorporated by reference therein, unless such materials are essential. The court may order any pleading or paper stricken if filed in violation of this rule.

(e) *Civil rights actions by prisoners, 42 U.S.C. § 1983.* All *pro se* complaints filed by state prisoners seeking relief under 42 U.S.C. § 1983 shall be filed with the clerk in compliance with the instructions of the clerk and on appropriate forms which are available without charge in the clerk's office. In each action, an original and one copy of the complaint for the court and one copy of the complaint for each defendant must be provided by the plaintiff.

**Rule LR7.2. Briefs.**

(a) *Contents.* All briefs filed with the court shall contain:

(1) A statement of the nature of the matter before the court.

(2) A concise statement of the facts. Each statement of fact should be supported by reference to a part of the official record in the case.

(3) A statement of the question or questions presented.

(4) The argument, which shall refer to all statutes, rules and authorities relied upon.

(b) *Citation of cases.* Cases cited should include parallel citations, the year of the decision, and the court deciding the case. If a petition for certiorari was filed in the United States Supreme Court, disposition of the case should be shown with three parallel citations [e.g. *Carson v. Warlick,* 238 F.2d 724 (4th. Cir. 1956), cert. denied, 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed.2d.664 (1957)].

(c) *Citation of unpublished decisions.* Unpublished decisions may be cited only if the unpublished decision is furnished to the court and to opposing parties or their counsel when the brief is filed. Unpublished decisions should be cited as follows: *Wise v. Richardson,* No. C-70-191-S (M.D.N.C., Aug. 11, 1971).

(d) *Citation of decisions not appearing in certain published reports.* Decisions published in reports other than the West Federal Reporter System, the official North Carolina reports and the official United States Supreme Court reports (e.g., C.C.H. Reports, Labor Reports, U.S.P.Q. reported decisions of other states or other specialized reporting services) may be cited only if the decision is furnished to the court and to opposing parties or their counsel when the brief is filed.

(e) *Additional copies of briefs for court use.* At the time the original of a brief is filed, an additional (working) copy of the brief shall be delivered to the clerk for use by the judge.

**Rule LR7.3. Motion practice.**

(a) *Form.* All motions, unless made during a hearing or at trial, shall be in writing and shall be accompanied by a brief except as provided in section (i) of this rule. Each motion shall be set out in a separate pleading.

(b) *Content.* All motions shall state with particularity the grounds therefor, shall cite any statute or rule of procedure relied upon, and shall set forth the relief or order sought.

(c) *Decided on motion papers and briefs.*

(1) Motions shall be considered and decided by the court on the pleadings, admissible evidence in the official court file, and motion papers and briefs, without hearing or oral argument, unless otherwise ordered by the court. Special considerations thought by counsel sufficient to warrant a hearing or oral argument may be brought to the court's attention in the motion or response.

(2) The clerk shall give at least five days' notice of the date and place of oral argument. The court, however, for good cause shown may shorten the five-day notice period.

(d) *Limitations on length of briefs.* Briefs in support of motions and responsive briefs are limited in length to 20 pages, and reply briefs are limited to 10 pages.

(e) *Movant's supporting documents and briefs.* When allegations of facts not appearing of record are relied upon to support a motion, affidavits, parts of depositions, and other pertinent documents then available shall accompany the motion. If supporting documents are not then available, the party may move for an extension of time in accordance with section (g) of this rule.

(f) *Response to motion and brief.* The respondent, if opposing a motion, shall file a response, including brief, within 20 days after service of the motion (30

days if the motion is for summary judgment; see LR56.1(d)). If supporting documents are not then available, the respondent may move for an extension of time in accordance with section (g) of this rule. For good cause appearing therefor, a respondent may be required to file any response and supporting documents, including brief, within such shorter period of time as the court may specify.

(g) *Extension of time for filing supporting documents and briefs.* Upon proper motion accompanied by a proposed order, the clerk may enter an ex parte order, specifying the time within which supporting documents and briefs may be filed pursuant to sections (e) and (f), if it is shown in writing that such documents are not available or cannot be filed contemporaneously with the motion or response. The time allowed to an opposing party for filing a response shall not run during any such extension. If good cause to grant the motion is not apparent upon the face of the motion, the clerk may direct that the motion be served upon the opposing party, who shall be allowed 10 days to respond.

(h) *Reply brief.* A reply brief may be filed within 10 days after service of the response. A reply brief is limited to discussion of matters newly raised in the response.

(i) *Suggestion of subsequently decided authority.* As an addendum to a brief, response brief, or reply brief, a suggestion of subsequently decided controlling authority, without argument, may be filed at any time prior to the court's ruling and shall contain only the citation to the case relied upon, if published, or a copy of the opinion if the case is unpublished.

(j) *Motions not requiring briefs.* No brief is required by either movant or respondent, unless otherwise directed by the court, with respect to the following motions: (1) discovery motions in which the parties have agreed to the expedited procedures described in LR26.1(d); (2) for extension of time for the performance of an act required or allowed to be done, provided request therefor is made before the expiration of the period originally prescribed or as extended by previous orders; (3) to continue a pretrial conference, hearing, or the trial of an action; (4) to add parties; (5) to amend the pleadings; (6) to file supplemental pleadings; (7) to appoint a next friend or guardian *ad litem*; (8) for substitution of parties; and (9) to stay proceedings to enforce judgment. The above motions, while not required to be accompanied by a brief, must state good cause therefor and cite any applicable rule, statute, or other authority justifying the relief sought. These motions must be accompanied by a proposed order.

(k) *Failure to file and serve motion papers.* The failure to file a brief or response within the time specified in this rule shall constitute a waiver of the right thereafter to file such brief or response, except upon a showing of excusable neglect. A motion unaccompanied by a required brief may, in the discretion of the court, be summarily denied. A response unaccompanied by a required brief may, in the discretion of the court, be disregarded and the pending motion may be considered and decided as an uncontested motion. If a respondent fails to file a response within the time required by this rule, the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice.

**CASE NOTES**

**Brief in Opposition to Motion.** — Even if the opposition is futile and the motion to amend must be granted, subsection (a) allows defendant to file a brief in opposition to the motion if it so chooses. Fulk v. Hartford Life Ins. Co., 839 F. Supp. 1181 (M.D.N.C. 1993).

**Combination Memorandum Inappropriate.** — Where defendant combined a reply memorandum with a response memorandum in what appeared to be an attempt to circumvent subsection (g), this tactic appeared to violate the spirit, if not the letter, of the rule and counsel for defendant was cautioned against similar future actions. Fulk v. Hartford Life Ins. Co., 839 F. Supp. 1181 (M.D.N.C. 1993).

**Pro Se Status of Plaintiffs.** — Where

plaintiffs failed to respond to defendants' motion for summary judgment, under this rule and rule 56.1(e), the Court could find the motion to be uncontested and grant it without further notice, but because of plaintiffs' pro se status, the Court acted with an abundance of caution and examined the motion closely on its merits. Baraukas v. Danek Med., Inc., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5122 (M.D.N.C. Jan. 13, 2000).

**Rule LR16.1. Initial pretrial proceedings.**

(a) *Requirement for initial pretrial order.* There shall be an initial pretrial order entered pursuant to the provisions of Fed.R.Civ.P. 16(b) and 26(f) in every civil case, except in:

(1) Social Security cases and other actions for review of administrative decisions;

(2) Prisoner petitions;

(3) Summons or subpoena enforcement proceedings;

(4) Bankruptcy appeals;

(5) Government collection cases and forfeiture proceedings; and

(6) Cases brought by *pro se* plaintiffs.

The above categories of cases are exempted from the timing-and-sequence-of-discovery provisions of Rule 26(d), and the meeting of parties described in Rule 26(f). Category (1), (2), (3), and (4) cases require no pretrial management and are ready for adjudication on the pleadings of the parties, unless the court orders otherwise. Category (5) cases (government collections and forfeitures) shall be governed by a 90-day period of discovery from the filing of answer or other response, with dispositive motions due in accordance with LR56.1. Category (6) cases (brought by *pro se* plaintiffs) shall be governed by a scheduling order entered by the court after an initial pretrial conference, unless the Court determines, in its discretion, that no conference is necessary.

(b) *Meeting of the parties.* Within the time set by Fed.R.Civ.P. Rule 16(b), the clerk shall schedule an initial pretrial conference and give at least thirty (30) days notice thereof. The parties must hold their Fed.R.Civ.P. 26(f) meeting at least 14 days before the scheduled initial pretrial conference and submit to the court their report within 10 days thereafter. The parties may not stipulate out of the Rule 26(f) meeting but must meet to discuss a proposed discovery plan. Parties are not required to make initial disclosures identified in Fed.R.Civ.P. 26(a)(1); the court elects to be exempt from the provisions of Rule 26(a)(1). At the Rule 26(f) meeting, the parties shall discuss:

(1) All matters identified in Rules 16(b) and (c) and 26(f),

(2) The possibility of settlement,

(3) The proper management track for the case under LR26.1,

(4) The timing of any mediated settlement conference under LR16.4 and LR83.10a-g, and the identity of any agreed-upon mediator,

(5) The nature of the documents and information believed necessary for the case,

(6) Issues of burden and relevance and the discoverability of different types of documents,

(7) A preliminary schedule for depositions, to be updated at reasonable intervals upon communication between the parties, and

(8) The decision of each party whether or not to consent to the trial jurisdiction of a magistrate judge.

Lead counsel for each party must meet and discuss the above-listed matters in a face-to-face meeting unless the offices of the parties' lead counsel are separated by more than 150 miles, in which event lead counsel may conduct the conference by telephone. In the absence of agreement to the contrary, the meeting of the parties shall be held in the office of the attorney nearest the court location where the initial pretrial conference is scheduled.

The parties shall jointly prepare a Rule 26(f) Report (LR16.2) if they are in agreement concerning a discovery plan for the case. If they do not agree, each

shall file a separate Rule 26(f) Report (LR16.3), setting forth its position on disputed matters. The Reports must be filed with the court within 10 days of the Rule 26(f) meeting.

(c) *Initial pretrial order by conference.* If the parties are unable to reach agreement on a discovery plan and therefore submit separate Rule 26(f) Reports (LR16.3), they shall appear for the scheduled initial pretrial conference. Each party shall personally appear or be represented by an attorney who has full authority to bind the party on the matters for discussion at the conference. After hearing from the parties, the court will enter an initial pretrial order that will control the conduct of the litigation.

(d) *Initial pretrial order upon the Joint Rule 26(f) report.* If the parties reach agreement on a discovery plan and submit a joint Rule 26(f) Report, the court will enter an order on the basis of the proposed plan as submitted or as modified by the court. The parties shall submit to the clerk sufficient copies of the joint Report so that all parties can receive a copy after approval by the court. The court may, on its own motion, modify the plan if it finds in its discretion that the plan provides for an excessive amount of discovery or the parties' selection of a case management track under LR26.1 is unreasonable. The scheduled initial pretrial conference is automatically canceled upon the submission to the court of the joint Rule 26(f) Report.

(e) *Discovery with respect to expert witnesses.* The initial pretrial order, whether based upon a joint Rule 26(f) Report or a conference following the filing of separate reports, shall provide that discovery with respect to experts be conducted within the discovery period established in the case. The order shall set the date on which disclosure of expert information under Fed.R.Civ.P. 26(a)(2) must be made.

**Rule LR16.2. Joint Rule 26(f) report.**

**If the parties are in agreement concerning a discovery plan, they shall file a joint report in substantially the following form:**

**Joint Rule 26(f) Report**

1. Pursuant to Fed.R.Civ.P. 26(f) and LR16.1(b), a meeting was held on date at place and was attended by _____ for Plaintiff(s), and _____ for Defendant(s).

2. Discovery Plan. The parties propose to the court the following discovery plan:

Discovery will be needed on the following subjects:

(brief descriptions) _____.

Discovery shall be placed on a case-management track established in LR26.1. The parties agree that the appropriate plan for this case (with any stipulated modification by the parties as set out below) is that designated in LR26.1(a) as:

Standard _____

Complex _____

Exceptional _____

The date for the completion of all discovery (general and expert) is: _____.

Stipulated modifications to the case management track include: _____ .

Reports from retained experts under Rule 26(a)(2) are due during the discovery period:

From Plaintiff(s) by _____

From Defendant(s) by _____

Supplementations under Rule 26(e) are due: (time[s] or interval[s]).

3. Mediation. [For cases selected for mediation under LR16.4 and LR 83.10a-g *et seq.*]

Mediation should be conducted [early] [midway] [late] in the discovery period, the exact date to be set by the mediator after consultation with the parties. The parties agree that the mediator shall be (identity).

(If the parties report no agreement, the clerk will select a mediator from the court's panel of mediators.)

4. Preliminary Deposition Schedule. Preliminarily, the parties agree to the following schedule for depositions: _____.

The parties will update this schedule at reasonable intervals.

5. Other items.

Plaintiff(s) should be allowed until date to request leave to join additional parties or amend pleadings.

Defendant(s) should be allowed until date to request leave to join additional parties or amend pleadings.

After these dates, the court will consider whether the granting of leave would delay trial.

The parties have discussed special procedures for managing this case, including reference of the case to a magistrate judge on consent of the parties under 28 U.S.C. § 636(c), or appointment of a master:

(Report any agreements on these matters).

Trial of the action is expected to take approximately ____ days. A jury trial [has] [has not] been demanded.

Date: _____

Signature of parties or counsel
Signature of parties or counsel

**ORDER OF APPROVAL**

The court has reviewed the Joint Rule 26(f) Report submitted by the parties. The order is approved without modification.

_____
For the Court

**Rule LR16.3. Rule 26(f) report.**

**If the parties are unable to agree on a discovery plan, each party shall file a separate report in substantially the following form:**

**Rule 26(f) Report**

1. Pursuant to Fed.R.Civ.P. 26(f) and LR16.1(b), a meeting was held on date at place and was attended by _____ for Plaintiff(s), and _____ for Defendant(s).

2. Discovery Plan. The undersigned party proposes to the court the following discovery plan:

Discovery will be needed on the following subjects:

(brief descriptions).

Discovery shall be placed on a case-management track established in LR26.1. The undersigned party proposes that the appropriate plan for this case is that designated in LR26.1(a) as:

Standard _____
Complex _____
Exceptional _____

The date for the completion of all discovery (general and expert) should be: _____.

Modifications to the case management track should include: _____ .

Reports from retained experts under Rule 26(a)(2) are due during the discovery period:

From Plaintiff(s) by _____

From Defendant(s) by _____

Supplementations under Rule 26(e) should be due: (time[s] or interval[s]).

3. Mediation. [For cases selected for mediation under LR16.4 and LR 83.10a-g, *et seq.*]

Mediation should be conducted [early] [midway] [late] in the discovery period, the exact date to be set by the mediator after consultation with the parties. The parties agree that the mediator shall be (identity) .

(If the parties report no agreement, the clerk will select a mediator from the court's panel of mediators.)

4. Preliminary Deposition Schedule. The undersigned proposes the following schedule for depositions: _____ .

The parties will update this schedule at reasonable intervals.

5. Other items.

Plaintiff(s) should be allowed until date to request leave to join additional parties or amend pleadings.

Defendant(s) should be allowed until date to request leave to join additional parties or amend pleadings.

After these dates, the court will consider whether the granting of leave would delay trial.

The parties have discussed special procedures for managing this case, including reference of the case to a magistrate judge on consent of the parties under 28 U.S.C. § 636(c), or appointment of a master:

(Report any agreements on these matters) .

Trial of the action is expected to take approximately ____ days. A jury trial [has] [has not] been demanded.

Date: _____

Signature of parties or counsel

**Rule LR16.4. Mediated settlement conferences.**

(a) *Mediated settlement conferences during discovery.* In selected civil cases (see section [b] for a description of cases automatically selected for mediation) there shall be conducted a mediated settlement conference in accordance with LR83.10a-g. The conference may be set for any time during the discovery period, as agreed by the parties. In appropriate cases, the parties may wish to schedule the mediation early in the discovery period, after a first round of depositions or other discovery. In other cases, the parties may choose to set the conference near the end of the discovery period after all, or substantially all, discovery is complete. The parties shall discuss the timing of the mediated settlement conference during the Rule 26(f) meeting of the parties.

(b) *Automatic selection by these rules.* Several categories of civil cases are automatically selected for mediated settlement conferences, without specific order by the court. These categories include, according to designations on the civil cover sheet (1) contract [categories 110-140 and 160-195, specifically excluding 150-153], (2) tort [all categories, 310-385], (3) civil rights [all categories, 440-444], (4) labor [all categories, 710-791], (5) property rights [all categories, 820-840], (6) antitrust [category 410], (7) banks and banking [category 430], (8) securities/commodities/exchange [category 850] and (9) environmental matters [category 893]. The parties to these actions shall discuss mediation plans at the Fed.R.Civ.P. 26(f) meeting of the parties and report such plans in their Rule 26(f) Report in preparation for the entry of an initial pretrial order. *See* LR16.1(b)(c) and (d). Cases wherein the United

States is a party or the plaintiff appears *pro se* are not included within this automatic selection for mediation.

(c) *Exemption from mediated settlement conference.* Any party, or parties jointly, may move for exemption from the requirement for a mediated settlement conference. The court will grant such a request only for good cause. A general assertion that settlement is unlikely or only a remote possibility does not serve as good cause for exemption.

**CASE NOTES**

**Where *pro se* plaintiff had not made any attempt to settle the dispute** and failed to show that defendant's proposed settlement was unfair, the court would deny her motion to compel, due to her failure to follow this rule, without prejudice to her filing a new motion within 15 days. Barlow v. Esselte Pendaflex Corp., 111 F.R.D. 404 (M.D.N.C. 1986), aff'd, 838 F.2d 1209 (4th Cir.), cert. denied, 488 U.S. 843, 109 S. Ct. 116, 102 L. Ed. 2d 90 (1988) (decided prior to the 1993 amendment).

## IV. PARTIES

### Rule LR17.1. Minors and incompetents as parties.

(a) *Capacity to sue or be sued.* Minors and incompetent persons may sue or defend only by their general or testamentary guardians within this state or by guardians *ad litem* appointed by this court.

(b) *Appointment of guardian ad litem.*

(1) Application for the appointment of a guardian *ad litem* to sue on behalf of a minor or incompetent may be made by motion submitted contemporaneously with a complaint. The complaint may be filed when the appointment is made by a judge.

(2) Application for the appointment of a guardian *ad litem* to defend on behalf of a minor or incompetent person may be filed after service of summons and complaint and before time has expired to answer or otherwise to respond.

(3) Applications for the appointment of a guardian *ad litem* by this court must:

(i) set out facts requiring such appointment,

(ii) suggest a natural person suitable for appointment,

(iii) contain information about that person, including willingness to serve, upon which the court can judge his or her qualifications, and

(iv) be accompanied by a proposed order of appointment.

(c) *Termination of actions; Court hearing and approval.*

(1) No civil action or proceeding in which a minor or incompetent person is a party may be compromised, settled, dismissed, or otherwise terminated without the approval of the court.

(2) In order to obtain court approval, a party must file a motion setting forth reasons justifying the termination and explaining its effect upon the rights of the minor or incompetent person.

(3) The court will conduct a hearing to determine whether the termination is fair, reasonable, and in the best interest of the minor or incompetent. The following persons must be present at the hearing unless excused by the court:

(i) attorneys for all parties,

(ii) the minor or incompetent party,

(iii) the guardian *ad litem* or other legal representative, and

(iv) a parent or other person in *loco parentis.*

(4) At the hearing the parties must establish to the satisfaction of the court:

(i) the facts giving rise to the cause of action and the contentions of the parties with respect to liability and damage;

(ii) the facts concerning the nature and extent of any injury or damage suffered by the minor or incompetent person, supported by medical records and reports in personal injury cases;

(iii) medical and hospital expenses, if any, incurred or likely to be incurred;

(iv) the concurrence of the attorney, guardian *ad litem* or other legal representative that the proposed settlement is fair, reasonable, and in the best interest of the minor or incompetent person;

(iv) the facts with respect to any related claims or liens, including separate claims of parents for expenses, and the disposition or status of such other claims.

(5) Ordinarily, the requirements of section (c)(4) of this rule may be satisfied by summaries made by the parties or their attorneys. In every case, the parties may present sworn testimony of witnesses, affidavits or documentary evidence, and the court reserves the right to call for such evidence at any time.

(d) *Fees.* At the hearing, the court will consider requests for counsel fees and a fee for services by the guardian *ad litem* or other legal representative and may make appropriate orders relating to payment of fees.

(e) *Consent judgments approving settlement.*

(1) Before a judgment approving a compromise settlement of claims of a minor or incompetent is presented to the court, it shall be consented and agreed to by counsel for the parties to the action and by the guardian *ad litem* or other legal representative of the minor or incompetent.

(2) The judgment presented should provide, *inter alia,* that the parties have agreed to a settlement of all matters in controversy between them, and the amount of the settlement; that the court has conducted a hearing on the matter; that the court has found that the proposed compromise settlement is fair, reasonable, and in the best interest of the minor or incompetent; and that the court has approved the compromise settlement agreement.

(f) *Payment of judgment.* The amount of the judgment shall be paid into the office of the clerk of this court, and the clerk shall make such disbursements from the proceeds as provided by the judgment of the court. The balance of the proceeds of the judgment shall be paid to the legal guardian of the minor or incompetent, if within this state. If there is no such guardian, the balance of the proceeds shall be paid to the clerk of superior court of the county in this state in which the minor or incompetent resides. If the minor or incompetent does not reside within this state, the balance shall be paid to a legal guardian approved by the court.

**Rule LR23.1. Class actions.**

(a) *Class action complaint.* The complaint shall bear next to its caption the legend, "Complaint — Class Action." The complaint shall contain under a separate heading, styled "Class Action Allegations":

(1) A reference to the portion or portions of Rule 23, Fed.R.Civ.P., under which it is claimed that the suit is properly maintainable as a class action.

(2) Appropriate allegations claimed to justify class treatment, including, but not necessarily limited to:

(i) the size and definition of the alleged class,

(ii) the basis upon which the plaintiff claims

(A) to be an adequate representative of the class, or

(B) if the class is comprised of defendants, that those named as parties are adequate representatives of the class,

(iii) the alleged questions of law or fact claimed to be common to the class, and

(iv) for actions sought to be maintained under Rule 23(b)(3), Fed.R.Civ.P., allegations thought to support the findings required by that subdivision.

(b) *Motion for class action determination.* Within 90 days after the filing of a complaint in a class action, unless this period is extended by court order, the plaintiff shall file a separate motion for a determination under Rule 23(c)(1), Fed.R.Civ.P., as to whether the case may be maintained as a class action. If a party wishes to present oral testimony to support or oppose the class action motion, the party must so inform the court in its motion or opposition. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where it is held that the determination should be postponed, a date will be fixed by the court for renewal of the motion.

(c) *Class action counterclaims or cross-claims.* The foregoing provisions shall apply, with appropriate adaptations, to any counterclaim or cross-claim alleged to be brought for or against a class.

(d) *Burden of proof; Notice.* The burden shall be upon any party seeking to maintain a case as a class action to present an evidentiary basis to the court showing that the action is properly maintainable as such. If the court determines that an action may be maintained as a class action, the party obtaining that determination shall initially bear the expenses of and be responsible for giving such notice as the court may order to members of the class.

## V. DEPOSITIONS AND DISCOVERY

### Rule LR26.1. Differentiated case management and discovery.

(a) *Differentiated case management.* Every case in which an initial pretrial order is entered pursuant to LR16.1(b)-(d) shall be assigned, by agreement of the parties (if adopted by the court) or by order of the court, to one of three case-management tracks. (See LR16.2 and 16.3 for forms of the Fed.R.Civ.P. 26(f) report wherein parties advise the court regarding case management tracks.) The three tracks are defined as follows:

(1) *Standard.* Discovery (including all discovery with respect to experts) in cases assigned to this track shall be completed within four (4) months from the date of the initial pretrial order. Presumptively, subject to stipulation of the parties or order of the court on good cause shown, interrogatories (including subparts) and requests for admission are limited to 15 in number by each party. Depositions are presumptively limited to four (4) depositions (including any experts) by the plaintiffs, by the defendants, and by third-party defendants.

(2) *Complex.* Discovery (including all discovery with respect to experts) in cases assigned to this track shall be completed within six (6) months from the date of the initial pretrial order, subject to agreement of the parties for a larger discovery period, if approved by the court. Presumptively, subject to stipulation of the parties or order of the court on good cause shown, interrogatories (including subparts) and requests for admission are limited to 25 in number by each party. Depositions are presumptively limited to seven (7) depositions (including any experts) by the plaintiffs, by the defendants, and by third-party defendants.

(3) *Exceptional.* Discovery (including all discovery with respect to experts) in cases assigned to this track shall be completed within nine (9) months from the date of the initial pretrial order. Presumptively, subject to stipulation of the parties or order of the court on good cause shown, interrogatories (including subparts) and requests for admission are limited to 30 in number by each party. Depositions are presumptively limited to 10 depositions (including any

experts) by the plaintiffs, by the defendants, and by third-party defendants. This management track is reserved for cases of exceptional complexity. It is not to be used for ordinary federal cases even though such cases have some complexity and require significant discovery.

(b) *Discovery procedures and materials.*

(1) The court expects counsel to conduct discovery in good faith and to cooperate and be courteous with each other in all phases of the discovery process. As a part of their Rule 26(f) Report, the parties must formulate a preliminary deposition schedule. They must continue to communicate throughout the discovery period to update the schedule.

(2) Depositions shall be conducted in accordance with the following guidelines:

(i) Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court.

(ii) Counsel shall not make objections or statements which might suggest an answer to a witness. Counsels' statements when making objections should be succinct, stating the basis of the objection and nothing more.

(iii) Counsel and their witness-clients shall not engage in private, off-the-record conferences while the deposition is proceeding in session, except for the purpose of deciding whether to assert a privilege.

(iv) Deposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and the witness's counsel do not have the right to discuss documents privately before the witness answers questions about them.

(3) Interrogatories, requests for production of documents, or requests for admission shall be numbered consecutively by each party regardless of the number of sets into which they are divided.

(4) Depositions and deposition notices, interrogatories, requests for documents, requests for admission, and answers and responses thereto shall not be filed unless the court so orders or unless the court will need such documents in a pretrial proceeding. All discovery papers must be served on other counsel or parties. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the court when needed or ordered. Any party seeking to compel discovery or other pretrial relief based upon discovery material which has not been filed with the clerk must identify the specific portion of the material which is directly relevant and ensure that it is filed as an attachment to the application for relief.

(c) *Conference of attorneys with respect to motions and objections relating to discovery.* The court will not consider motions and objections relating to discovery unless moving counsel files a certificate that after personal consultation and diligent attempts to resolve differences the parties are unable to reach an accord. The certificate shall set forth the date of the conference, the names of the participating attorneys, and the specific results achieved. It shall be the responsibility of counsel for the movant to arrange for the conference and, in the absence of an agreement to the contrary, the conference shall be held in the office of the attorney nearest the court location where the initial pretrial conference was convened or, in the absence thereof, nearest to Greensboro. Alternatively, at any party's request, the conference may be held by telephone.

(d) *Expedited resolution of some discovery disputes.* If, after a LR26.1(c) conference, the parties agree that a discovery dispute can be ruled upon in a telephone conference of no more than 30 minutes, the magistrate judge will schedule such a conference and rule on the dispute without briefing by the

parties. Alternatively, if the parties agree that the dispute can be ruled upon in an in-court hearing of no more than one hour, without briefing, the magistrate judge will schedule an early hearing. The fact that these proceedings are expedited and without briefing does not alter the application of Fed.R.Civ.P. 37(a)(4) and subsection (e) of this rule regarding the imposition of sanctions in discovery motions.

(e) *Award of expenses of discovery motion.* Any ruling on a discovery motion shall ordinarily result in the imposition of sanctions under Fed.R.Civ.P. 37(a)(4) unless the court determines that the position taken by the losing party was justifiable or some other circumstances would make a sanction unjust.

(f) *Completion of discovery.* The requirement that discovery be completed within a specified time means that adequate provisions must be made for interrogatories and requests for admission to be answered, for documents to be produced, and for depositions to be held within the discovery period.

(g) *Extension of the discovery period or request for more discovery.* Motions seeking an extension of the discovery period or permission to take more discovery than is permitted under the initial pretrial order must be made or presented prior to the expiration of the time within which discovery is required to be completed. They must set forth good cause justifying the additional time and will be granted or approved only upon a showing that the parties have diligently pursued discovery. The court will permit additional depositions only on a showing of exceptional good cause.

(h) *Trial preparation after the close of discovery.* For good cause appearing therefor, the physical or mental examination of a party may be ordered at any time prior to trial. Ordinarily, the deposition of a material witness not subject to subpoena should be taken during discovery. However, the deposition of a material witness who agrees to appear at trial, but who later becomes unable or refuses to attend, may be ordered at any time prior to trial.

**Rule LR26.2. Exemption from Fed. R. Civil P. 26(a)(1).**

Parties are not required to make initial disclosures identified in Fed.R.Civ.P. 26(a)(1); the court elects to be exempt from the provisions of Rule 26(a)(1).

## VI. TRIALS

**Rule LR40.1. Trial dates and final pretrial preparation.**

(a) *Establishment of trial date.* While the case is in discovery, the clerk shall establish a trial date and give at least 4 months' notice thereof to the parties. The case may be set on a trial calendar of the assigned judge or placed on a master calendar to be called by one or more district judges. A magistrate judge may assist with the master calendar, although no case may be referred to the magistrate judge for trial unless the parties consent to the magistrate judge's trial jurisdiction.

(b) *Continuance of trial.* The court will consider a request to continue a trial date only if the request is signed by both the party and counsel for the party.

(c) *Final pretrial preparation.* The parties shall comply in all respects with Fed.R.Civ.P. 26(a)(3) regarding final pretrial disclosure, including the time requirements set out therein. The pretrial disclosures mandated by that rule shall be served on other parties but should not be filed with the court. No later than 20 days before trial, each party shall file a trial brief, along with proposed instructions on the issues (jury cases) or findings of fact and conclusions of law (non-jury cases). Any party, or the court on its own motion, may request a pretrial hearing or telephone conference to address matters relating to final pretrial preparation or settlement of the case. At any settlement conference, the court may require the attendance of parties and insurers.

**Rule LR43.1. Trial procedure.**

(a) *Opening statement in civil actions.* At the commencement of the trial of civil actions, the party with the burden of proof may, without argument, state his cause of action and the evidence by which he expects to sustain his claim. The adverse party may then, without argument, state his defense and the evidence by which he expects to sustain his defense. If the trial is to a jury, the opening statement shall be made immediately after the jury is sworn. If the trial is to the court, the opening statement shall be made immediately after the case is called for trial. Opening statements shall be subject to such time limitations as may be imposed by the court.

(b) *Documents, other than exhibits, used at trial.* When counsel expects to examine or cross-examine a witness concerning a document which will not be offered as an exhibit, counsel shall have at trial a copy of the document for use by the judge.

(c) *Absence during return of verdict.* In a jury trial, if a party or counsel is voluntarily absent from the courtroom prior to the return of the verdict, it shall be conclusively presumed that such party or counsel waived presence.

**Rule LR47.1. Juries.**

(a) *Examination of jurors.*

(1) The court will conduct the examination of prospective jurors.

(2) When the court's examination is completed, attorneys and parties appearing pro se may request that the court ask additional questions to the prospective jurors.

(b) *Contacts prohibited.*

(1) All parties, witnesses, and attorneys shall avoid any extra-judicial contact or communication with a grand juror or member of a petit jury venire or panel who has been or may be selected in a case in which that person is involved. No person may have any extra-judicial contact or communication, either directly or indirectly, with a grand juror, member of a petit jury venire or panel which may reasonably have the effect of influencing, or which is intended to influence, the grand juror, potential petit juror, or sitting petit juror.

(2) Attorneys for parties shall inform their clients and witnesses of this rule.

(3) No person shall approach a juror, either directly or through any member of his immediate family, in an effort to secure information concerning the juror's background.

(4) No provision of this rule is intended to prohibit communication with a petit juror after the juror has been dismissed from further service, so long as the communication does not tend to harass, humiliate, or intimidate the juror in any fashion.

(c) *Disclosure of names and addresses of prospective jurors.*

(1) The names of prospective jurors for any session of court or for a specific case may not be disclosed prior to their reporting for duty except in compliance with instructions of the court. The clerk will make available to counsel for the parties, and to any parties appearing *pro se,* a list which sets forth the name, general address, and occupation of each potential juror when court is opened for the session for which the jurors have been summoned.

(2) The names, address, and telephone numbers of persons who have served as jurors may not be disclosed by the clerk's office without court permission.

(d) *Number of jurors in civil jury cases.* In civil jury cases the jury shall consist of six (6) or more members.

## VII. JUDGMENT

### Rule LR51.1. Jury arguments and instructions.

(a) *Jury arguments.* In the trial of civil actions the party having the burden of proof shall have the right to open and close the jury argument, without regard to whether the defendant has offered evidence. If each of the parties has the burden of proof on one or more issues, the court, in its discretion, shall determine the order of arguments. All arguments shall be subject to such time limitations as may be imposed by the court.

(b) *Instructions to jury.* In all cases tried to a jury, a party who desires the jury to be instructed on a particular point must set it out in writing and furnish it to the court before jury arguments commence.

### Rule LR54.1. Taxation of costs.

(a) *Filing bill of costs.*

(1) A prevailing party may request the clerk to tax allowable costs in a civil action as a part of a judgment or decree by filing a bill of costs, on a form available in the clerk's office, within 30 days.

(i) after the expiration of time allowed for appeal of a final judgment or decree, or

(ii) after receipt by the clerk of an order terminating the action on appeal.

(2) The original of the bill of costs shall be filed with the clerk, with copies served on adverse parties.

(3) The failure of a prevailing party to timely file a bill of costs shall constitute a waiver of any claim for costs.

(b) *Objections to bill of costs.*

(1) If an adverse party objects to the bill of costs or any item claimed by a prevailing party, that party must state objection in a motion for disallowance with a supporting brief within 10 days after the filing of the bill of costs. Within five days thereafter, the prevailing party may file a response and brief. Unless a hearing is ordered by the clerk, a ruling will be made by the clerk on the record.

(2) A party may request review of the clerk's ruling by filing a motion within five days after the action of the clerk. The court's review of the clerk's action will be made on the existing record unless otherwise ordered.

(c) *Taxable costs.*

(1) Items normally taxed include, without limitation:

(i) Those items specifically listed on the bill of costs form. The costs incident to the taking of depositions (when allowable as necessarily obtained for use in the litigation) normally include only the reporter's attendance fee and charge for one transcript of the deposition.

(ii) Premiums on required bonds.

(iii) Actual mileage, subsistence, and attendance allowances for necessary witnesses at actual cost, but not to exceed the applicable statutory rates, whether they reside in or out of this district.

(iv) One copy of the trial transcript for each party represented by separate counsel.

(2) Items normally not taxed include, without limitation:

(i) Witness fees, subsistence, and mileage for individual parties, real parties in interest, parties suing in representative capacities, and the officers and directors of corporate parties.

(ii) Copies of depositions.

(iii) Daily copy of trial transcripts, unless prior court approval has been obtained.

(d) *Costs in settlements.* The court will not tax costs in any action terminated by compromise or settlement. Settlement agreements must resolve any issue relating to costs. In the absence of specific agreement, each party will bear its own costs.

(e) *Payment of costs.* Costs are to be paid directly to the party entitled to reimbursement, who must file a certificate of satisfaction within 20 days of receipt of payment.

**Rule LR54.2. Award of statutory attorney's fees.**

The court will not consider a motion to award statutory attorney's fees until moving counsel shall first advise the court in writing that after consultation the parties are unable to reach an agreement in regard to the fee award. The statement of consultation shall set forth the date of the consultation, the names of the participating attorneys, and the specific results achieved.

Within 60 days after the entry of final judgment, (i) the parties shall file an appropriate stipulation and request for an order if they have reached an agreement on an award of statutory attorney's fees; or (ii) if the parties have not reached such an agreement, the moving party shall file the statement of consultation required by this rule and a motion, supported by affidavits, time records, or other evidence, setting forth the factual basis for each criterion which the court will consider in making such an award.

**Rule LR56.1. Summary judgment motions.**

(a) *Notice of dispositive motion.* Any party who intends to file a motion for summary judgment, or any other dispositive motion, must file and serve notice of intention to file a dispositive motion within 10 days following the close of the discovery period.

(b) *Filing of dispositive motions.* All dispositive motions and supporting briefs must be filed and served within 30 days following the close of the discovery period.

(c) *Limitations of length of briefs.* The page limitations for briefs on all motions, established by LR7.3(d), apply to summary judgment briefs. Principal briefs are limited to 20 pages, and reply briefs are limited to 10 pages.

(d) *Form of briefs — Summary judgment motion by claimant.* A party requesting summary judgment on its claim shall set out a statement of the nature of the matter before the court, a statement of facts, and a statement of the questions presented as provided in LR7.2(a)(1)-(3). The party shall also set out the elements that it must prove (with citations to supporting authority), and the specific, authenticated facts existing in the record or set forth in accompanying affidavits that would be sufficient to support a jury finding of the existence of those elements.

In a responsive brief the opposing party may, within 30 days after service of the summary judgment motion and brief, set out the statements required by LR7.2(a)(1)-(3) and also set out the elements that the claimant must prove (with citations to supporting authority), and either identify any element as to which evidence is insufficient (and explain why the evidence is insufficient), or point to specific, authenticated facts existing in the record or set forth in accompanying affidavits that show a genuine issue of material fact, or explain why some rule of law (e.g., an applicable statute of limitations) would defeat the claim. The failure to file a response may cause the court to find that the motion is uncontested.

In a reply brief the claimant may, within 10 days of service of the response, address matters newly raised in the response.

(e) *Form of briefs — Summary judgment motion by defending party.* A party moving for summary judgment upon an opposing party's claim shall set out a

statement of the nature of the matter before the court, a statement of facts, and a statement of the questions presented as provided in LR7.2(a)(1)-(3). The party shall also set out the elements that the claimant must prove (with citations to supporting authority), and explain why the evidence is insufficient to support a jury verdict on an element or elements, or why some other rule of law would defeat the claim.

In a responsive brief the party having made the challenged claim may, within 30 days after service of the summary judgment motion and brief, file with the court a response that sets out the statements required by LR7.2(a)(1)-(3) and also sets out the elements that it must prove (with citations to supporting authority), and the specific, authenticated facts existing in the record or set forth in accompanying affidavits that would be sufficient to support a jury finding of the existence of the disputed elements. The failure to file a response may cause the court to find that the motion is uncontested.

In a reply brief the defending party may, within 10 days of service of the response, address matters newly raised in the response.

(f) *Summary judgment motions and trial dates.* The pendency of summary judgment motions will not serve to delay trial on the date set by the court in accordance with LR40.1. If by the time set for trial, the court has been unable to reach any pending summary judgment motion, the case will nonetheless be reached according to the trial calendar. The court will rule on the motion at the outset of trial.

(g) *Failure to timely file dispositive motions.* A dispositive motion which is not noticed and filed within the prescribed time will not be reached by the court prior to trial unless the court determines that its consideration will not cause delay to the proceedings.

CASE NOTES

**Where plaintiffs failed to respond to defendants' motion for summary judgment,** under Local Rules 7.3(k) and this rule, the Court could find the motion to be uncontested and grant it without further notice, but because of plaintiffs' pro se status, the Court acted with an abundance of caution and examined the motion closely on its merits. Baraukas v. Danek Med., Inc., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5122 (M.D.N.C. Jan. 13, 2000).

## VIII. PROVISIONAL AND FINAL REMEDIES

### Rule LR65.1. Injunctions and temporary restraining orders.

(a) *Form of application.* A prayer for a temporary restraining order or preliminary injunction set forth in a pleading will not bring the issue before the court prior to the time of trial. If a ruling before trial is desired, a party must separately file a motion and brief.

(b) *Hearing.* A motion seeking a preliminary injunction will be considered and determined on the official court file including affidavits, briefs and other documents filed in support thereof without oral argument or testimony unless otherwise ordered by the court. A request for leave to present oral argument or testimony in support of or in opposition to such motion must be included in the motion or response.

### Rule LR65.1.1. Sureties.

(a) *Surety.* Except as otherwise provided by law or by order of the court, all bonds, guaranties, and undertakings must be secured by:

(1) Deposit of cash, certified check, certificate of deposit, bank draft, Post Office money order, negotiable bond, note of the United States as defined in 6

U.S.C. § 15, or other bond or note of the United States with the agreement provided for in 6 U.S.C. § 15;

(2) Undertaking of guaranty of a company holding a certificate of authority from the U.S. Department of Treasury as an acceptable surety on federal bonds; which company has filed with the clerk the designation of a resident of this district as agent, dated not more than three years earlier than the date of the undertaking, upon whom process may be served; and which company is otherwise qualified by having met all requirements of the law of North Carolina and of 6 U.S.C. §§ 6-13; or

(3) Undertaking of individual surety or sureties who are residents of North Carolina and own property within the state worth double the amount of the bond or undertaking over all exemptions, debts, liabilities and other obligations.

(b) *Individual sureties.*

(1) An individual surety must execute an affidavit of justification giving full name, occupation, residence address, business address, and facts showing his financial qualification to act as surety.

(2) A husband and wife are considered as one surety.

(3) Members of the bar, officers and employees of this court, and employees of the Department of Justice serving in this district may not serve as sureties in any suit, action, or proceeding in this court.

(c) *Approval.* All bonds, guaranties, undertakings, and individual sureties must be approved by a judge or the clerk. Individual sureties who justify on the basis of ownership of real or personal property may be required to provide proof of ownership such as a certificate of title, and a title search conducted by an attorney other than the attorney representing the party on whose behalf the bond is being posted, and give security in the form of a proper security instrument or deed of trust.

**Rule LR67.1. Registry funds.**

(a) *Deposit with the Treasury.* Unless otherwise ordered by the court, the clerk shall deposit registry funds in the Treasury of the United States.

(b) *Investments in income-earning account.* Upon motion or upon consent of the parties, the court may order the clerk to invest certain registry funds in an income-earning account. The order may issue upon a consent request of the parties or upon motion by an interested party, in accordance with the following procedures:

(1) A consent request must demonstrate the assent of all interested and potentially interested parties. The agreement must demonstrate that the investment will be in compliance with applicable provisions of the law regulating the investment of public monies, provide for proper disposition of future earnings, and set out with particularity the following information:

(i) the form of deposit;

(ii) the amount to be invested;

(iii) the type of investment to be made by the clerk of court; i.e., passbook savings, insured money fund, CD, etc.;

(iv) the name and address of the private institution where the deposit is to be made;

(v) the rate of interest at which the deposit is to be made, if possible;

(vi) the length of time the money should be invested, whether it should automatically be reinvested, etc., keeping in mind that some investments include a penalty for early withdrawal;

(vii) the name and address of the designated beneficiary or beneficiaries;

(viii) the form of additional collateral to be posted by the private institution in the event that the standard F.D.I.C. coverage is insufficient to insure the total amount of deposit; and

(ix) such other information that may be deemed appropriate under the facts and circumstances of the particular case.

The consent request shall be accompanied by a proposed order directing the clerk to proceed with the investment.

(2) A motion may be filed *ex parte* by an interested party, and the court may enter an order in advance of the filing of any response thereto. The motion must set forth the showings required in subsection (b)(1) concerning the investment and must include a proposed order. The motion must be served on all known interested parties who do not join therein. The court may determine the motion upon the record or may, in its discretion, call for a hearing on the matter. If an order is entered prior to the filing of a response in opposition, the motion will be reconsidered by the court.

(3) When an order is issued to invest or reinvest registry funds into some form of interest-bearing account or accounts, the party presenting the order shall deliver a copy of said order either personally, or by certified mail, return receipt requested, to the Clerk, or in his absence, the Chief Deputy Clerk or the Financial Deputy. Further, it shall be incumbent upon the presenting party to confirm that the appropriate action has been accomplished by the Clerk in accordance with the provisions of the particular order.

(4) The clerk of court shall deduct from the income earned the fee specified in Chapter VII, *Guide to Judiciary Policies and Procedures*, for deposit to the credit of the Judiciary, without order of the court.

## IX. SPECIAL PROCEEDINGS

### Rule LR72.1. Authority of magistrate judges.

(a) *Designation to conduct trials and to perform other duties.*

(1) Magistrate judges are authorized and designated to exercise the powers and authority and to perform the duties enumerated in 28 U.S.C. § 636(b)(1) and (2).

(2) Magistrate judges serving this court are specially designated to:

(i) exercise civil jurisdiction to conduct any or all proceedings in jury or non-jury cases and order the entry of judgment in any case referred to them for that purpose, pursuant to 28 U.S.C. § 636(c), and

(ii) exercise jurisdiction to try persons accused of, and sentence persons convicted of, criminal misdemeanors.

(b) *Authority to perform additional duties.* Pursuant to 28 U.S.C. § 636(b)(3), magistrate judges are authorized to perform additional functions and duties, including the following:

(1) Conduct pretrial conferences, settlement conferences, omnibus hearings, and related pretrial proceedings;

(2) Conduct calendar and status calls for civil and criminal calendars, and determine motions to expedite or postpone the trial of cases;

(3) Conduct arraignments in cases not triable by the magistrate judge to the extent of taking a not guilty plea or noting a defendant's intention to plead guilty or *nolo contendere* and ordering a presentence report in appropriate cases;

(4) Conduct *voir dire* and select petit juries for the court;

(5) Accept petit jury verdicts in civil cases in the absence of a district judge;

(6) Conduct preliminary proceedings relating to the potential revocation of probation;

(7) Issue subpoenas, writs of *habeas corpus ad testificandum* or *habeas corpus ad prosequendum,* or other orders necessary to obtain the presence of parties or witnesses or evidence needed for court proceedings;

(8) Order the exoneration or forfeiture of bonds;

(9) Conduct proceedings for the collection of civil penalties of not more than $200 assessed under the Federal Boat Safety Act of 1971, in accordance with 46 U.S.C. § 1484(d);

(10) Conduct examinations of judgment debtors, in accordance with Rule 69 of the Federal Rules of Civil Procedure;

(11) Review petitions in civil commitment proceedings under Title III of the Narcotic Addict Rehabilitation Act;

(12) Conduct such hearings as are necessary or appropriate, and submit to a district judge proposed findings of fact and recommendations for disposition of applications for judgment by default pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, or motions to set aside judgments by default pursuant to Rule 55(c) of the Federal Rules of Civil Procedure;

(13) Consider an application by complainant pursuant to 42 U.S.C. § 2000e-5(f)(1), and in such circumstances as may be deemed just, appoint an attorney for such complainant, and authorize the commencement of an action without payment of fees, costs, or giving security therefor;

(14) Issue orders or warrants authorizing acts necessary in the performance of the duties of administrative and regulatory agencies and departments of the United States Government;

(15) Conduct extradition proceedings, in accordance with 18 U.S.C. § 3184;

(16) Supervise proceedings conducted pursuant to letters rogatory, in accordance with 28 U.S.C. § 1782;

(17) Require compliance with local rules with regard to *pro se* petitions under 42 U.S.C. § 1983;

(18) Issue orders of withdrawal from the court registry of funds pursuant to 28 U.S.C. § 2042; and

(19) Perform any additional duty which is not inconsistent with the Constitution and laws of the United States.

### Rule LR72.2. Assignment of matters to magistrate judges.

Duties and cases may be assigned or referred to a magistrate judge by a court order entered in the action or by the clerk in compliance with standing orders or the instructions of a district judge.

### Rule LR72.3. Consent to designation of magistrate judge as a special master.

(a) *Consent.* Upon the written consent of the parties, a magistrate judge may be designated to serve as a special master in any civil proceeding without a showing of exceptional conditions or that the issues are complicated.

(b) *Reference.* Reference of a case to a magistrate judge as a special master is within the discretion of the court, but the consent of the parties may not thereafter be withdrawn without approval of the referring district judge.

### Rule LR72.4. Stay of order.

Application for stay of a magistrate judge's order pending review of objections made thereto must first be made to the magistrate judge.

### Rule LR73.1. Consent to civil trial jurisdiction.

(a) *Consent to exercise of civil trial jurisdiction.*

(1) The consent of a party to the exercise of civil trial jurisdiction authorized in 28 U.S.C. § 636(c)(1) may be communicated to the clerk by letter, or by a form available in the clerk's office, signed by the party or the party's attorney.

(2) The consent of a party will be placed in the public court file only when the court has ordered the case referred to a magistrate judge.

(b) *Withdrawal of consent.* After a case has been referred, the consent of the parties to the exercise of a magistrate judge's jurisdiction may not be withdrawn without the approval of the district judge who signed the order of reference.

(c) *Reference discretionary.* Reference of a case to a magistrate judge after consent of all parties is within the discretion of the court.

## X. DISTRICT COURTS AND CLERKS

### Rule LR77.1. Court schedule and conduct of business.

(a) *Headquarters.* The headquarters of the court shall be located in Greensboro. All pleadings and papers submitted for filing shall be presented to the clerk in Greensboro, except that papers may be filed in open court in any court location when permitted by a judge.

(c) *Scheduling.* Conferences, hearings, and trials will be scheduled by the court or by the clerk at the court's direction. All sessions of court will commence at 9:30 a.m. unless otherwise announced.

(c) *Naturalization.* Petitions for naturalization will be considered by the court at Greensboro, North Carolina, on Fridays after the third Mondays in February, May, August, and on the Friday before Thanksgiving in November. In its discretion, the court may at other times consider petitions for naturalization when made by members of the armed services, seamen on merchant vessels registered under the laws of the United States, members of the immediate families and dependents of such personnel, or other persons in exceptional circumstances.

### Rule LR77.2. Orders and judgments grantable by clerk.

(a) *Orders and judgments.* The clerk is authorized to grant the following orders and judgments without direction by the court:

(1) Consent orders for the substitution of attorneys.

(2) Upon a showing of good cause, consent orders in civil actions for extending for not more than 30 days (plus an additional 30 days in exceptional circumstances) the time within which to answer or otherwise plead or to respond to motions.

(3) Consent orders dismissing an action, except in cases governed by Fed.R.Civ.P. 23 or 66.

(4) Entry of default and judgment by default as provided for in Fed.R.Civ.P. 55(a) and 55(b)(1).

(5) Orders canceling liability on bonds other than orders disbursing funds from the court's registry account.

(6) Orders appointing persons to serve process pursuant to Fed.R.Civ.P. 4(c).

(7) *Ex parte* orders as authorized in LR7.3(g). Applications for extensions of time, orders or judgments shall be accompanied by a proposed order.

(b) *Clerk's action reviewable.* The actions of the clerk may be suspended, altered, or rescinded by the court upon cause shown.

### Rule LR77.3. Court libraries.

The court's libraries are maintained for the exclusive use of the judges and the clerk.

### Rule LR79.1. Access to court records.

(a) *Access.* The public records of the court are available for examination in the clerk's office during normal business hours.

(1) No file, pleading, paper, or index card may be removed from the clerk's office without the approval of a judge.

(2) When removal of a file or document is authorized, the clerk will set a date for its return and will require a written receipt for its release.

(b) *Copies.* The clerk will make and furnish copies of official court records upon request and upon payment of prescribed fees. The official court record consists of items filed on the right-hand side of the case folder. Items filed on the left-hand side of the case folder, while available for public examination, may not be copied without the written approval of a judge. Requests for copies of items filed on the left-hand side of the case folder must be submitted in writing to the clerk of court, who will refer the matter to the appropriate judge and advise the requester of the judge's decision.

**Rule LR79.2. Release of information by court personnel.**

All court personnel, including, among others, the United States Marshal and deputies, the clerk of court and deputies, the chief probation officer and officers, the chief pretrial services officer and officers, bailiffs, and court reporters, are prohibited from disclosing to any person, without authorization by the court, information relating to a case that is not part of the public records of the court. This proscription applies to the divulgence of information concerning arguments and hearings held in chambers or otherwise outside the presence of the public.

**Rule LR79.3. Designation of contents of record on interlocutory appeal.**

With respect to an interlocutory appeal, the clerk shall certify and forward to the court of appeals a record consisting of copies of the docket entries, all pleadings (complaints, counterclaims, cross claims, and answers thereto), and the order from which the appeal is taken.

**Rule LR80.1. Official court reporters.**

The duties and responsibilities of official court reporters of this court are set forth in the Court Reporters Management Plan which is a public document on file with the office of the clerk.

## XI. LOCAL CIVIL RULES FOR WHICH THERE ARE NO CORRESPONDING FEDERAL RULES

**Rule LR83.1. Attorneys.**

(a) *Roll of attorneys.* The bar of this court shall consist of those attorneys admitted to practice before this court.

(b) *Eligibility and admission.* To be eligible for admission to the bar of the court, a person must be admitted to the practice of law in this state and in good standing with the Supreme Court of North Carolina. A judge will consider a request for admission only upon motion made in open court by a member of the bar of this court. Prior to being admitted to practice, an attorney must certify, on the application for admission to practice form provided for use in this court, that the attorney has read and is familiar with the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the Local Rules of this Court, and the North Carolina Code of Professional Responsibility. Attorneys seeking admission to practice in this court must take an oath or make an affirmation in a form approved by the court

and pay the filing fee required by the Administrative Office of the United States Courts for admission to practice in this district. When the application form prescribed for use by this court is completed and the appropriate filing fee has been paid to the Clerk of Court of this court, a judge or magistrate judge of the Eastern or Western Districts of North Carolina, upon being presented evidence that the above-mentioned application has been filed and that the requisite fees have been paid, may admit an attorney who is qualified according to these rules to practice before this court. Attorneys already admitted to the bars of either the United States District Court for the Eastern District of North Carolina or the United States District Court for the Western District of North Carolina may be admitted to the bar of this court upon tendering the application and fees required by this rule, together with a copy of the order admitting the attorney to practice in either of the aforementioned districts.

(c) *Litigants must be represented by a member of the bar of this court.*

(1) Litigants in civil and criminal actions and parties in bankruptcy proceedings before this court, except governmental agencies and parties appearing pro se, must be represented by at least one attorney who is a member of the bar of this court. The service of all pleadings and papers permitted by the Federal Rules of Civil and Criminal Procedure shall be sufficient if made upon such attorney.

(2) All pleadings and papers presented to the clerk for filing, except by attorneys representing governmental agencies or parties appearing *pro se,* shall be rejected by the clerk unless signed by a member of the bar of this court.

(d) *Special appearance.*

(1) Attorneys who are members in good standing of the bar of the highest court of any state or the District of Columbia may practice in this court for a particular case in association with a member of the bar of this court. By entering an appearance, an attorney agrees that:

(i) the attorney will be responsible for ensuring the presence of an attorney who is familiar with the case and has authority to control the litigation at all conferences, hearings, trials and other proceedings; and that

(ii) the attorney submits to the disciplinary jurisdiction of the court for any misconduct in connection with the litigation for which the attorney is specially appearing.

(2) A member of the bar of this court who accepts employment in association with a specially appearing attorney is responsible to this court for the conduct of the litigation or proceeding and must sign all pleadings and papers, except for certificates of service. Such member must be present during pretrial conferences, potentially dispositive proceedings, and trial.

(e) *Withdrawal of appearance.* No attorney who has entered an appearance in any civil or criminal action shall be permitted to withdraw an appearance, or have it stricken from the record, except on order of the court.

**Rule LR83.2. Courtroom practices.**

(a) *Addressing the court.* Attorneys or *pro se* litigants shall rise when addressing the court, and shall make all statements to the court from behind the counsel table or the lectern facing the court. They shall not approach the bench, except upon the permission of the court.

(b) *Questioning witnesses.* While questioning witnesses, attorneys or *pro se* litigants shall remain seated or standing behind the counsel table or standing at the lectern. They shall not approach the witness except for the purpose of examining the witness with respect to an exhibit. Only one attorney for each party may participate in the examination or cross-examination of a witness.

### Rule LR83.3. Settlement.

Attorneys or *pro se* litigants shall immediately notify the clerk of an agreement in principle reached by the parties which resolves the litigation as to any or all parties. Whenever any civil action scheduled for a jury trial is settled or otherwise disposed of in advance of the actual trial, then, except for good cause shown, all jury costs, including any marshal's fees, mileage and per diem, may be assessed equally against the parties or otherwise assessed as determined by the court, unless the clerk's office is notified at least one full business day prior to the date on which the action is scheduled for trial or in sufficient time to notify jurors that their presence will not be required.

### Rule LR83.4. Sanctions.

(a) *Imposition of sanctions.* If an attorney or a party fails to comply with a local rule of this court, the court may impose sanctions against the attorney or party, or both. The court may make such orders as are just under the circumstances of the case, including the following:

(1) an order that designated matters or facts shall be taken as established for purposes of the action;

(2) an order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence;

(3) an order striking out pleadings or parts thereof, or staying proceedings until the rule is complied with, or dismissing the action or any part thereof, or rendering a judgment by default against the failing party;

(4) an order imposing costs, including attorney's fees, against the party, or the party's attorney, who has failed to comply with a local rule.

(b) *Sanctions within the discretion of the court.* The imposition of sanctions for violation of a local rule is discretionary with the court. In considering the imposition of sanctions, the court may consider whether a party's failure was substantially justified or whether other circumstances make the imposition of sanctions inappropriate.

#### CASE NOTES

**Disqualification Sanction Not Necessary.** — Ethical violations of plaintiff's out-of-state law firm were relatively minor, inasmuch as not all ex parte contacts with defendant's employees were improper and defendants did not suffer any harm; therefore, the disqualification sanction was not necessary to vindicate the public interest in preventing overreaching by counsel or to restore public confidence. McCallum v. CSX Transp., Inc., 149 F.R.D. 104 (M.D.N.C. 1993).

### Rule LR83.5. Custody and disposition of trial exhibits, sealed documents, and filed depositions.

(a) *Custody with the clerk.* Unless otherwise directed by the court, all trial exhibits admitted into evidence in criminal and civil actions shall be placed in the custody of the clerk, except as provided in section (b) below.

(b) *Custody with the offering party.* All exhibits not suitable for filing and transmission to the court of appeals as a part of a record on appeal shall be retained in the custody of the party offering them, subject to the orders of the court. Such exhibits shall include, but not be limited to, the following types of bulky or sensitive exhibits: narcotics and other controlled substances, firearms, ammunition, explosive devices, jewelry, liquor, poisonous or dangerous chemicals, money or articles of high monetary value, counterfeit money, and documents or physical exhibits of unusual bulk or weight.

At the conclusion of a trial or proceeding, the party offering such exhibits shall retain custody of them and be responsible to the court for preserving them in their condition as of the time admitted until any appeal is resolved or the time for appeal has expired. The party retaining custody shall make such exhibits available to opposing counsel for use in preparation of an appeal and be responsible for their safe transmission to the appellate court, if required.

(c) *Disposition of exhibits, sealed documents, and filed depositions by clerk.* Any exhibit, sealed document, disk, or filed deposition in the clerk's custody more than 30 days after the time for appeal, if any, has expired, or an appeal has been decided and mandate received, may be returned to the parties or destroyed by the clerk. Complaints, answers, motions, responses and replies, whether sealed or not, must be forwarded to the General Services Administration for permanent storage. The confidentiality of sealed documents cannot be assured after the case file is transferred to the General Services Administration for records holding.

(d) *Depositions.* Depositions read into the court record are considered exhibits for which the parties shall be responsible as provided in section (b) above. Depositions on file admitted into evidence but not read into the record shall be retained in the clerk's custody and disposed of as authorized in section (c) of this rule.

**Rule LR83.6. Disposition of private property.**

(a) *Disposition.* Whenever, during the course of an investigation, a trial of any action, or any other proceeding in this court, money, contraband, or other private property comes into the possession or custody of a law enforcement officer or an officer of the court, which will require an order of this court to determine its ownership or proper disposition, it is the responsibility of the attorney representing the party having original custody or control of such property to apply to the court for an order determining its ownership and directing its disposition.

(1) This application must be made before the conclusion of the litigation while all parties are before the court in person or through their attorneys.

(2) If the court cannot determine ownership or the proper disposition on the basis of the record or information from the parties before it, application must be made for an order providing for temporary custody pending institution of appropriate civil proceedings to determine final ownership or disposition.

(b) *Sanctions.* The court may impose sanctions as provided in LR83.4 against any party or attorney whose failure to comply with this rule necessitates a subsequent hearing or court proceeding which would otherwise not have been necessary.

**Rule LR83.7. Claim of unconstitutionality; three-judge courts.**

(a) *Notification.* If at any time prior to the trial of an action to which (1) neither the United States nor any of its officers, agencies, or employees is a party and a party draws in question the constitutionality of an act of Congress affecting the public interest, or (2) neither the state nor any of its agencies, officers, or employees is a party and a party draws in question the constitutionality of any statute of that state affecting the public interest, that party, to enable the court to comply with 28 U.S.C. § 2403, shall notify the court. The notice shall be in writing, stating the title of the action, the statute in question, and the respects in which it is claimed the statute is unconstitutional, and a copy shall be served upon the Attorney General of the United States and the United States Attorney in this district or the North Carolina Attorney General, as applicable.

(b) *Additional copies.* In any action or proceeding required by act of Congress to be heard and determined by a district court of three judges, all pleadings, papers, and documents filed subsequent to the designation of the court, as provided in 28 U.S.C. § 2284(a), shall be filed in triplicate, original and two copies, with the clerk. The clerk shall make timely distribution of these documents to the designated judges.

### Rule LR83.8. Photographs, recordings, and broadcasts.

Radio or television broadcasting and the use of photographic, electronic, or mechanical reproduction or recording equipment without court permission is prohibited in courtrooms or their environs. "Environs" is defined to mean the courtrooms, the offices of the judges, clerk, probation officers, or any corridor connecting or adjacent thereto. Ceremonial proceedings such as the administration of oaths of office to appointed officials of the court, naturalization, and presentation of portraits, may be photographed in or broadcast from the courtroom under the supervision of the court. This rule does not apply to courtroom proceedings by other government agencies.

### Rule LR83.9. Courtroom security.

The United States Marshal or a Court Security Officer shall be present at all proceedings held in open court, unless otherwise ordered by the court.

### Rule LR83.10a. Purpose of mediated settlement conferences.

These rules govern reference of selected civil actions for mediated settlement conferences. Their purpose is to provide for an informal process conducted by a mediator with the objective of helping the parties reach a mutually acceptable settlement of their dispute. The rules are not intended to force settlement upon any party. The rules shall be construed to secure the speedy, fair, and economical resolution of controversies while preserving the right of all parties to a conventional trial.

CASE NOTES

**Legal analysis in deciding Rule 15 motions should not be materially different merely because a case involves court-annexed arbitration** from which the parties may seek a trial de novo. R.J. Reynolds Tobacco Co. v. Southern Ry., 110 F.R.D. 95 (M.D.N.C. 1986) (decided prior to the 1993 amendments).

**In ruling on a motion to amend the pleadings made immediately before an arbitration hearing,** the court should consider, with slightly reduced rigor, the factors of delay and prejudice, as are appropriate to a trial setting. R.J. Reynolds Tobacco Co. v. Southern Ry., 110 F.R.D. 95 (M.D.N.C. 1986) (decided prior to the 1993 amendments).

### Rule LR83.10b. Selection of cases for mediated settlement conferences.

(a) *Automatic selection by these Rules.* Several categories of civil cases are automatically selected for mediated settlement conferences, without specific order by the court. These categories include, according to designations on the civil cover sheet (1) contract [categories 110-140 and 160-195, specifically excluding 150-153], (2) tort [all categories, 310-385], (3) civil rights [all categories, 440-444], (4) labor [all categories, 710-791], (5) property rights [all categories, 820-840], (6) antitrust [category 410], (7) banks and banking [category 430], (8) securities/commodities/exchange [category 850], and (9) environmental matters [category 893]. The parties to these actions shall discuss mediation plans at the Fed.R.Civ.P. 26(f) meeting of the parties and

report such plans in their Rule 26(f) Report in preparation for the entry of an initial pretrial order. *See* LR16.1(b)(c) and (d). Cases wherein the United States is a party or the plaintiff appears *pro se* are not included within this automatic selection for mediation.

(b) *Discretionary selection by the court.* In its discretion, the court may order a mediated settlement conference in any action not automatically selected under section (a), above. After entry of such an order, the parties shall have 20 days to file a statement identifying an agreed-upon mediator.

(c) *Stipulated selection by the parties.* In any case where selection for a mediated settlement conference is not automatic under section (a) of this rule, the parties may file a stipulation for mediation. In such stipulation, the parties may state any agreements they have reached regarding the identity of the mediator, the timing of the conference, and any modification of the procedures described by these rules.

(d) *Exemption from mediation.* Any party, or parties jointly, may file a motion for exemption from mediation. Such a motion will be granted only on a showing of good cause. A general assertion that a case is not likely to settle or that settlement possibilities are remote does not constitute good cause.

**Rule LR83.10c. Mediators.**

(a) *Certification.* The clerk shall maintain a list of mediators who have agreed to serve under these rules. The list shall identify areas of subject matter expertise of each mediator according to the categories identified in LR83.10b(a) and include such biographical information as each mediator may wish to provide. Attorneys who have been certified as mediators pursuant to the rules of the North Carolina Supreme Court and who have at least 8 years of civil trial practice or membership on the faculty of an accredited law school may serve on the panel of mediators. Further, attorneys who were on the court's panel of arbitrators as of December 1, 1993 may serve on the panel of mediators. Appointment to the list does not guarantee any mediator that he or she will be appointed to serve in any case before the court.

(b) *Compensation of mediators.* All mediators under these rules, whether agreed upon by the parties or selected by the clerk, shall be compensated by the parties at the hourly rate set by the Chief Judge, except that the court may permit a higher compensation rate to an agreed-upon mediator on joint application by the parties and a showing that the case involves extraordinary complexities. The parties shall make payment directly to the mediator at the termination of the mediated settlement conference, whether or not the case is settled. The mediator shall be compensated for up to 2 hours of preparation time and for the time expended in the conference. The only compensable expense of the mediator is travel mileage at the ordinary government rate. The mediator's fee and travel expense shall be paid in one equal share by the plaintiff (or plaintiffs), one equal share by the defendant (or defendants), and one equal share by any third party (or parties), unless otherwise agreed by all parties or ordered by the court in the interest of fairness.

(c) *Compensation of mediators when a party is unable to pay.* If a party contends it is unable to pay its share of the mediator's fee, that party shall, before the conference, file a motion with the court to be relieved of the obligation to pay. The motion shall be accompanied by an affidavit of financial standing. The mediated settlement conference should proceed without payment by the moving party, and the court will rule on the motion upon completion of the case. The court will take into consideration the outcome of the case, whether by settlement or judgment, and may relieve the party of its obligation to pay the mediator if payment would cause a substantial financial hardship. If the party is relieved of its obligation, the mediator shall remain

uncompensated as to that portion of his or her fee, a circumstance that reflects the mediator's duty of *pro bono* service.

**Rule LR83.10d. Selection of the mediator.**

(a) *Selection by agreement.* The parties are encouraged to select their own mediator by agreement. If, within 20 days of the initial pretrial order, the parties file with the clerk a statement identifying an agreed-upon mediator, such statement shall be effective to select the mediator, and the clerk will notify the mediator of his or her selection. The parties may select an agreed-upon mediator who is not on the clerk's list of certified mediators, but any such mediator must, prior to service, agree to be bound by all provisions of these rules.

(b) *Selection by the clerk.* If no timely statement pursuant to section (a) of this rule is filed, the clerk shall appoint a mediator from the certified list. The appointment is within the discretion of the clerk, who may consider subject matter expertise in making the appointment. The clerk shall give notice of the appointment to the mediator and the parties.

(c) *Disqualification.* On motion made to the court not later than 20 days before a scheduled mediated settlement conference, a mediator may be disqualified by the court for bias or prejudice as provided in 28 U.S.C. §144. Further, a mediator shall disqualify himself or herself if the mediator could be required to do so under 28 U.S.C. § 455 if he or she were a justice, judge, or magistrate judge.

(d) *Copies of the pleadings.* On request of the mediator, the clerk shall furnish to the mediator a copy of the complaint, answer, and any third-party pleadings in the action.

**Rule LR83.10e. Procedures for mediated settlement conferences.**

(a) *Time period for the mediated settlement conference.* The mediated settlement conference shall be held during the discovery period unless the court specifically orders otherwise.

(b) *Scheduling the mediated settlement conference.* The mediated settlement conference shall ordinarily be held in the office of the mediator, but may be held at any other place agreed to by the parties and the mediator. Because of space limitations, the federal courthouses are not available for mediated settlement conferences. After conferring with the attorneys for the parties regarding scheduling matters, the mediator shall determine the place and time of the conference (within the period established by these rules), and give notice to the parties.

(c) *Submission of position papers to mediator.* No later than five (5) business days before the scheduled date of the mediated settlement conference, any party may submit a confidential position paper to the mediator. The position paper shall be limited in length to five (5) pages, double-spaced, and may be accompanied by up to five (5) pages of exhibits. Position papers are confidential, shall be held so by the mediator, and need not be served on other parties. The purpose of these submissions is to help the mediator become familiar with the assertions of the parties, and the parties may agree to the submission of additional information if they believe the information will facilitate the mediated settlement conference.

(d) *Duties of parties, representatives, and attorneys.* The following persons shall be physically present at the entire mediated settlement conference unless excused by the mediator:

(1) Individual parties; an officer, manager, or director of a corporate or entity party, such representative to have full authority to negotiate on behalf of the entity and to approve or recommend a settlement;

(2) At least one attorney of record for each represented party; and

(3) A representative of the insurance carrier for any party against whom a claim is made. The representative must have full authority to settle the claim and must be a person other than the carrier's outside counsel.

Upon reaching a settlement agreement at a mediated settlement conference, the parties shall forthwith reduce the agreement to writing and prepare a stipulation of dismissal or consent judgment for presentation to the court.

(e) *Authority of the mediator.* The mediator is authorized by these rules to exercise control over the mediated settlement conference and to direct all proceedings therein. The mediator is specifically authorized to meet or consult privately with any party or their counsel during the conference. The mediator may report in writing to the court, with copies to the parties, any conduct of any party that may be in violation of these rules for mediated settlement conferences.

(f) *Duties of the mediator.* At the beginning of the mediated settlement conference, the mediator shall describe the following matters to the parties:

(1) The process of mediation,

(2) The differences between mediation and other forms of conflict resolution,

(3) The costs of the mediated settlement conference,

(4) The fact that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement,

(5) The circumstances under which the mediator may meet alone with either of the parties or any other person,

(6) The conditions under which communications with the mediator will be held in confidence during the conference,

(7) The inadmissibility of negotiating statements and offers at trial,

(8) The fact that the court will not permit parties in other litigations to conduct discovery regarding the mediation in this case,

(9) The duties and responsibilities of the mediator and the parties, and

(10) The fact that any agreement reached will be reached by mutual consent of the parties.

The mediator may recess or suspend the conference at any time and set a schedule for reconvening. It is the duty of the mediator to determine if an impasse has been reached or mediation should for any reason be terminated. He shall then inform the parties that mediation is terminated.

(g) *Agreements to modify mediation procedures.* By agreement filed with the court, the parties, with the consent of the mediator, may modify the mediation procedures described in these rules, except that the parties may not alter time limitations set by these rules or order of the court.

(h) *Sanctions for failure to appear.* If a person fails to attend a mediated settlement conference without good cause, the court may impose on that person (or any associated party) any lawful sanction, including, but not limited to, the imposing of the cost of attorney's fees, mediator's fees, and expenses of persons incurred in attending the conference.

CASE NOTES

**Cited** in Ashley Furn. Indus., Inc. v. SanGiacomo N.A. Ltd., 187 F.3d 363 (4th Cir. 1999).

## Rule LR83.10f. Completion of the mediated settlement conference.

When the mediated settlement conference is completed, the mediator shall immediately submit to the clerk a report of the status of the case, on a form supplied by the clerk. If the case is resolved, it is the duty of the parties to file

a stipulation of dismissal or consent judgment. If the case is not resolved, it proceeds without further order of the court in accordance with the local rules of the court.

**Rule LR83.10g. Evaluation of the mediation program.**

The mediation program established by these rules is experimental in nature and will be periodically reviewed by the court. For purposes of evaluation of the program, the mediator, the attorneys, and the litigants may be requested to complete confidential evaluation reports at the completion of the mediation. These reports shall be kept confidential by the clerk and shall be maintained in a file separate and apart from the case file. The clerk shall compile information from the evaluation reports to assist the court in determining the effectiveness of the mediation program.

**Rule LR83.11a. Purpose of disciplinary rules.**

The court, in furtherance of its inherent power and responsibility to supervise attorneys who practice before it, adopts these rules of disciplinary enforcement.

**Rule LR83.11b. Attorneys convicted of a crime.**

(a) *Suspension upon filing of judgment.* Upon the filing of a certified copy of a judgment of conviction demonstrating that any attorney practicing before the court has been convicted in any court of the United States, or the District of Columbia, or of any state, territory, commonwealth or possession of the United States, of a serious crime as herein defined, the court may enter an order immediately suspending that attorney from practice until final disposition of a disciplinary proceeding before this court, or until final disposition is made by the appropriate state bar.

(b) *Definition of serious crime.* "Serious crime" shall include any felony and also any other crime which involves false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy of solicitation of another to commit a "serious crime."

(c) *Conviction of serious crime.* Upon the filing of a certified copy of a judgment of conviction of an attorney for a serious crime, the court may refer the matter to counsel for institution of a disciplinary proceeding before the court, providing that a disciplinary proceeding so instituted will not be brought to final hearing until all appeals from the conviction are concluded. Alternatively, the court may refer the matter to the appropriate state bar.

(d) *Conviction of other crime.* Upon the filing of a certified copy of a judgment of conviction of an attorney for a crime not constituting a "serious crime," the court may refer the matter to counsel for whatever action counsel may deem warranted, including the institution of a disciplinary proceeding before the court. Alternatively, the court may refer the matter to the appropriate state bar. The court is not restricted from taking such other disciplinary action as is within the inherent authority of the court.

(e) *Reinstatement after suspension.* An attorney suspended under the provisions of this rule will be reinstated immediately upon the filing of a certificate demonstrating that the conviction of a serious crime has been reversed, but the reinstatement will not terminate any disciplinary proceeding then pending, the disposition of which shall be determined by the court on the basis of all available evidence pertaining to both guilt and the extent of discipline to be imposed.

**Rule LR83.11c. Discipline imposed by another court or by a state bar.**

(a) *Duty to inform the clerk.* Any attorney practicing before this court shall, upon being subjected to public discipline by any court or by the state bar of any state, promptly inform the clerk of such action.

(b) *Show cause order.* Upon the filing of a certified copy of a judgment or order demonstrating that an attorney has been disciplined by another court or by a state bar, this court shall forthwith issue a notice containing a copy of the judgment or order and an order to show cause directing that the attorney inform this court within 20 days why imposition of the identical discipline by this court would be unwarranted and the reasons therefor.

(c) *Imposition of discipline.* Upon expiration of 20 days from service of the show cause order, this court will presume the misconduct to have been established and will impose the identical discipline unless the attorney demonstrates that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears:

(1) that the attorney was deprived of due process; or

(2) that there was such an infirmity of proof that this court could not accept as final the conclusion on that subject; or

(3) that the imposition of the same discipline by this court would result in grave injustice; or

(4) that the misconduct established is deemed by this court to warrant substantially different discipline. Where this court determines that any of said elements exist, it shall enter such order as it deems appropriate. The grant of a stay of discipline by the other jurisdiction shall constitute grounds for a similar grant by this court.

**Rule LR83.11d. Disbarment on consent or resignation in another court or before a state bar.**

Any attorney practicing before this court who shall be disbarred on consent or resign from the bar of any court or state while an investigation into allegations of misconduct is pending, shall promptly inform the clerk, and upon the filing with this court of a certified copy of the judgment or order accepting such disbarment on consent or resignation, shall cease to be permitted to practice before this court.

**Rule LR83.11e. Standards for professional conduct.**

(a) *Disciplinary enforcement.* For misconduct defined in these rules, and after notice of an opportunity to be heard, any attorney practicing before this court may be disbarred, suspended from practice, reprimanded, or subjected to such other disciplinary action as the circumstances may warrant.

(b) *Standards for conduct.* Acts or omissions by an attorney practicing before this court which violate the Code of Professional Responsibility adopted by this court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Code of Professional Responsibility adopted by this court is the Code of Professional Responsibility adopted by the Supreme Court of North Carolina, as amended from time to time by that state court, except as otherwise provided by a specific rule of this court.

**Rule LR83.11f. Disciplinary proceedings.**

(a) *Referral of complaints to counsel or to a state bar.* When allegations of misconduct by an attorney practicing before this court come to the attention of a judge of this court, whether by complaint or otherwise, the judge may refer the matter to counsel for investigation and the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as

may be appropriate. Alternatively, the judge may refer the matter to the appropriate state bar. The court is not restricted from taking such other disciplinary action as is within the inherent authority of the court.

(b) *Recommendation by counsel.* Should counsel conclude after investigation that a formal disciplinary proceeding should not be initiated against the attorney, counsel shall file with the court a recommendation for disposition of the matter, whether by dismissal, admonition, or deferral and shall set forth the reasons for such recommendation.

(c) *Initiation of disciplinary proceedings.* To initiate formal disciplinary proceedings, counsel shall obtain an order of the court upon a showing of probable cause requiring the attorney to show cause within 20 days after service of the order why the attorney should not be disciplined.

(d) *Hearing.* Upon the attorney's answer to the order to show cause, if any issue of fact is raised or the attorney wishes to be heard, the court shall set the matter for prompt hearing.

**Rule LR83.11g. Disbarment on consent while under disciplinary investigation or prosecution.**

(a) *Consent to disbarment.* Any attorney practicing before this court who is the subject of an investigation into, or a pending proceeding involving, allegations of misconduct may consent to disbarment by delivering to this court an affidavit stating that the attorney desires to consent to disbarment and that:

(1) the attorney's consent is freely given,

(2) the attorney is aware of the pending investigation or proceeding,

(3) the attorney acknowledges the material facts of misconduct, and

(4) the attorney consents because the attorney knows that he or she could not defend successfully against charges of misconduct.

(b) *Order of disbarment.* Upon receipt of the required affidavit, this court shall enter an order disbarring the attorney.

(c) *Record.* The order disbarring the attorney on consent shall be a matter of public record. However, the affidavit required under the provisions of this rule shall not be publicly disclosed or made available for use in any other proceeding except upon order of this court.

**Rule LR83.11h. Reinstatement.**

(a) *Automatic reinstatement; Reinstatement by order.* An attorney suspended for 3 months or less shall be automatically reinstated at the end of the period of suspension upon filing with the court an affidavit of compliance with the provisions of the suspension order. An attorney suspended for more than three months or disbarred may not resume practice until reinstated by order of this court.

(b) *Time for petition.* An attorney who has been disbarred after hearing or by consent may not petition for reinstatement until the expiration of at least 5 years from the effective date of disbarment.

(c) *Procedure.* Petitions for reinstatement by a disbarred or suspended attorney under this rule shall be filed with the court. Upon receipt of the petition, the chief judge shall assign the matter for a prompt hearing before a judge (or judges) of the court and may, in the chief judge's discretion, refer the petition to counsel for investigation. The judge assigned to the matter shall schedule a hearing at which petitioner shall have the burden of demonstrating by clear and convincing evidence that the attorney has the moral qualifications, competency, and learning of the law required for admission to practice law before this court, and that the attorney's resumption of the practice of law will not be detrimental to the integrity and standing of the Bar or the

administration of justice or subversive of the public interest. In all proceedings upon a petition for reinstatement, cross-examination of the witnesses of the attorney and the submission of evidence, if any, in opposition to the petition shall be conducted by counsel if the matter has been referred to counsel by the court.

(d) *Costs.* Petitions for reinstatement under this rule shall be accompanied by an advanced cost deposit in an amount to be set from time to time by the court to cover anticipated costs of the reinstatement proceeding.

(e) *Order of reinstatement.* If the petitioner is found to be unfit to resume the practice of law, the petition shall be dismissed. If the petitioner is found to be fit to resume the practice of law, the judgment shall reinstate the petitioner, provided that the judgment may make reinstatement conditional upon the payment of all or part of the costs of the proceedings, and upon the making of partial or complete restitution to parties harmed by the petitioner whose conduct led to the suspension or disbarment. Provided further that if the petitioner has been suspended or disbarred for 5 years or more, reinstatement may be conditioned, in the discretion of the judge, upon the furnishing of proof of competency and learning in the law, which proof may include certification by the bar examiners of North Carolina of the attorney's successful completion of an examination for admission to practice subsequent to the date of suspension or disbarment.

(f) *Successive petitions.* No petition for reinstatement under this rule shall be filed within 1 year following an adverse judgment upon a petition for reinstatement filed by or on behalf of the same person.

### Rule LR83.11i. Attorneys specially appearing.

Whenever an attorney appears for purposes of a particular proceeding, the attorney shall be deemed thereby to have conferred disciplinary jurisdiction upon this court for any alleged misconduct of that attorney arising in the course of or in preparation for such proceeding.

### Rule LR83.11j. Service of papers and other notices.

Service of an order to show cause instituting a formal disciplinary proceeding shall be made by personal service or by registered or certified mail addressed to the attorney. Service of any other papers or notices required by these rules shall be deemed to have been made if such paper or notice is addressed to the attorney or to the attorney's counsel and is posted by regular mail.

### Rule LR83.11k. Appointment of counsel.

Whenever counsel is to be appointed by these rules to investigate allegations of misconduct or to prosecute disciplinary proceedings or in conjunction with a reinstatement petition, the court may appoint as counsel the disciplinary agency of the Supreme Court of North Carolina or any other disciplinary agency having jurisdiction. Alternatively, the court may appoint as counsel one or more members of the Bar, provided, however, that the respondent-attorney may move to disqualify an attorney so appointed who is or who has been engaged as an adversary of the respondent-attorney in any manner. Counsel, once appointed, may not resign unless permission to do so is given by the court. Nothing in this rule limits the court's authority to refer any matter to the appropriate state bar for investigation, prosecution of disciplinary proceedings, or reinstatement.

**Rule LR83.11l. Duties of the clerk.**

(a) *Obtaining certificate of conviction.* Upon being informed that an attorney practicing before this court has been convicted of any crime, the clerk shall determine whether the clerk of the court in which such conviction occurred has forwarded a certificate of such conviction to this court. If certificate has not been so forwarded, the clerk shall promptly obtain a certificate and file it with this court.

(b) *Obtaining certificate of disciplinary judgment or order.* Upon being informed that an attorney practicing before this court has been subjected to discipline by another court or a state bar, the clerk shall determine whether a certified copy of the disciplinary judgment or order has been filed with this court, and, if not, the clerk shall promptly obtain a certified copy of the disciplinary judgment or order and file it with this court.

(c) *Clerk to inform other jurisdictions.* Whenever it appears that any attorney convicted of any crime, disbarred, suspended, censured, or disbarred on consent by this court is admitted to practice law in any other jurisdiction or before any other court, the clerk shall, within 10 days of that conviction, disbarment, suspension, censure, or disbarment on consent, transmit to the disciplinary authority in such other jurisdiction, or for such other court, a certificate of the conviction or a certified copy of the judgment or order of disbarment, suspension, censure, or disbarment on consent, as well as the last known office and residence addresses of the attorney.

(d) *Clerk to inform the National Discipline Data Bank.* The clerk shall, likewise, promptly notify the National Discipline Data Bank operated by the American Bar Association of any order imposing public discipline upon any attorney practicing before this court.

**Rule LR83.11m. Jurisdiction.**

Nothing contained in these rules shall be construed to deny to this court such powers as are necessary for the court to maintain control over proceedings conducted before it, such as proceedings for contempt under Title 18 of the United States Code or under Rule 42 of the Federal Rules of Criminal Procedure or other sanctions under the Federal Rules of Civil Procedure or these Local Rules.

# PART II. LOCAL RULES OF CRIMINAL PRACTICE

I. SCOPE, PURPOSE AND CONSTRUCTION

II. PRELIMINARY PROCEEDINGS

III. INDICTMENT AND INFORMATION

IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

**Rule LCrR12.1. Pretrial motions in criminal cases.**

(a) *Time for filing.* The time for filing pretrial motions and responses thereto shall be set by the court at arraignment in all cases in which a defendant pleads not guilty.

(b) *Extensions of time for filing.* Motions for an extension of time to file pretrial motions must be made within the time set for the filing of motions and will be granted only upon a showing of good cause for delay.

(c) *Motions adopting other motions.* Motions adopting motions filed by codefendants must clearly identify by character and date of filing the motions

adopted. General adoptions which do not identify specifically the motions adopted may be summarily denied by the court.

**Rule LCrR16.1. Discovery motions.**

Discovery motions filed by a defendant who is represented by counsel must include a statement that counsel has fully reviewed the government's case file before bringing the motion or a statement that such file is not available for counsel's review. The filing of a discovery motion which does not include such certification may cause the court to deny the motion, to disapprove payment to court-appointed counsel in regard to a motion made unnecessary by examination of the file, or to impose other sanctions under LCrR57.3 in the discretion of the court.

V. VENUE

**Rule LCrR24.1. Juries.**

(a) *Examination of jurors.*

(1) The court will conduct the examination of prospective jurors.

(2) When the court's examination is completed, attorneys and parties appearing pro se may request that the court ask additional questions to the prospective jurors.

(b) *Contacts prohibited.*

(1) All parties, witnesses, and attorneys shall avoid any extra-judicial contact or communication with a grand juror or member of a petit jury venire or panel who has been or may be selected in a case in which that person is involved. No person may have any extra-judicial contact or communication, either directly or indirectly, with a grand juror, member of a petit jury venire or panel which may reasonably have the effect of influencing, or which is intended to influence, the grand juror, potential petit juror, or sitting petit juror.

(2) Attorneys for parties shall inform their clients and witnesses of this rule.

(3) No person shall approach a juror, either directly or through any member of his immediate family, in an effort to secure information concerning the juror's background.

(4) No provision of this rule is intended to prohibit communication with a petit juror after the juror has been dismissed from further service, so long as the communication does not tend to harass, humiliate, or intimidate the juror in any fashion.

(c) *Disclosure of names and addresses of prospective jurors.*

(1) The names of prospective jurors for any session of court or for a specific case may not be disclosed prior to their reporting for duty except in compliance with instructions of the court. The clerk will make available to counsel for the parties, and to any parties appearing *pro se,* a list which sets forth the name, general address, and occupation of each potential juror when court is opened for the session for which the jurors have been summoned.

(2) The names, address, and telephone numbers of persons who have served as jurors may not be disclosed by the clerk's office without court permission.

**Rule LCrR26.1. Documents, other than exhibits, used at trial.**

When counsel expects to examine or cross-examine a witness concerning a document which will not be offered as an exhibit, counsel shall have at trial a copy of the document for use by the judge.

**Rule LCrR30.1. Instructions to the jury.**

In all cases tried to a jury, a party who desires the jury to be instructed on a particular point must set it out in writing and furnish it to the court before jury arguments commence.

VI. TRIAL

VII. JUDGMENT

**Rule LCrR32.1. Sentencing recommendations by probation officers.**

Any sentencing recommendation made to the court by a probation officer is for the judge's use only and shall not be disclosed to the parties at any time.

VIII. STAY OF EXECUTION

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

X. GENERAL PROVISIONS

**Rule LCrR44.1. Representation of certain defendants.**

The Court's Plan for Furnishing Representation and Services to defendants who are financially unable to obtain an adequate defense, pursuant to the Criminal Justice Act of 1964, as amended, is a public document available through the office of the clerk of this court. The court's plan as it now exists and as it is hereinafter amended shall have the same force and effect as a local rule of this court. When deemed appropriate by the court, the court may appoint an attorney to represent a defendant even though such attorney's name does not appear on the panel of attorneys drawn pursuant to the plan.

**Rule LCrR50.1. Prompt disposition of criminal cases.**

The Court's *Plan for Prompt Disposition of Criminal Cases* in compliance with Rule 50(b) of the Federal Rules of Criminal Procedure, the Speedy Trial Act of 1974 (18 U.S.C. § 3161, *et seq.*), and the Federal Juvenile Delinquency Act (18 U.S.C. §§ 5036, 5037), as approved by the Judicial Council, is a public document available through the office of the clerk of this court. The Court's Plan for the Prompt Disposition of Criminal Cases as it now exists and as it is hereafter amended and approved by the Judicial Council shall have the same force and effect as a local rule of this court.

XI. LOCAL CRIMINAL RULES FOR WHICH THERE ARE NO CORRESPONDING FEDERAL RULES

**Rule LCrR57.1. Incorporation of certain local rules of civil practice.**

Local Rules of Civil Practice 1.1, 1.2, 6.1, 7.1, 7.2, 65.1.1, 72.1, 77.1, 77.3, 79.1, 79.2, 80.1, 83.1, 83.2, 83.5, 83.6, 83.8, 83.9, and 83.11a-m shall apply fully to criminal proceedings, and shall be interpreted consistent with the Federal Rules of Criminal Procedure and other Local Rules of Criminal Practice.

**Rule LCrR57.2. Fair trial directives.**

(a) *Prohibited statements; Attorney's obligations.*

(1) An attorney participating in or associated with a grand jury or other investigation of a criminal matter shall not make or participate in making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication and which does more than state without elaboration:

(i) Information contained in a public record.

(ii) That the investigation is in progress.

(iii) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(iv) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(v) A warning to the public of any dangers.

(2) An attorney associated with the prosecution or defense of a criminal case to be tried by a jury shall not make or participate in making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication which relates to:

(i) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(ii) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(iii) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement

(iv) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(v) The identity, testimony, or credibility of a prospective witness.

(vi) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(3) Section (a)(2) above does not preclude an attorney from announcing:

(i) The name, age, residence, occupation, and family status of the accused.

(ii) Any information necessary to aid in the apprehension of an accused or to warn the public of any dangers.

(iii) A request for assistance in obtaining evidence.

(iv) The identity of the victim of the crime.

(v) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(vi) The identity of investigating and arresting officers or agencies and the length of the investigation.

(vii) The nature, substance, or text of the charge.

(viii) Quotations from or references to public records of the court in the case.

(ix) The scheduling or result of any step in the judicial proceedings.

(x) That the accused denies the charges.

(4) The foregoing provisions of this rule do not preclude an attorney from replying to charges of misconduct publicly made against the attorney or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(b) *Attorney's employees and associates.* An attorney must exercise reasonable care to prevent employees and associates from making any extrajudicial statement which the attorney would be prohibited from making under this rule.

**Rule LCrR57.3. Sanctions.**

(a) *Imposition of sanctions.* If an attorney or a party fails to comply with a local rule of this court, the court may impose sanctions against the attorney or

party, or both. The court may make such orders as are just under the circumstances of the case, including the following:

(1) an order that designated matters or facts shall be taken as established for purposes of the action;

(2) an order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence;

(3) an order striking out pleadings or parts thereof, or staying proceedings until the rule is complied with, or dismissing the action or any part thereof, or rendering a judgment by default against the failing party;

(4) an order imposing costs, including attorney's fees, against the party, or the party's attorney, who has failed to comply with a local rule.

(b) *Sanctions within the discretion of the court.* The imposition of sanctions for violation of a local rule is discretionary with the court. In considering the imposition of sanctions, the court may consider whether a party's failure was substantially justified or whether other circumstances make the imposition of sanctions inappropriate.

# PART III. LOCAL RULES OF BANKRUPTCY PRACTICE

## I. COMMENCEMENT OF CASE; PROCEEDINGS RELATING TO PETITION AND ORDER FOR RELIEF

### Rule LBR1002-1. Petition — General.

*Number of copies of petition required for filing.* The following number of copies, together with the original, of a voluntary or involuntary bankruptcy petition shall be filed with the Bankruptcy Court:

| | |
|---|---|
| For Chapter 7: | original and two copies |
| For Chapter 11: | corporation and partnership, original and five copies; individual, original and four copies |
| For Chapter 12: | original and three copies |
| For Chapter 13: | original and one copy |

The copy requirements listed above include copies required for service on the Bankruptcy Administrator. They do not include any filed stamped copies for the debtor or the debtor's attorney.

**Editor's note.** — See http://www.ncmb.uscourts.gov.

**NOTE**

*See also LBR5005-1* for return of "Filed" stamped copies of documents.

### Rule LBR1004-1. Petition — Partnership.

*Evidence of general partner's consent.* Within 15 days of the filing of the petition, a written consent to the petition, which is signed by all general partners, shall be filed with the Bankruptcy Court.

NOTE

*See also Federal Bankruptcy Rule 1004* for requirement that general partners consent to the petition.

## Rule LBR1006-1. Fees — Installment payments.

(a) *Chapter 13 cases.* In a Chapter 13 case, a meeting of creditors called pursuant to Section 341 of the Bankruptcy Code shall not be concluded until the entire filing fee is paid.

(b) *Chapter 7 cases.* In a Chapter 7 case, a debtor shall not receive a discharge until the entire filing fee is paid.

## Rule LBR1007-1. Lists, schedules, and statements.

(a) *Corporate resolution.* Within fifteen days of the filing of a voluntary bankruptcy petition by a corporation, the debtor shall file the original or a certified copy of the resolution of the debtor's board of directors authorizing the filing of the bankruptcy petition.

(b) *Schedule of creditors.* Any Schedule of Creditors containing more than five creditors should be alphabetized.

NOTE

*See also LBR1007-2* for mailing matrix requirements.

## Rule LBR1007-2. Mailing — List or matrix.

(a) *Matrix required upon filing.* As a requirement of filing, all voluntary Chapter 7, 11 and 12 petitions must be accompanied by an alphabetized matrix containing the names and addresses of all parties-in-interest, including the creditors and appropriate governmental agencies. The mailing matrix shall be submitted on a computer diskette as set forth in instructions provided by the Clerks Office.

(b) *Matrix required upon Chapter 13 conversion.* As a requirement of conversion by the debtor of a Chapter 13 case to any other bankruptcy relief chapter, the debtor must file, at the time of filing the motion for conversion, an alphabetized matrix containing the names and addresses of any additional creditors to be included in the bankruptcy case and/or any creditors not included under the Chapter 13 Plan. If there are five or more additional creditors, the matrix shall be submitted on a computer diskette as set forth in instructions provided by the Clerks Office.

NOTE

*See also Local Bankruptcy Guide Section 4.1* for guidelines on creditors matrix, and *Local Bankruptcy Guide Section 4.2* for guidelines on submission of matrix on diskette.

## Rule LBR1009-1. Amendments to lists and schedules.

(a) *Service of amendment to petition, list, schedule or statement in Chapter 7 and 11 cases.* Any amendment to a petition, list, schedule (including Exemption Form 91-C) or statement in a Chapter 7 or 11 case shall be accompanied by a certificate of service in the form of a statement of the date and manner of service, and of the names and addresses of the persons served, certified by the person who made the service. **All creditors and other**

**parties in interest** shall be notified of any amendment to the claim for property exemptions.

(b) *Amendments to schedules or matrix to add new creditors.* If an amendment adds additional creditors, the filer shall serve a copy of the Notice of Creditor's Meeting on all new creditors.

(c) *Copies required for filing amendments.* The number of copies required for filing an amendment to the petition shall be the same as the number of copies required for filing a petition pursuant to Local Bankruptcy Rule 1002-1.

**NOTE**

*Refer to the Bankruptcy Court Fee Schedule* or contact the Bankruptcy Clerks Office to determine the amount of fee due for amending the schedule of creditors.

### Rule LBR1020-1. Chapter 11 small business cases — General.

(a) *Election to be considered a small business in a Chapter 11 reorganization case.* In a Chapter 11 case, a debtor that is a small business under § 1121(e) of the Bankruptcy Code may elect to be considered a small business by filing a written statement of election no later than 60 days after the date of the order for relief or by such later date as the Bankruptcy Court, for cause, may fix.

(b) *Approval of the disclosure statement.*

(1) *Conditional approval.* If the debtor is a small business and has made timely election to be considered a small business in a Chapter 11 case, the Bankruptcy Court may, upon application of the plan proponent, conditionally approve a disclosure statement filed in accordance with Bankruptcy Rule 3016. On or before conditional approval of the disclosure statement, the Bankruptcy Court shall

(A) fix a time within which the holders of claims and interests may accept or reject the plan;

(B) fix a time for filing objections to the disclosure statement;

(C) fix a date for the hearing on final approval of the disclosure statement to be held if a timely objection is filed; and

(D) fix a date for the hearing on confirmation.

(2) *Application of Bankruptcy Rule 3017.* If the disclosure statement is conditionally approved, Bankruptcy Rule 3017(a), (b), (c), and (e) do not apply. Notice of conditional approval of the disclosure statement shall be given in accordance with Bankruptcy Rule 2002 and may be combined with notice of the hearing on confirmation of the plan. Objections to the disclosure statement shall be filed at any time before final approval of the disclosure statement or by an earlier date as the Bankruptcy Court may fix, transmitted to the Bankruptcy Administrator, and served on the debtor, the Trustee, any committee appointed under the Bankruptcy Code, and any other entity designated by the Bankruptcy Court.

## II. OFFICERS & ADMINISTRATION; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS

### Rule LBR2002-1. Notice to creditors and other interested parties.

(a) *Notice and hearing or period of objection.* The period of notice and hearing or period of objection required by the Bankruptcy Court shall not be less then ten (10) days, unless Bankruptcy Rule 2002, other Bankruptcy Rule, or the Bankruptcy Court, for cause, otherwise provides.

(b) *Filing request for notice in Chapter 13 cases.* If a request to receive notice is made in a Chapter 13 case, a copy of the request shall be sent to the appropriate Chapter 13 Standing Trustee.

## Rule LBR2004-1. Depositions & Examinations.

(a) *Service of motions for examination under Rule 2004.* Motions for examination under Rule 2004 shall be served upon the debtor, Trustee (if any), the party whose examination is requested, and any other party required to be served by the Federal Rules of Bankruptcy.

(b) *Use of videotape for recording examinations.* Only upon the consent of all parties will a motion for the use of videotape as the sole method for recording an examination be considered by the Bankruptcy Court.

**NOTE**

*See also Local Bankruptcy Guide Section 6.5*
for guidelines on 2004 examinations.

## Rule LBR2007.1-1. Trustees and examiners (Ch. 11).

*Election of trustee in a Chapter 11 case.*

(a) *Request for an election.* A request to convene a meeting of creditors for the purpose of electing a Trustee in a Chapter 11 case shall be filed and transmitted to the Bankruptcy Administrator in accordance with Bankruptcy Rule 5005 within the time prescribed by § 1104(b) of the Bankruptcy Code. Pending Bankruptcy Court approval of the person elected, a person appointed Trustee under § 1104(d) shall serve as Trustee.

(b) *Manner of election and notice.* An election of a Trustee under § 1104(b) of the Code shall be conducted in the manner provided in Bankruptcy Rules 2003(b)(3) and 2006. Notice of the meeting of creditors convened under § 1104(b) shall be given in the manner and within the time provided for notices under Bankruptcy Rule 2002(a). A proxy for the purposes of voting in the election may be solicited by a committee appointed under § 1102 of the Code and by any other party entitled to solicit a proxy under Bankruptcy Rule 2006.

(c) *Application for approval of appointment and resolution of disputes.* If it is not necessary to resolve a dispute regarding the election of the Trustee or if all disputes have been resolved by the Bankruptcy Court, the Bankruptcy Administrator shall promptly file an application for approval of the appointment of the elected person, except that the application does not have to contain names of parties in interest with whom the Bankruptcy Administrator has consulted. If it is necessary to resolve a dispute regarding the election, the Bankruptcy Administrator shall promptly file a report informing the Bankruptcy Court of the dispute. If no motion for the resolution of the dispute is filed within ten (10) days after such report is filed, the Bankruptcy Administrator will file a motion to approve the appointment of a Trustee.

## Rule LBR2016-1. Compensation of professionals.

*Chapter 11 quarterly fee applications.* Any professional employed in a Chapter 11 case under § 327 of the Bankruptcy Code may file a motion to allow the filing of quarterly statements for interim allowance. Unless the Bankruptcy Court orders otherwise, the quarterly statements shall be filed on or before the 20th day of the month following the end of the calendar quarter for services rendered for the previous quarter. Absent Bankruptcy Court Order, any late filed statements shall be processed in the succeeding quarter.

**NOTE**

*See also Local Bankruptcy Guide Section 8*
for guidelines on employment of professionals.

**Rule LBR2090-1. Attorneys — Admission to practice.**

(a) *Attorneys licensed in this judicial district.* Except as otherwise provided herein, only those persons who are admitted to practice before the United States District Court for this judicial district will be allowed to practice before the Bankruptcy Court.

(b) *Pro Hac Vice* appearance.

(1) Any attorney who is a member in good standing of the bar of any District Court of the United States other than the Middle District of North Carolina, may, upon written motion and in the discretion of the Bankruptcy Court, appear and participate *pro hac vice* in any case or proceeding without general admission before this Bankruptcy Court **if**:

(A) the movant requesting to appear *pro hac vice* must file a written motion containing the following:

1. The movant's name, residence, office address and telephone number, and state bar number;

2. The courts to which the movant has been admitted to practice and the respective dates of admission;

3. A statement by the movant of the good standing to practice before the courts to which the movant has been admitted;

4. Whether the movant has been disciplined by any court or administrative body, and if disciplinary proceedings are pending, the details of such proceedings, and whether the movant resigned while disciplinary proceedings were pending;

5. A list of case names and numbers for the three years preceding the application in which the movant has filed for permission to appear *pro hac vice* before any court within the state of North Carolina;

6. A statement certifying that the movant has read and is familiar with the Local Bankruptcy Rules, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence; and

(B) such privilege is not abused by frequent or regular appearances in separate cases to such a degree as to constitute the maintenance of a regular practice of law in the Middle District.

(2) Any attorney seeking to be admitted to practice pursuant to the provisions of this Rule shall attach a proposed order to the application and shall specifically provide therein that "this order shall not be considered admission to practice generally before this Bankruptcy Court or the United States District Court."

(c) *Attorney representation of debtor.* Any attorney who represents a debtor in a bankruptcy case shall remain the responsible attorney of record for all purposes including the representation of the debtor in all matters in the case (including, but not limited to, adversary proceedings and all contested matters) until the case is closed or the attorney is relieved from representation upon motion and Bankruptcy Court order.

(d) *Government representation.* Any attorney who is an employee of a government agency may represent that governmental agency before the Bankruptcy Court.

NOTE

*See also LBR9011-2* for appearances of *pro se* parties.

**Rule LBR2090-2. Attorneys — Discipline and Disbarment.**

(a) *Standards of conduct.* Acts or omissions by an attorney practicing before this court which violate the Rules of Professional Conduct adopted by this

court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Rules of Professional Conduct adopted by this court are the Revised Rules of Professional Conduct of the North Carolina State Bar adopted by the Supreme Court of North Carolina, as amended from time to time by that state court, except as otherwise provided by a specific rule of this court.

(b) *Disciplinary enforcement.* For misconduct as defined in these rules, and after notice and an opportunity to be heard, any attorney practicing before this court may be disbarred, suspended from practice, reprimanded, or subjected to such other disciplinary action as the circumstances may warrant.

(c) *Duty to inform the clerk.* Any attorney practicing before this court shall, upon being subjected to public discipline by any court or by the state bar of any state, promptly inform the clerk of such action.

(d) *Referral of complaints to counsel or to a state bar.* When allegations of misconduct by an attorney practicing before this court come to the attention of a judge of this court, whether by complaint or otherwise, the judge may refer the matter to counsel for investigation and the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate. Alternatively, the judge may refer the matter to the appropriate state bar. The court is not restricted from taking such other disciplinary action as is within the inherent authority of the court.

(e) *Referral to counsel.* Should the judge decide to refer a disciplinary matter to counsel for investigation and the prosecution of a formal disciplinary proceeding, the proceeding shall be referred and shall proceed and be conducted as set forth in Rule 83.11 of the Local Rules of the United States District Court for this judicial district.

(f) *Attorneys specially appearing.* Whenever an attorney appears in this court for purposes of a particular proceeding, the attorney shall be deemed thereby to have conferred disciplinary jurisdiction upon this court for any alleged misconduct of that attorney arising in the course of or in the preparation for such proceeding.

(g) *Jurisdiction.* Nothing contained in these rules shall be construed to deny to this court such powers as are necessary for the court to maintain control over proceedings conducted before it, such as proceedings for contempt or other sanctions under the Federal Rules of Civil Procedure, the Federal Rules of Bankruptcy Procedure, these local rules or other applicable law.

## III. CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

### Rule LBR3001-1. Claims and equity security interests — General.

(a) *Transfer of claim with waiver.* If the Clerks Office's standard form titled "NOTICE OF TRANSFER OF CLAIM AND WAIVER OF NOTICE" is signed by the attorney for the transferor, the transfer is deemed completed upon the filing of the notice.

(b) *Transfer of claim with no waiver.* Every transfer of claim shall contain the following information:

(1) the transferor's specific name and address of record in the case;

(2) the transferee's name and address;

(3) the amount of the claim being transferred as listed on the proof of claim;

(4) the claim or account number being transferred;

(5) whether a proof of claim has been filed by the transferor or transferee or deemed filed pursuant to § 1111(a) of the Bankruptcy Code;

(6) whether the transfer is unconditional; and

(7) if the transfer is not unconditional, whether the transfer was made for security purposes (for example, a transfer made as collateral on a loan).

The above information shall be included in a separate document for each claim. The original and at least two copies of each transfer must be submitted. A Notice of Transfer with the transferor's address of record in the case shall be submitted with the original and each copy.

NOTE

*See also Local Bankruptcy Guide Section 6.6* for guidelines on filing objections to claims.

**Rule LBR3002-1. Place of filing claims.**

(a) *Filing claims in Chapter 13.* Proofs of claim in Chapter 13 cases shall be filed in duplicate directly with the office of the Standing Trustee to whom the case is assigned. The address of the proper Standing Trustee will be shown on the notice of creditors' meeting. Claims will be dated and stamped as "received" as of the date they arrive in the Standing Trustee's office, and the claim shall be deemed filed with the Bankruptcy Court as of that date.

(b) *Filing claims in Chapter 7, 11 and 12 cases.* Unless otherwise ordered by the Bankruptcy Court, proofs of claim in Chapter 7, 11 and 12 cases shall be filed in the office of the Clerk of the Bankruptcy Court.

(c) *Return of filed stamped copies of claims.* Any person desiring return of a "Filed" stamped office copy of a claim filed must provide an extra copy of the claim plus a self-addressed envelope with sufficient return postage.

NOTE

*See also LBR9007-1* for service of pleadings on the Bankruptcy Administrator.

**Rule LBR3003-1. Chapter 11 claims.**

(a) *Period for filing Chapter 11 claims.* In a Chapter 11 case, an entity other than a governmental unit shall file a proof of claim (if required to be filed) within ninety (90) days after the date first set for the meeting of creditors called pursuant to Section 341(a) of the Bankruptcy Code, except as otherwise specified by order of the Bankruptcy Court.

(b) *Debtor notification of Chapter 11 creditor of disputed, contingent or unliquidated claim.* In Chapter 11 cases, the debtor shall notify each creditor whose claim is listed on the schedules as contingent, disputed or unliquidated of that fact within fifteen (15) days after filing the schedules, or within fifteen (15) days after the addition of such creditor to the schedules. Within three (3) days after service has been made, the debtor shall mail a certificate of service to the Bankruptcy Clerk's Office. Failure to timely notify a creditor that its claim is listed as disputed, contingent or unliquidated shall result in the creditor's claim being deemed filed in the amount listed as disputed, contingent or unliquidated, as though a proof of claim had been filed by the creditor.

**Rule LBR3018-1. Ballots — Voting on plans.**

Unless otherwise ordered, all original ballots shall be returned directly to the Bankruptcy Clerks Office by the voting parties. Any proponent of a plan shall file a summary of ballots as they appear in the Bankruptcy Court record. The summary shall be filed with the Bankruptcy Clerk not later than 3 business days prior to the hearing on confirmation unless otherwise set by the Bankruptcy Court.

## IV. THE DEBTOR: DUTIES AND BENEFITS

### Rule LBR4001-1. Automatic stay — Relief from.

(a) *Lifting of stay upon abandonment.* In Chapter 7, 11, 12 and 13 cases, the abandonment of property pursuant to Section 554 of the Bankruptcy Code shall have the effect of lifting the automatic stay (of Section 362(a) of the Bankruptcy Code) with respect to the property abandoned.

(b) *Secured creditor inquiry with Chapter 13 debtor.* In Chapter 13 cases, affected allowed secured creditors may inquire of the debtor in writing of the following:

1. the status of insurance coverage on property used as collateral;
2. whether insurance premiums are paid directly by the debtor;
3. the location, inspection, and appraisal of the collateral; and
4. the status of direct payments.

Copies of all inquiries shall be sent to the debtor's attorney and the Chapter 13 Standing Trustee.

(c) *Taxing authority actions authorized.* In Chapter 7 and 13 cases, the Internal Revenue Service and the North Carolina Department of Revenue are authorized:

1. To assess tax liability shown on voluntarily filed returns and other agreed-to-tax liabilities;

2. To offset any refund due a debtor in a Chapter 7 or Chapter 13 case against any allowed, secured or priority tax due the United States Government or the State of North Carolina provided promptly upon receipt of the refund the taxing authority shall file an amended proof of claim; and

3. To make income tax refunds, in the ordinary course of business, directly to the debtor unless otherwise directed by the Bankruptcy Court or otherwise instructed in writing by the Chapter 7 or Chapter 13 Trustee.

**NOTE**

*See also Local Bankruptcy Guide Section 6.3* for guidelines on filing motions for relief from stay.

### Rule LBR4003-1. Exemptions.

Each debtor who is an individual in a Chapter 7 case shall file any claim for exempt property pursuant to Section 522(b)(1) of the Bankruptcy Code on Local Form #91-C, which form is available from the Clerk of the Bankruptcy Court; the debtor's filing of Local Form #91-C must be referenced in Schedule "C" of the debtor's schedules.

### Rule LBR4008-1. Reaffirmation.

*Reaffirmation Agreements.* Reaffirmation Agreements shall be filed on Form B240 as it has been altered to conform with North Carolina state law.

## V. COURTS AND CLERKS

### Rule LBR5005-1. Filing papers — Requirements.

(a) *Filing of papers with the Bankruptcy Clerk's Office.* All pleadings (including, but not limited to, complaints, answers, motions and applications), and all prepared orders, shall be tendered by the party submitting such document to the Bankruptcy Clerks Office, and not to the Bankruptcy Judge.

(b) *Return of filed stamped copies.* Any person desiring return of a "Filed" stamped office copy of a document filed must provide an extra copy of the document plus a self-addressed envelope with sufficient return postage.

**Rule LBR5010-1. Reopening cases.**

A party seeking to reopen a case for purposes not related to the debtor's discharge, shall file a motion with the court and shall give twenty days notice to all parties-in-interest. The motion shall be served upon the Bankruptcy Administrator, the previously appointed trustee, and any party being added, if any, as a creditor or party-in-interest in the case. The motion shall be accompanied by the appropriate fee to reopen the case, a notice containing the hearing date as obtained from the court and proof of service. The motion shall also state that any objections to reopening the case must be filed at least three days prior to the hearing.

**Rule LBR5011-1. Withdrawal of Reference.**

(a) *Form of request; place for filing.* A request for withdrawal, in whole or in part, of the reference of a case or proceeding referred to the Bankruptcy Court, other than a sua sponte request by a bankruptcy judge, shall be by motion filed with the Clerk of the Bankruptcy Court. All such motions shall be accompanied by the proper filing fee. In addition, all such motions shall clearly and conspicuously state that "RELIEF IS SOUGHT FROM A UNITED STATES DISTRICT COURT JUDGE."

(b) *Stay.* The filing of a motion to withdraw the reference does not stay proceedings in the Bankruptcy Court. The procedures relating to stay shall be those set forth in FRBP 5011.

(c) *Designation of record.* The moving party shall serve on all interested parties and file with the Clerk of the Bankruptcy Court, together with the motion to withdraw the reference, a designation of those portions of the record of the case or proceeding in the Bankruptcy Court that the moving party believes will reasonably be necessary or pertinent to the District Court's consideration of the motion. Within ten (10) days after service of such designation of record, any other party may serve and file a designation of additional portions of the record. If the record designated by any party includes a transcript of any hearing or trial, or a part thereof, that party shall immediately after filing the designation, deliver to the court reporter and file with the Clerk of the Bankruptcy Court a written request for the transcript and make satisfactory arrangements for the payment of its cost. All parties shall take any action necessary to enable the Clerk to assemble and transmit the record.

(d) *Responses to motions to withdraw the reference; reply.* Opposing parties shall file with the Clerk of the Bankruptcy Court, and serve on all parties to the matter for which withdrawal of the reference has been requested, their written responses to the motion to withdraw the reference, within ten (10) days after being served with a copy of the motion. The moving party may serve and file a reply within ten (10) days after service of the response.

(e) *Transmittal to and proceedings in district court.* When the record is complete for purposes of transmittal, but without awaiting the filing of any transcripts, the Clerk of the Bankruptcy Court shall promptly transmit to the Clerk of the District Court the motion and the portions of the record designated. After the opening of a docket in the District Court, documents pertaining to the matter under review by the District Court shall be filed with the Clerk of the District Court, but all documents relating to other matters in the bankruptcy case or adversary proceeding or contested matter shall continue to be filed with the Clerk of the Bankruptcy Court.

**Rule LBR5020-1. Corporate Disclosure.**

*Disclosure of corporate parent.* Any nongovernmental corporate party identified as follows shall file a statement identifying all of its parent corporations and listing any public company that owns 10% or more of the party's stock:
(1) Corporate debtor filing a petition in a voluntary case;
(2) Petitioning corporate creditor in any involuntary case;
(3) Corporate party serving on a creditors' committee;
(4) Corporate party to any adversary proceeding; and
(5) Corporate party to any contested matter which arises in any pending bankruptcy case.
A party shall file the statement with its initial pleading or within 10 days of being appointed to a creditors committee. A party shall supplement the statement within a reasonable time of any change in the information.

**Rule LBR5071-1. Continuance.**

No continuance of hearing or trial (whether stipulated to by counsel or not) shall be effective unless:
(1) the Bankruptcy Court announces it in open Court,
(2) the Bankruptcy Court approves it by written Order, or
(3) the courtroom deputy informs the parties that the Bankruptcy Court has authorized the requested continuance.
Requests for continuances of Chapter 7 and Chapter 11 creditors' meetings shall be made to the Bankruptcy Administrator's office, and requests for continuances of Chapter 13 creditors' meetings shall be made to the appropriate Chapter 13 Standing Trustee's office.

**Rule LBR5073-1. Photography, recording devices and broadcasting.**

All photographic, recording and broadcasting equipment is prohibited from the courtrooms and their environs without Bankruptcy Court permission.

## VI. COLLECTION AND LIQUIDATION OF THE ESTATE

## VII. ADVERSARY PROCEEDINGS

**Rule LBR7003-1. Cover sheet.**

*Adversary proceeding cover sheet.* All complaints initiating adversary proceedings shall be accompanied by a fully completed Adversary Cover Sheet (Form B-104).

**Rule LBR7005-2. Filing of discovery materials.**

Unless ordered otherwise, the following discovery documents shall not be filed with the Bankruptcy Clerk until there is a proceeding in which the document or proof of service is in issue:
(a) transcripts of depositions upon oral examination;
(b) transcripts of depositions upon written questions;
(c) interrogatories;
(d) answers or objections to interrogatories;
(e) requests for the production of documents or to inspect tangible things; responses or objections to requests for the production of documents or to inspect tangible things;
(g)[f] requests for admissions;
(h)[g] responses or objections to requests for admissions;

(i)[h] notices of deposition, unless filing is required in order to obtain issuance of a subpoena in another district; and

(j)[i] subpoena or subpoena duces tecum.

Any party seeking to compel discovery or other pretrial relief based upon discovery material which has not been filed with the Bankruptcy Clerk must identify the specific portion of the material that is directly relevant and ensure that it is filed as an attachment to the motion for relief.

**Rule LBR7026-1. Discovery — General.**

Federal Rule 26(a)(1) shall not apply to contested matters and adversary proceedings pending in this Bankruptcy Court.

## VIII. APPEALS TO DISTRICT COURT OR BANKRUPTCY APPELLATE PANEL

## IX. GENERAL PROVISIONS

**Rule LBR9004-1. Papers — Requirements of form.**

Each bankruptcy case docket number used in the caption of documents or other papers filed with the Bankruptcy Court shall include the case chapter and division assigned to the case.

**Rule LBR9006-1. Time periods.**

Unless otherwise ordered or noticed, to ensure review and consideration at a scheduled hearing, any response to a pleading in a contested matter, including, but not limited to, a brief, memorandum or objection, shall be filed not less than three (3) business days before the scheduled hearing date on which the motion is scheduled to be heard.

**Rule LBR9007-1. General notice and service provisions.**

(a) *Designation of parties to provide notice.* The Bankruptcy Clerk is authorized to designate the parties who shall provide such notice to creditors and parties-in-interest as required under the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court.

(b) *Service required on trustee and attorney for debtor-in-possession.* In cases where a Trustee has been appointed, any and all pleadings (except claims) in all matters under the Bankruptcy Code shall be served on the Trustee whether or not such Trustee is a party to the proceeding. In Chapter 11 cases, the attorney for the debtor is to be served in like manner for all matters.

(c) *Service required on bankruptcy administrator.* In Chapter 7, 11 and 12 cases, the Bankruptcy Administrator shall be served with all pleadings and documents required to be filed with the Clerk of the Bankruptcy Court, and any other documents specifically requested by the Bankruptcy Administrator. In Chapter 13 cases, the Bankruptcy Administrator shall be served with fee applications, motions to dismiss with prejudice, responses to documents filed by the Bankruptcy Administrator and any other documents specifically requested by the Bankruptcy Administrator.

NOTE

*See also LBR1002-1* for manner of providing copies of petitions to the Bankruptcy Administrator, and *see also LBR3002-1* for filing of proof of claims.

## Rule LBR9011-2. Pro se parties.

An individual may appear *pro se*. All partnerships, corporations, and other business entities (other than an individual conducting business as a sole proprietorship) that desire to appear in cases or proceedings before this Bankruptcy Court must be represented by an attorney duly admitted to practice before the Bankruptcy Court, except in the following instances:

(a) A business entity, employed as a professional pursuant to 11 U.S.C. § 327, may file an interim or final fee application *pro se*;

(b) A business entity may file a claim *pro se*;

(c) A business entity may appear *pro se* at a meeting of creditors called pursuant to section 341 of the Bankruptcy Code;

(d) A business entity may file a response to a notice transferring the business entity's claim.

Any individual appearing *pro se* is subject to these Local Rules, as well as the Federal Bankruptcy Rules and the Bankruptcy Code.

NOTE

*See also LBR2090-1* for attorney admission procedures.

## Rule LBR9011-4. Signatures.

(a) *State bar code number.* The state bar number of an attorney shall appear on every petition, pleading, motion or other paper filed with the Bankruptcy Court.

(b) *Typed or printed name of attorney or party filer.* Every petition, pleading, motion or other paper signed by an attorney or by a party who is not represented by an attorney shall contain a printed or typed name below all signatures.

## Rule LBR9013-1. Motion practice.

(a) *Multiple requests for relief.* Multiple requests for relief in a single motion will be allowed for filing purposes if those requests are based upon *identical* facts or arise out of the same transaction. Multiple requests for relief not based on identical facts or not arising out of the same transaction shall be filed in separate documents.

(b) *Motions regarding property.* Any person filing a motion for relief from stay, abandonment or sale of property, or other relief with respect to property, shall attach thereto copies of all documents evidencing the related indebtedness and perfected lien status unless otherwise on file with the Bankruptcy Court in which case a specific reference should be made to the pleading in which such copies are attached.

NOTE

*See also Local Bankruptcy Guide Section 10.4* for guidelines on filing multiple requests in a complaint and *Local Bankruptcy Guide Section 6* for guidelines on filing applications, motions and claims.

## Rule LBR9013-2. Briefs & memoranda of law.

At the time the original of a brief or memoranda of law is filed, a working copy of the brief or memoranda for use by the Bankruptcy Judge shall be delivered to the Bankruptcy Clerks Office.

**Rule LBR9014-1. Discovery in contested matters.**

For the purpose of Bankruptcy Rule 7026, which is made applicable to contested matters by Bankruptcy Rule 9014, the initial court hearing on a motion, application, or objection commencing a contested matter shall be treated as the scheduling conference under Federal Rule 16(b). The discovery conference required by Federal Rule 26(f) shall be held at least 7 calendar days (including intervening Saturdays, Sundays, and holidays) prior to the initial court hearing, unless the hearing has been set on less than 20 days notice, in which event the discovery conference shall be held not later than the business day prior to the hearing. A discovery plan, if one is required, may be presented orally at the hearing. This rule does not prevent the court from disposing of the contested matter at the initial hearing if the Court determines that material facts are not in dispute or that discovery is not needed. Unless notified by the Court to the contrary or unless all parties agree that discovery is needed and present a discovery plan in accordance with this rule, parties should always assume that the Court will hear evidence at the initial hearing.

**Rule LBR9015-1. Jury trial.**

(a) *Demand.*

(1) *Form.* A demand for jury trial shall state whether the party consents to the trial being conducted by the Bankruptcy Court.

(2) *Determination by the Bankruptcy Court.* On motion or on its own initiative, the Bankruptcy Court may determine whether there is a right to trial by jury of the issues for which a jury trial is demanded.

(3) *Statement of consent.* Within the later of (i) the time required for the filing of a response to the pleading in which a jury demand is set forth or (ii) 14 days after the filing of a jury demand, any other party shall file a statement as to that party's consent to trial by the Bankruptcy Court.

(b) *Applicability of certain Federal Rules of Civil Procedure.* Rules 38, 39, and 47-51 of the Federal Rules of Civil Procedure, and Rule 81(c) F.R.Civ.P., insofar as they apply to jury trials, apply to cases and adversary proceedings except that a demand made under Rule 38(b) F.R.Civ.P. shall be filed in accordance with Bankruptcy Rule 5005.

(c) *Applicability of Local Rules of the District Court.* To the extent applicable, the Local Rules of the United States District Court for the Middle District of North Carolina shall govern matters pertaining to the conduct of jury trials in this Bankruptcy Court.

**Rule LBR9019-2. Mediated Settlement Conference.**

(a) *Order for mediated settlement conference:*

(1) Order by Court: The court may, by written order, require parties and their representatives to attend a pre-trial mediated settlement conference in any adversary proceeding or contested matter pending in the court.

(2) Timing of the Order: The court may issue the order at any time after the time for filing answers has expired in an adversary proceeding or after a response is filed in a contested matter.

(3) Content of Order: The court's order shall:

(A) Require that a mediated settlement conference be held in the case;

(B) Establish a deadline for the completion of the conference;

(C) State clearly that the parties have the right to select their own mediator as provided by section (b);

(D) State the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to section (b); and

(E) State that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) Motion to Dispense with Mediated Settlement Conference: A party may move the court, within ten (10) days after the court's order, to dispense with the conference. The motion shall state the reasons the relief is sought, and shall be filed with the clerk of court and served on all opposing parties. Any party may file a written objection specifically stating his or her reasons for opposing the motion. The judge will rule upon such motion without a hearing.

(5) Motion for Court Ordered Mediated Settlement Conference: In cases not ordered to mediated settlement conference, any party may move the court to order such a conference. The motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections may be filed in writing with the court within ten (10) days after the date of the service of the motion. Thereafter, the judge shall rule upon the motion without a hearing.

(6) Motion to Authorize the Use of Other Settlement Procedures: Within ten (10) days of the court's mediation order, any party may move the court to authorize the use of some other settlement procedure in lieu of a mediated settlement conference. The motion shall state the reasons the authorization is requested and that all parties consent to the motion. The deadline for completion of the authorized settlement procedure shall be as provided by the rules authorizing the procedure or, if none, the deadline shall be as ordered for the mediated settlement conference.

(b) *Selection of Mediator:*

(1) Selection of Certified Mediator by Agreement of Parties: The parties appearing of record may select a mediator certified pursuant to the rules of the Supreme Court of North Carolina. The plaintiff shall file with the court an approved Designation for Mediator notice form indicating Selection of Certified Mediator by Agreement within twenty-one (21) days of the court's order. The notice shall state the name, address, and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and the parties have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to the rules of the Supreme Court.

(2) Nomination and Court Approval of Noncertified Mediator: The parties may select a mediator who does not meet the certification requirements of the Supreme Court but who, in the opinion of the parties and the judge, is otherwise qualified by training or experience to mediate the action.

If the parties select a noncertified mediator, the plaintiff or plaintiff's attorney shall file with the court an approved Designation of Mediator notice form indicating Nomination for Noncertified Mediator within twenty-one (21) days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties have agreed upon the selection and rate of compensation. The judge shall rule on the nomination without a hearing.

(3) Appointment of Mediator by the Court: If the parties cannot agree upon the selection of a mediator, the plaintiff shall submit a Designation of Mediator form indicating a Motion for Court Appointment of Mediator to the court on behalf of the parties. The motion must be filed within twenty-one (21) days after the court's order and shall state that the parties and their attorneys have had a full and frank discussion concerning the selection of a mediator and have been unable to agree.

The motion shall state whether any party prefers a certified attorney mediator, and if so, the judge shall appoint a certified attorney mediator. The

motion shall state that all parties prefer a certified, nonattorney mediator, and if so, the judge shall appoint a certified, nonattorney mediator if one is on the list of certified mediators desiring to mediate cases in the district. If no preference is expressed, the judge may appoint a certified attorney mediator or a certified nonattorney mediator.

Upon receipt of a Motion for Court Appointment of Mediator, or in the event the plaintiff has not filed a Notice of Selection of Certified Mediator or Nomination of Noncertified Mediator with the court within twenty-one (21) days of the court's order, the judge shall appoint a mediator certified pursuant to these rules. Only mediators that have indicated their desire to mediate cases in the Middle District shall be appointed.

(4) Mediator Information Directory: To assist the parties in the selection of a mediator by agreement, a central directory of information on all certified mediators who wish to mediate cases in the Middle District will be collected and maintained by the clerk of court.

(5) Disqualification of Mediator: Any party may move for an order disqualifying the mediator. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to this rule. Nothing in this provision shall preclude mediators from disqualifying themselves upon written notice to the judges and the parties.

(c) *The mediated settlement conference:*

(1) Where Conference Is to Be Held: Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the United States Bankruptcy Courthouse or other public or community building in the Middle District. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

(2) When Conference Is to Be Held: The court's order issued pursuant to section (a)(2) shall state a date of completion for the conference. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

(3) Request to Extend Date of Completion: A party, or the mediator, may request the judge to extend the deadline for completion of the conference. The request shall state the reasons the continuance is sought and shall be served by the movant upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the judge.

The judge may grant the request and enter an order setting a new date for the completion of the conference, which date may be set at any time prior to trial. The order shall be served on all parties and on the mediator by the person who sought the extension.

(4) Recesses: The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

(5) Mediated Settlement Conference Is Not to Delay Other Proceedings: The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the judge.

(d) *Duties of parties, representatives, and attorneys:*

(1) Attendance: The following persons shall physically attend the entire mediated settlement conference until an agreement is reduced to writing and signed as provided by section (d)(3) or an impasse has been declared, unless excused by the judge or by the mediator with approval of all parties and attorneys:

(A) Parties:
(i) All individual parties;
(ii) Any party that is not a natural person or a government entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle this action; and
(iii) Any party that is a governmental agency shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.
(B) Insurance company representatives: A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of the carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have decision making authority.
(C) Attorneys: At least one counsel of record for each party or other participant whose counsel has appeared in the action.
(2) Notifying Lien Holders: Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify the lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request the lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.
(3) Finalizing Agreement: Upon reaching agreement during the conference but before the conference concludes, a draft of the settlement terms shall be written by the mediator and signed by the parties and others with settlement authority. Upon reaching agreement, either before or during the conference, the parties and others with settlement authority, shall provide a copy of a formal executed written agreement to the mediator within seven (7) days of the settlement. The mediator shall attach a copy of the formal written agreement to the Report of Mediator filed pursuant to section (f)(2)(D) of these rules. Failure of the parties to provide a copy of the formal written agreement to the mediator on a timely basis may result in sanctions.
(e) *Sanctions and failure to attend:* If any person required to attend the conference pursuant to section (d) of these rules fails to attend without good cause, the judge may impose an appropriate monetary sanction, including but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and losses of earnings incurred by persons attending the conference.
A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so after notice and a hearing, and in a written order making findings of fact and conclusions of law.
(f) *Authority and Duties of a Mediator:*
(1) Authority of a Mediator:
(A) Control of conference: The mediator shall at all times be in control of the conference and the procedures to be followed.
(B) Private consultation: The mediator may meet and consult privately with any participant or counsel during the conference.
(C) Scheduling of the conference: The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the

participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

(2) Duties of Mediator:

(A) Generally: The mediator shall define and describe the following to the parties at the beginning of the conference:

(i) The process of mediation;

(ii) The difference between mediation and other forms of conflict resolution;

(iii) The costs of the mediated settlement conference;

(iv) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach a settlement;

(v) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(vi) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(vii) The inadmissibility of conduct and settlements as provided by applicable Rules of Evidence;

(viii) The duties and responsibilities of the mediator and the participants; and

(ix) The fact that any agreement reached will be reached by mutual consent.

(B) Disclosure: The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(C) Declaring impasse: It is the duty of the mediator to timely determine that an impasse exists and that the conference should end.

(D) Report results in conference: The mediator shall submit a Report of Mediator to the judge which indicates the results of the conference. This report shall be filed within 2 weeks of the conclusion of the conference or upon the receipt of a copy of a written settlement agreement, whichever comes first.

If an agreement was reached, the report shall state whether the action will be concluded by consent judgement or voluntary dismissal and shall identify the persons designated to file the consent judgement or dismissal. The mediator's report shall inform the court of the absence of any party, attorney, or insurance representative who was absent without permission from the conference.

The mediator shall attach the written settlement agreement prepared by the parties to the Report of Mediator.

(E) Scheduling and holding the conference: It is the duty of the mediator to schedule the conference and to conduct and conclude the conference prior to the conference completion deadline set out in the court's order. Deadlines for completion of the conference shall be strictly observed by the mediator unless the time limit is changed by a written order of the judge.

(3) Failure of Mediator to Comply with Section (f): The judge may withhold future appointments of any mediator who does not fully comply with the requirement of section (f).

(g) *Compensation of the Mediator:*

(1) By agreement: When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(2) By court order: When the mediator is appointed by the court, the mediator shall be compensated by the parties at an hourly rate set by the judge.

(3) Payment of compensation by parties: Unless otherwise agreed to by the parties or ordered by the court, costs of the mediated settlement conference shall be paid in equal shares by the parties. Multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the costs shall pay them equally unless the court otherwise orders.

(4) Sanctions for failure to pay mediator's fee: Except when excused by these rules or by order of the court, failure of a party to make a timely payment of the party's share of a mediator's fee at the conclusion of the conference may result in the imposition of sanctions.

(h) *Communications with the Court:* All communications concerning mediated settlement conferences should be addressed to the Bankruptcy Administrator.

## Rule LBR9022-1. Judgments & Orders — Notice of.

Unless otherwise directed by the Bankruptcy Court, the Bankruptcy Clerks Office serves Orders. To facilitate this service, the preparer of each Order shall submit the following:

(1) a certificate of service to be signed by the Bankruptcy Clerks Office,

(2) pre-addressed, stamped (or metered) envelopes for every party (except for Bankruptcy Administrator and Chapter 13 Standing Trustees) listed on the certificate of service, and

(3) sufficient copies of the Order for service by the Bankruptcy Clerks Office upon the parties listed on the certificate of service.

**NOTE**

*Refer to Local Bankruptcy Guide Section 5.2*
for guidelines regarding service of Orders.

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# RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Adopted effective January 1, 1999,
with amendments through December 1, 2000.

**Part I. Local Rules of Civil Procedure**


Rule
LR3.1. Filing fee, bond, security and prohibited sureties.
LR5.1. Filing of papers, presenting judgments, orders, and communications to judge and sealed records.
LR7.1. Motions in civil actions.
LR7.2. Briefs.
LR16.1. Pretrial conferences.
LR16.2. Mediation or alternative dispute resolution (ADR).
LR16.3. Rules applicable to mediation or alternative dispute resolution (ADR).
LR26.1. Discovery material not to be filed unless ordered or needed.
LR26.2. Corporate disclosure statement (11/00).
LR47.1. Jurors.
LR47.2. Contact with jurors.
LR54.1. Taxation of costs other than attorneys' fees.
LR67.1. Registry funds.
LR72.1. Authority of Magistrate Judges in civil matters.
LR73.1. Trial by consent before a Magistrate Judge.
LR77.1. Orders and judgments which the clerk may grant.
LR79.1. Custody and disposition of evidence, models, exhibits and depositions.
LR83.1. Attorney admissions.
LR83.2. No photographing, televising, or broadcasting of court proceedings.


**Part II. Local Rules of Criminal Procedure**


Rule
LCrR11.1. Electronic recording of Rule 11 inquiry.
LCrR20.1. Transfers for plea and sentence.
LCrR23.1. Fair trial and free press in criminal cases.
LCrR32.1. Disclosure of presentence or probation records.
LCrR46.1. Release from custody — Recognizance.
LCrR55.1. Sealed records.
LCrR57.1. Authority of Magistrate Judge in criminal matters.
LCrR57.2. Pending cases involving same defendant.
LCrR58.1. Forfeiture of collateral security in lieu of appearance.


**Form: National Park Service**

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B. Consent to proceed before a United States Magistrate Judge.
C. Entities with a direct financial interest in litigation.


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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE**
**WESTERN DISTRICT OF NORTH CAROLINA**

| | | |
|---|---|---|
| IN THE MATTER OF RULES OF PRACTICE AND PROCEDURE IN THIS THIS COURT | ) ) ) ) | ORDER ADOPTING RULES OF PRACTICE AND PROCEDURE |

For good cause appearing to the Court,

IT IS ORDERED that:

1. The following Local Rules of Practice and Procedure in the United States District Court for the Western District of North Carolina be and they are hereby adopted effective at 12:01 a.m. on the 1st day of January, 1999. At that time these local rules shall supersede all local rules theretofore in effect, as well as the Civil Justice Expense and Delay Reduction Plan adopted by this court on September 23, 1993, and shall apply to all pending cases, unless the Court finds that their application in a specific case would result in injustice or hardship.

2. These rules are adopted in compliance with and pursuant to the authority of Rule 83, Fed. R. Civ. P.; Rule 57, Fed. R. Crim. P.; and other federal rules and statutes providing for district court local rules. Those rules are adopted after having provided the public and the bar with an opportunity to comment.

3. These local rules supplement the Federal Rules of Civil Procedure as necessary in all civil suits in the United States District Courts for the Western District of North Carolina. Where applicable, these rules also supplement the Federal Rules of Criminal Procedure and Bankruptcy. In keeping with the spirit of the Federal Rules, these rules are designed, and will be construed and administered, to enhance speed and flexibility, control expense, and direct the efforts of all involved to the ends of justice.

4. The Clerk is directed to make appropriate arrangements to see that these rules are published promptly and that copies of the rules are made available for distribution to the bar and the public.

This, the 31st day of December, 1998.

_____
Chief Judge
United States District Court

_____
Judge
United States District Court

_____
Judge
United States District Court

# PART I. LOCAL RULES OF CIVIL PROCEDURE

## Rule LR3.1. Filing fee, bond, security and prohibited sureties.

(A) *Filing fee and cost bond.* In every civil action commenced in or removed to this court, there shall be filed at the time of commencing or removal a filing fee in such amount as determined according to law. In a civil case commenced in this court, no bond, or cash deposit in lieu of such bond, as security for costs shall be required except on motion and for good cause shown.

(B) *Security.* In both civil and criminal actions, bonds shall be allowed and taken with security, or one or more securities, as provided by the federal statutes, the Federal Rules of Civil Procedure, and the Federal Rules of Criminal Procedure. The judges of this district may, for good cause, enter orders restricting any bonding company or surety company from being accepted as surety upon any bond in any case or matter in this district.

(C) *Prohibited sureties.* Members of the Bar, administrative officers or employees of this court, or the United States Marshal and his deputies or assistants, shall not act as surety in any suit, action, or proceeding pending in this court.

**Editor's note.** — For website, see www.ncwd.net.

## Rule LR5.1. Filing of papers, presenting judgments, orders, and communications to judge and sealed records.

(A) *Filing of papers.* All motions, memoranda, orders, and judgments shall be filed with the court in duplicate. All papers of every sort may be filed at Statesville, Charlotte or Asheville regardless of the Division in which the case may be pending as may suit the convenience of counsel.

(1) A motion for consolidation shall be filed only in one of the cases involved with a notice of the motion being filed in the proposed member case(s). After consolidation, each pleading filed shall continue to note all case numbers involved with sufficient copies for each case file.

(2) All pleadings shall be filed in duplicate, an original and one copy.

(B) *Presenting judgments, orders, and communications to judges.* Judgments and orders submitted by counsel will ordinarily be sent to the clerk in the appropriate division and not to the judge, unless shortness of time or other good reason appears for sending them directly to the judge. Copies as may be needed will be certified by the clerk.

All communications (letters, briefs, enclosures, etc.) sent to a judge about a case must be sent to opposing counsel and must show that a copy has been sent to opposing counsel.

(C) *Seeking continuance.* Any motion filed seeking continuance of a hearing or trial shall be filed immediately upon counsel's learning of the need for same and must, in any event, be timely filed.

(D) *Sealed matters.*

(1) *New Civil Cases:* A civil complaint may be sealed at the time the case is filed if the complaint is accompanied by an ex parte motion of the plaintiff/petitioner accompanied by an order sealing the case. The case will be listed on the clerk's index as Sealed Plaintiff vs. Sealed Defendant.

(2) *Pending cases:* A pending case may be sealed at any time upon motion of either party and execution by the court of a written order. Unless otherwise specified in the order, the clerk's case index nor the existing case docket will be modified.

(3) *Documents:* Documents ordered sealed by the court or otherwise required to be sealed by statute shall be marked as such within the document

caption and submitted together with the judge's copy prepared in the same manner. If the document is sealed pursuant to a prior order of the court, the pleading caption shall include a notation that the document is being filed under court seal and include the order's entry date.

No document shall be designated by any party as "filed under seal" or "confidential" unless

(a) it is accompanied by an order sealing the document;

(b) it is being filed in a case that the court has ordered sealed; or

(c) it contains material that is the subject of a protective order entered by the court.

(4) *Case closing:* Unless otherwise ordered by a court, any case file or documents under court seal that have not previously been unsealed by the court order shall be unsealed at the time of final disposition of the case.

(5) *Access to sealed documents:* Unless otherwise ordered by the court, access to documents and cases under court seal shall be provided by the clerk only pursuant to court order. Unless otherwise ordered by the court, the clerk shall make no copies of sealed case files or documents.

## Rule LR7.1. Motions in civil actions.

(A) *Motions in writing.* Unless made during a hearing or trial, all motions must be put in writing and shall state with particularity the grounds of the motions and shall set forth the relief or order sought. As required by LR 5.1(A), all motions and supporting memoranda shall be filed in duplicate. Any motions other than for dismissal, summary judgment, or default judgment should show that counsel have met and attempted in good faith to resolve areas of disagreement and should set forth which issues remain unresolved.

All motions will ordinarily be ruled upon without oral argument, unless otherwise ordered by the court.

(B) *Time frames for the filing of responses to motions and for reply motions.* Responses to motions, if any, shall be filed within fourteen (14) days of the date on which the motion is served, as evidenced by the certificate of service attached to said motion. When a motion is served by mail, the respondent shall have an additional three (3) days to file a response, pursuant to Fed. R. Civ. P. Rule 6(e).

A reply to the response to the motion, if any, shall be filed within seven (7) days of the date on which the response is served, as evidenced by the certificate of service attached to said response. When a response is served by mail, an additional three (3) days is granted in which to file the reply, pursuant to Fed. R. Civ. P. Rule 6(e).

The filing of a reply brief is not mandatory, and in any event such a brief should be limited to a discussion of matters newly raised in the response. If the party making the motion does not wish to file a reply brief, it must so inform the Court and opposing counsel in writing by the deadline for filing the reply brief, as set forth above.

### CASE NOTES

**Defendant's Motion to Stay was treated as a timely response** under pretrial order although it was late under the changed Local Rule 7.1 time for filing responses. Holz-Her U.S., Inc. v. Monarch Mach., Inc., 187 F.R.D. 238 (W.D.N.C. 1999).

**Failure to attempt resolution.** — Where defendants did not attempt to confer with plaintiff prior to filing the motion to compel, nor was any certification as to that requirement attached, the fact that defendants did not confer with opposing counsel and attempt to resolve this dispute before filing the motion to compel was sufficient reason to deny the motion. Ambu, Inc. v. Kohlbrat & Bunz Corp., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 241 (W.D.N.C. Jan. 6, 2000).

**Applied** in Angel Med. Ctr., Inc. v.

Abernathy, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5109 (W.D.N.C. Mar. 10, 2000), aff'd, 243 F.3d 535 (4th Cir. 2001).

### Rule LR7.2. Briefs.

Briefs shall be filed with the motion, except timely motions for extension of time or admission pro hac vice.

### Rule LR16.1. Pretrial conferences.

(A) *Initial attorneys conference (IAC).* The IAC is the first required conference in which counsel for all parties shall confer. During this conference counsel shall discuss and agree upon, if possible, the following matters: whether the case is suitable for reference to ADR, the type and extent of discovery, the setting of a discovery cut-off date, deadline for filing motions, and the dates of anticipated hearings and trial. The IAC is to be held within fifteen (15) days of the filing of the last required responsive pleading or as otherwise ordered by the court. Within five (5) days after the IAC, counsel shall sign and file the Certification and Report of Initial Attorneys' Conference, using the form for same attached hereto in Appendix A, which form is also available in the clerk's office.

(B) *Initial pretrial conference (IPC).* A pretrial conference initiated by the court will be conducted in all civil matters except cases involving pro se prisoners and Social Security appeals. Unless otherwise directed by an Article III Judge, Magistrate Judges will preside over the pretrial conference irrespective of whether consent to disposition of a case by a Magistrate Judge has been given. Counsel for all parties must appear either in person or by telephone for the conference as determined by the judicial officer.

The IPC is to be held no later than thirty (30) days after the filing of the Certification and Report of Initial Attorneys' Conference or as ordered by the court. The Judge who conducts the conference shall manage the pretrial activity of the case through direct involvement in the establishment, supervision, and enforcement of an order setting a plan for discovery and a schedule for disposition of each case. The Judge shall convene and conduct the IPC as contemplated by Rule 16, Federal Rules of Civil Procedure. Matters which may be considered during the pretrial conference may include but not be limited to:

- ♦ discovery guidelines and deadlines;
- ♦ Rule 26 disclosures;
- ♦ responses to interrogatories and requests for admission;
- ♦ maintenance of discovery material;
- ♦ video depositions;
- ♦ protective orders;
- ♦ motions deadlines;
- ♦ motions hearings;
- ♦ response to motions;
- ♦ trial subpoenas;
- ♦ counsel's duties prior to trial;
- ♦ trial date;
- ♦ proposed jury instructions;
- ♦ exhibits; and
- ♦ mediation.

### Rule LR16.2. Mediation or alternative dispute resolution (ADR).

(A) *Mandatory mediated settlement conference.* All parties to civil actions are required to attend a Mediated Settlement Conference, unless otherwise ordered by the court. A mediated settlement conference is a pretrial, court-

ordered (by local rule) conference of the parties to a civil action and their representatives conducted by a mediator. The procedure for the conference shall be as provided in Local Rule 16.3.

(B) *Cases not suitable for ADR.* These rules for mandatory ADR shall not apply to habeas corpus proceedings or other actions for extraordinary writs, appeals from rulings of administrative agencies, forfeitures of seized property, and bankruptcy appeals. The Judicial Officer may determine, either sua sponte or on application of any party, that any other case is not suitable for ADR, in which case no ADR procedure will be ordered.

**Rule LR16.3. Rules applicable to mediation or alternative dispute resolution (ADR).**

(A) *Time for proceeding.* The Court favors the use of alternative dispute resolution (ADR), ordinarily in the form of a mediated settlement conference, for the efficient and orderly resolution of civil cases. Accordingly, the parties shall in the Certification and Report of Initial Attorneys' Conference indicate their estimation of the usefulness of ADR, their preferred method of ADR, and their opinion of the most advantageous time at which to commence ADR. If the parties fail to submit, or are unable to agree on, a proposed method of ADR, a Mediated Settlement Conference shall be selected as the default. The presiding Magistrate Judge or other Judicial Officer will in the Pretrial Order and Case Management Plan, or an Order for Alternative Dispute Resolution issued shortly thereafter, specify the selected ADR method and order it to commence on a schedule in accordance with the applicable responses given by counsel in the Certification and Report.

(B) *Rules for proceeding.* Upon entry of an Order for Alternative Dispute Resolution, the case shall proceed as follows:

(1) (1) If a Mediated Settlement Conference is ordered, the ADR proceeding shall be governed by and a mediator shall be selected in accordance with the Rules *Governing Mediated Settlement Conferences in Superior Court Civil Actions* promulgated from time to time by the North Carolina Supreme Court pursuant to N.C.G.S. § 7A-38 (the "Mediation Rules"), and by the supplemental rules set forth therein.

(a) Wherever the Mediation Rules refer to "Senior Resident Superior Court Judge" and "Administrative Office of the Court," it shall mean "Judicial Officer" and "Clerk of the United States District Court," respectively.

(b) Rule 3(a) of the Mediation Rules is modified to permit the mediated settlement conference to be held in an appropriate facility anywhere in the division in which the case is pending.

(2) If an Alternative ADR Procedure is ordered, the ADR proceeding shall be governed by these Rules and by such other procedural rules submitted by the parties and approved by the Judicial Officer. The rules submitted by the parties shall include, in addition to rules regarding the actual proceeding, provisions setting a deadline for completion of the proceeding; the location for the proceeding; pre-proceeding submissions; and the method for selection and compensation of a mediator, evaluator or other "neutral" to preside over the proceeding.

(3) Nothing in this Alternative Dispute Resolution Program shall be deemed to override the Federal Arbitration Act or any other provision of the United States Code.

(4) The Judicial Officer may, either sua sponte or on application of any party, permit exceptions or deviations from these rules.

(C) *Supplemental rules for mediated settlement conferences.* In addition to the Mediation Rules, the following rules shall also apply to mediated settlement conferences in the Western District:

(1) *No record made.* There shall be no record made of any proceedings under these rules.

(2) *Telephonic attendance.* A party or person required to attend who resides morethan 200 miles away by the usual highway route may appear at the mediated settlement conference through telephone communication with the Judicial Officer's prior consent.

(3) *Mediator's report of outcome.* The mediator's report required by the Mediation Rules shall be issued within seven (7) days of the conclusion of the Mediated Settlement Conference. The mediator may submit his or her report on a report form provided by the Clerk of Court, or using his or her own letterhead or individually developed mediation report form.

(D) *Judicial settlement conference.*

(1) *Mandatory consideration.* The Judicial Officer to whom a case is assigned may, at any time, order the parties to participate in a settlement conference to be convened by the court. Any party may also file a request for a judicial settlement conference.

(2) *Mandatory attendance by representatives with full authority to effect settlement.* At the time of the conference, except with regard to government attorneys and federal agency parties, attorneys for all parties and either the party or a person with the full authority to settle all pending claims must be present. For purposes of this rule the "person with full authority to settle" shall not be the attorney. Government attorneys are required to bring as much binding authority as is feasible. A knowledgeable representative of the federal agency party with the authority to recommend any contemplated settlement is required to attend the conference, except for good cause shown prior to the date of conference.

(3) *Presiding judicial officer.* Any Judicial Officer of the district other than the Judicial Officer to whom the case is assigned for disposition may preside over a judicial settlement conference convened by the court.

### Rule LR26.1. Discovery material not to be filed unless ordered or needed.

Disclosures made pursuant to Fed. R. Civ. P. Rule 26, depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto are not to be filed unless on order of the court or for use in proceeding or in support of a motion or petition. Materials filed in support of a motion or petition shall be appropriately labeled and attached as an Appendix thereto and shall be limited to those portions of the material directly necessary to support the motion or petition. All such papers must be served on other counsel or parties entitled to service of papers filed with the clerk. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered.

### Rule LR26.2. Corporate disclosure statement (11/00).

(A) *Who must file.* All parties shall file a corporate affiliate/financial interest disclosure statement form which is available from the clerk's office. This rule does not apply to the United States of America, state and local governments, pro se parties or natural persons.

(B) *Time for filing.* A party must file the statement with the complaint or the petition for removal, or with their first responsive pleading. The plaintiff or the moving party must serve a copy of the Disclosure of Corporate Affiliation and Other Entities with a Direct Financial Interest in Litigation form an all defendants or respondents when initial service is made.

(C) *Contents of statement.* The statement must identify all parent company subsidiaries (except wholly-owned subsidiaries) and affiliates that have been issued shares to the public. A trade association shall identify in the disclosure statement all members of the association and their parents, subsidiaries, and affiliates that have issued shares to the public. All parties shall identify any publicly held corporation, whether or not a party to the present litigations, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement. (Effective December 1, 2000.)

**Rule LR47.1. Jurors.**

Ordinarily, in the interest of time, the court will conduct the examination of prospective jurors, but may permit counsel to do so. If the court conducts the examination, counsel may suggest additional questions.

When jurors for a term of court are drawn, members of the bar of this court, upon request, shall be furnished with a copy of the list; and if questionnaires are used, responses will be made available to attorneys. The list shall include the address for each juror. However, no juror shall be contacted, either directly or through any member of his immediate family, in an effort to secure information concerning his background.

**Rule LR47.2. Contact with jurors.**

No attorney or party to an action shall personally or through their designees, directly or indirectly, interview, examine or question any juror, relative, friend or associate thereof during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of the presiding judge upon good cause shown.

**Rule LR54.1. Taxation of costs other than attorneys' fees.**

(A) *Filing bill of costs.*

(1) A prevailing party may request the Clerk to tax allowable costs, other than Attorneys' fees, in a civil action as a part of a judgment or decree by filing a bill of costs, on a form available in the clerk's office, within 30 days:

(i) after the expiration of time allowed for appeal of a final judgment or decree; or

(ii) after receipt by the clerk of an order terminating the action on appeal.

(2) The original of the bill of costs shall be filed with the clerk, with copies served on adverse parties.

(3) The failure of a prevailing party to timely file a bill of costs shall constitute a waiver of any claim for costs.

(B) *Objections to bill of costs.*

(1) If an adverse party objects to the bill of costs or any item claimed by a prevailing party, that party must state its objection in a motion for disallowance with a supporting brief within ten (10) days after the filing of the bill of costs. Within five (5) days thereafter, the prevailing party may file a response and brief. Unless a hearing is ordered by the clerk, a ruling will be made by the Clerk on the record.

(2) A party may request review of the Clerk's ruling by filing a motion within five (5) days after the action of the Clerk. The court's review of the Clerk's action will be made on the existing record unless otherwise ordered.

(C) *Taxable costs.*

(1) Items normally taxed include, without limitation:

(i) those items specifically listed on the bill of costs form. The costs incident to the taking of depositions (when allowable as necessarily obtained for use in

the litigation) normally include only the reporter's attendance fee and charge for the original transcript of the deposition;

(ii) premiums on required bonds;

(iii) actual mileage, subsistence, and attendance allowances for necessary witnesses at actual cost, but not to exceed the applicable statutory rates, whether they reside in or out of this district;

(iv) one copy of the trial transcript for each party presented by separate counsel.

(2) Items normally not taxed include, without limitation:

(i) multiple copies of depositions;

(ii) daily copy of trial transcripts, unless prior court approval has been obtained.

(D) *Costs in settlements.* The court will not tax costs in any action terminated by compromise or settlement. Settlement agreements must resolve any issue relating to costs. In the absence of specific agreement, each party will bear its own costs.

(E) *Payment of costs.* Costs are to be paid directly to the party entitled to reimbursement.

**Rule LR67.1. Registry funds.**

(A) *Deposit with the Treasury.* Unless otherwise ordered by the court, the clerk shall deposit registry funds in the Treasury of the United States and the funds shall accrue no interest.

(B) *Investment in income-earning account.* Upon motion or upon consent of the parties, the court may order the clerk to invest certain registry funds in an income-earning account which will be the Court Registry Investment System. The order may issue upon a consent request of the parties or upon motion by an interested party, in accordance with the following procedures:

(1) A consent request must demonstrate the assent of all interested and potentially interested parties. The agreement must demonstrate that the investment will be in compliance with applicable provisions of the law regulating the investment of public monies, provide for proper disposition of future earnings, and set out with particularity the following information:

(i) the form of deposit;

(ii) the amount to be invested;

(iii) the length of time the money should be invested, whether it should automatically be reinvested, etc., keeping in mind that some investments include a penalty for early withdrawal;

(iv) the name and address of the designated beneficiary or beneficiaries;

(v) such other information that may be deemed appropriate under the facts and circumstances of the particular case. The consent request shall be accompanied by a proposed order directing the clerk to proceed with the investment.

(2) A motion may be filed *ex parte* by an interested party, and the court may enter an order in advance of the filing of any response thereto. The motion must set forth the showings required in subsection (b)(1) concerning the investment and must include a proposed order. The motion must be served on all known interested parties who do not join therein. If an order is entered prior to the filing of a response in opposition, the motion will be reconsidered by the court. The court may determine the motion upon the record or may, in its discretion, call for a hearing on the matter.

(3) Counsel or parties obtaining an order directing investment in an income-earning account shall personally serve the clerk or the chief deputy and the financial deputy. Counsel or parties have the responsibility, fifteen (15) days after service of the order on the clerk, to verify that the funds have been

invested as ordered. Failure to personally serve the clerk as specified in this section or failure to verify that the funds were actually invested as provided in the order shall release the clerk and deputy clerks from any liability for the loss of interest which could have been earned on the funds.

(4) A service fee may be charged by the clerk for the investment of registry funds.

(5) Interest on Registry Funds — "Settlement Funds". Funds invested with the court for the purpose of settlement are subject to additional rules under 26 U.S.C. § 468B. To comply with the requirements found in Section 468B, the order required in subsection (b) must also contain the following information:

(i) the deposit is identified as a settlement fund;

(ii) liability is resolved by the settlement agreement as described in 26 U.S.C. § 468B or 26 C.F.R. § 1.468B-1(c);

(iii) designation of a person outside the court as the administrator responsible for obtaining the employer identification number for the fund, filing all fiduciary tax returns, and paying any tax.

**Rule LR72.1. Authority of Magistrate Judges in civil matters.**

(A) *Magistrate Judges are authorized and designated to exercise the following functions and duties regarding civil actions in the Western District.*

(1) To perform the duties prescribed in 28 U.S.C. § 636(a).

(2) To hear and decide non-dispositive procedural or discovery motions and other pretrial matters, as provided by 28 U.S.C. § 636(b)(1)(A).

(3) To hear any dispositive motions involving cases in which the parties have not consented to jurisdiction of the Magistrate Judge, and thereafter to submit to the District Court proposed findings of fact and recommendations for disposition of such motions, as provided by 28 U.S.C. § 636(b)(1)(B).

(4) To make a final determination upon any dispositive motion in a case wherein the parties have consented to the jurisdiction of the Magistrate Judge, subject to right of appeal to the United States Court of Appeals for the Fourth Circuit.

(5) To serve as a Special Master in appropriate civil cases in accordance with 28 U.S.C. § 636(b)(2) and Rule 53 of the Federal Rules of Civil Procedure.

(6) Upon the consent of all parties, to conduct jury voir dire in civil cases when designated by the District Court to do so on a case-by-case basis.

(7) To accept petit jury verdicts in civil cases in the absence of a District Court Judge.

(8) Upon the consent of all parties to conduct the trial and order entry of judgment, as authorized by 28 U.S.C. § 636(c).

(9) To issue orders or warrants authorizing acts necessary in the performance of the duties of administrative and regulatory agencies and departments of the United States Government pursuant to 28 U.S.C. § 636(b)(3).

(10) To conduct proceedings of the court under the Federal Debt Collection Procedures Act, consistent with the Constitution and the laws of the United States as authorized by 28 U.S.C. § 3008 (1990).

(11) To perform any additional duties that are not inconsistent with the Constitution or the laws of the United States, as shall be assigned or delegated by the District Court.

**Rule LR73.1. Trial by consent before a Magistrate Judge.**

(A) *Consent to the exercise of civil trial jurisdiction.* The consent of a party to the exercise of civil trial jurisdiction by a U.S. Magistrate Judge authorized in 28 U.S.C. § 636(c)(1) shall be communicated to the clerk by letter, or by a form available in the clerk's office, signed by the party or the party's attorney.

(1) The Plaintiff's consent/denial form shall be mailed to or filed with the Clerk on or before the date that plaintiff first seeks service of the complaint upon the defendant(s) in any manner provided by Rule 4, Fed.R.Civ.Proc.

(2) The plaintiff shall serve a blank copy of the consent/denial form on all defendants with the complaint.

(3) The defendant(s) shall file an executed consent/denial form with their first responsive pleading. For purposes of this rule, any pleading filed by the defendant, including a motion to dismiss, shall be deemed its first responsive pleading.

(B) *Failure to file executed consent/denial form.* In the event any party fails to file an executed consent form, the Magistrate Judge initially assigned to the case, unless otherwise ordered by the court, shall continue to be responsible for the pretrial proceedings of the case and will advise the parties during the pretrial conference of his availability to conduct the entire case up through trial. At the conference the parties will be given a final opportunity to file the required consent/denial form.

**Rule LR77.1. Orders and judgments which the clerk may grant.**

Pursuant to the provisions of Fed. R. Civ P. Rule 77(c), the Clerk of Court and an authorized deputy clerk at Asheville, Charlotte and Statesville are authorized to grant and enter the following orders and judgments without further direction by the court, but any such action may be suspended, altered or rescinded by the court for good cause shown:

(1) Consent orders for the substitution of attorneys only after determining such substitution will not delay a scheduled hearing or trial.

(2) Consent orders extending for not more than 20 days the time within which to answer or otherwise plead, answer interrogatories submitted under Fed. R. Civ. P. Rule 33. Care will be taken not to extend the time for so long as to delay unreasonably the trial. Matters in bankruptcy and those matters set forth in Fed. R. Civ. P. Rule 6(b), are not included in this authorization. Where convenience and necessity are thought to require it; e.g., unavailability of a judge, and except where an extension may delay a scheduled trial or hearing, the clerk or deputy clerk(s) in the division in which the proceeding is pending is/are authorized to extend for not more than ten (10) days the time within which to answer or otherwise plead, answer interrogatories submitted under Rule 33, or requests for admission as provided for in Rule 36. If the other party is aggrieved, he may immediately appeal the action of the clerk's office to one of the District Judges.

(3) Consent orders extending for not more than thirty (30) days the time to file the record on appeal and to docket the appeal in the appellate court, except in criminal cases.

(4) Consent orders dismissing an action, except in bankruptcy proceedings and in causes to which Fed. R. Civ. P. Rule 23(c) and Rule 66 apply.

(5) Judgments of default as provided for in Rule 55(a) and 55(b)(1), Federal Rules of Civil Procedure.

(6) Orders canceling liability on bonds.

(7) Judgments authorized by Fed. R. Civ. P. Rule 68.

(8) Orders directing inmates to file sworn statements showing exhaustion of all administrative remedies through the North Carolina Department of Corrections pursuant to 42 U.S.C. § 1997(e).

(9) Orders directing inmates and the correctional facility in which the inmate is housed to file a copy of the inmate's trust fund account statement (or institutional equivalent) pursuant to 28 U.S.C. § 1915.

(10) Orders waiving the filing fee or directing a partial filing fee be paid by the inmate pursuant to Section 804 of the Prison Litigation Reform Act of 1995.

These orders may also include directing the correctional facility at which the inmate is incarcerated to deduct monthly payments from the inmate's trust fund account and forward said payment to the clerk.

**Rule LR79.1. Custody and disposition of evidence, models, exhibits and depositions.**

(A) *Custody with the clerk.* Unless otherwise directed by the court, all trial exhibits admitted into evidence in criminal and civil actions shall be placed in the custody of the clerk, except as provided in Section (B) below.

(B) *Custody with the offering party.* All exhibits not suitable for filing and transmission to the court of appeals as a part of a record on appeal shall be retained in the custody of the party offering them, subject to the orders of the court. Such exhibits shall include, but not be limited to, the following types of bulky or sensitive exhibits: narcotics and other controlled substances, firearms, ammunition, explosive devices, jewelry, liquor, poisonous or dangerous chemicals, money or articles of high monetary value, counterfeit money, and documents or physical exhibits of unusual bulk or weight.

At the conclusion of a trial or proceedings, the party offering such exhibits shall retain custody of them and be responsible to the court for preserving them in their condition as of the time admitted until any appeal is resolved or the time for appeal has expired. The party retaining custody shall make such exhibits available to opposing counsel for use in preparation of an appeal and be responsible for their safe transmission to the appellate court, if required.

(C) *Disposition of exhibits, sealed documents, and filed depositions by clerk.* Any exhibit, sealed document, or filed deposition in the clerk's custody more than 30 days after the time for appeal, if any, has expired or an appeal has been decided and mandate received, may be returned to the parties or destroyed by the clerk. Complaints, answers, motions, responses and replies, whether sealed or not, must be forwarded to the General Services Administration for permanent storage. The confidentiality of sealed documents cannot be assured after the case file is transferred to the General Services Administration for records holding.

(D) *Depositions.* Depositions read into the court record are considered exhibits for which the parties shall be responsible as provided in Section (B) above. Depositions on file admitted into evidence but not read into the record shall be retained in the clerk's custody and disposed of as authorized in Section (C) of this rule.

**Rule LR83.1. Attorney admissions.**

(A) *Eligibility and admission.* Any lawyer who is a member in good standing of the North Carolina State Bar is eligible for admission to the bar of this court, which admission shall be granted as a matter of course upon the payment of a fee in the amount of $75.00 and upon taking the prescribed oath in open court which reads as follows:

> I do solemnly swear that I am a member in good standing of the North Carolina State Bar entitled to practice law in the courts of general jurisdiction of the State of North Carolina, and I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same and that I will demean myself as an attorney and officer of this court in accordance with the Canons of Ethics of the North Carolina State Bar and American Bar Association, and according to law.
>
> I take this obligation freely without any mental reservation or purpose of evasion, so help me God.

Attorneys already admitted to the bars of either the United States District Court for the Eastern District of North Carolina or the United States District Court for the Middle District of North Carolina may be admitted to the bar of this court upon tendering the application and fees required by this rule, together with a copy of the order admitting the attorney to practice in either of the aforementioned districts. It shall be necessary for a member in good standing of the North Carolina State Bar to be formally admitted in this district in advance of making an appearance and filing papers; such attorney may be admitted *nunc pro tunc* at trial time.

(B) *Special admissions.* Litigants in civil and criminal actions, except counsel representing governmental agencies and parties appearing pro se, must be represented by at least one member of the bar of this court or by an attorney admitted to practice by this court pursuant to this section. Any lawyer who is a member in good standing of the Bar of the Supreme Court of the United States or the Bar of the Supreme Court of any state in the United States may, in the discretion of the judges of this court, be permitted to appear in a particular case. If such permission is granted, and if a member of the bar of this court is not associated, said attorney and his client shall be deemed to have consented that service of all pleadings and notices may be made upon a deputy clerk in the appropriate division of this court as process agent. The court encourages such out-of-state attorneys to associate a member of the bar of this court in all cases, but will not require such association where the amount in controversy or the importance of the case does not appear to justify double employment of counsel. Special admissions will be the exception and not the rule, and no out-of-state counsel will be permitted to practice frequently or regularly in this court without the association of local counsel.

Where justice requires, the authorized deputy clerks at Asheville, Statesville and Charlotte may permit the filing of papers at the request of out-of-state counsel; provided, however, the further participation of out-of-state counsel shall be governed as herein above provided.

All counsel, except those representing governmental agencies, must pay a fee in the amount of $75.00 for each special admission or whenever Pro Hac Vice admission is granted.

(C) *Withdrawal of counsel.* Counsel seeking to withdraw shall file written consent of their client to their withdrawal which shall become effective on determination that a scheduled hearing or trial will not be delayed and upon court approval. Over objection of the client, withdrawal may still be obtained upon good cause shown if it is determined that a scheduled hearing or trial will not be delayed.

**Rule LR83.2. No photographing, televising, or broadcasting of court proceedings.**

The taking of photographs in the courtroom, or in the corridors immediately adjacent thereto, during the progress of judicial proceedings, or during any recess, and the transmitting or sound recording of such proceedings for broadcasting by radio or television, shall not be permitted. Proceedings other than judicial proceedings designed and conducted as ceremonies, such as administering oaths of office to appointed officials of the court, presentation of portraits, and similar ceremonial occasions, may be photographed in, broadcasted or televised from the courtroom, with the permission and under the supervision of the court.

# PART II. LOCAL RULES OF CRIMINAL PROCEDURE

## Rule LCrR11.1. Electronic recording of Rule 11 inquiry.

When an appropriate inquiry under Fed. R. Civ. P. Rule 11 is conducted by a United States Magistrate Judge, the electronic recording of the proceeding shall constitute the verbatim record of the proceeding.

## Rule LCrR20.1. Transfers for plea and sentence.

(A) Upon transfer of the pleadings from the transferor district, the clerk in the appropriate divisional office shall assign a criminal case number and randomly assign a District Judge.

(B) Pending Related Case(s): If a related case is pending before another District Judge, the U.S. Attorney shall move for consolidation of both actions before the judge assigned to the lowest case number and submit a proposed order for the court. The motion for consolidation may be filed in either of the cases with proper notice of motion in the related case. Upon execution of the order, the clerk shall reassign the later case to the judge presiding on the lowest case number, unless otherwise set forth in the order.

## Rule LCrR23.1. Fair trial and free press in criminal cases.

(A) It is the duty of the lawyer, in connection with pending or imminent criminal litigation with which he is associated, not to release or authorize the release of information or opinion for dissemination by any means of public communication, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement for dissemination by any means of public communication that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status; and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examination or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer during this period, in the proper discharge of his official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

After completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement, for dissemination by any means of public communication, if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

Nothing in this rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

(B) All courthouse personnel, including, among others, marshals, deputy marshals, court clerks, bailiffs, and court reporters, shall not disclose to any person, without authorization by the court, information concerning arguments and hearings in criminal cases held in chambers or otherwise outside the presence of the public, or disclose any other information relating to a pending criminal case that is not part of the public records of this court.

(C) In a widely publicized or sensational case, the court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the accused's right to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the court may deem appropriate for inclusion in such an order.

**Rule LCrR32.1. Disclosure of presentence or probation records.**

The probation officer's recommendation on the sentence is a confidential record and shall not be disclosed, except pursuant to an order of the court. No confidential records of this court maintained by the probation office shall be sought by an applicant except by written petition to this court establishing with particularity the need for specific information in the records.

**Rule LCrR46.1. Release from custody — Recognizance.**

Release on personal recognizance shall be granted by United States Judges in accordance with the provisions of the Federal Rules of Criminal Procedure. Recognizance shall be left to the discretion of the judge within the requirements of the rules.

**Rule LCrR55.1. Sealed records.**

(A) For any criminal case which the government desires to be sealed, the charging document must be accompanied by an ex parte motion and order requesting that all or a portion of the documents in the criminal case be sealed at the time of filing a complaint or information, or on the return of a grand jury indictment. The clerk shall seal the case or documents as specified in the court's order. The case shall be listed on the clerk's index as United States of America vs. Sealed Defendant. Unless otherwise ordered by the court, upon referral, the Magistrate Judge on a showing of good cause by the United States Attorney or a defendant, the case or documents shall be unsealed as follows:

(1) Where the case involves a single defendant, at the time of the defendant's initial appearance before the Magistrate Judge;

(2) Where the case involves more than one defendant, at the time the last defendant appears in this district before the Magistrate Judge, unless written motion to unseal is submitted earlier with a proposed order to be executed by the court.

(B) A pending case may be sealed at any time upon motion of either party and execution by the court of a written order. Unless otherwise specified in the order, neither the clerk's case index nor the existing case docket shall be modified. The motion and proposed order presented to the court should specifically identify that portion of the record which is to be sealed, such as:

(1) the case file;

(2) the case docket;

(3) a specific pleading; or

(4) only the identity of new defendants brought into the case.

(C) Documents: Documents ordered sealed by the court or otherwise required to be sealed by statute shall be marked as such within the document caption and submitted together with the judge's copy prepared in the same manner. If the document is sealed pursuant to a prior order of the court, the pleading caption shall include a notation that the document is being filed under court seal and include the order's entry date.

No document shall be designated by any party as "filed under seal" or "confidential" unless:

(1) it is accompanied by an order sealing the document;

(2) it is being filed in a case that the court has ordered sealed; or

(3) it contains material that is the subject of a protective order entered by the court.

(D) Case Closing: After final disposition of any criminal case where the file or documents under court seal have not previously been unsealed by court order, unless otherwise ordered by the court, the United States Attorney shall be responsible for filing a motion unsealing the matter with a proposed order for the court's execution.

(E) Access to Sealed Documents: Unless otherwise ordered by the court, access to documents and cases under court seal shall be provided by the clerk only pursuant to court order. Unless otherwise ordered by the court, the clerk shall make no copies of sealed files or documents.

**Rule LCrR57.1. Authority of Magistrate Judge in criminal matters.**

(A) *Magistrate Judges are authorized and designated to exercise the following functions and duties regarding criminal actions in the Western District.*

(1) To perform the duties prescribed in 28 U.S.C. § 636(a).

(2) To try and to sentence, if found guilty, persons charged with petty offenses and misdemeanors, and to direct the probation office to prepare a presentence report in any such case, as provided by 18 U.S.C. § 3401.

(3) To hear and decide non-dispositive procedural or discovery motions and other pretrial matters, as provided by 28 U.S.C. § 636(b)(1)(A).

(4) To hear any dispositive motions involving cases in which the parties have not consented to jurisdiction of the Magistrate Judge and thereafter to submit to the district court proposed findings of fact and recommendations for disposition of such motions, as provided by 28 U.S.C. § 636(b)(1)(B).

(5) To issue preliminary orders and conduct necessary evidentiary hearings or other appropriate proceedings in connection with cases filed pursuant to 28 U.S.C. § 2254 and § 2255, and to submit to the district court a report containing proposed findings of fact and recommendations for disposition of such cases (unless consent is obtained for final disposition).

(6) To accept returns of true bills of indictment from the Grand Jury.

(7) To issue orders or warrants authorizing acts necessary in the performance of the duties of administrative and regulatory agencies and departments of the United States Government pursuant to 28 U.S.C. § 636(b)(3).

(8) To perform any additional duties that are not inconsistent with the Constitution or the laws of the United States, as shall be assigned or delegated by the district court.

**Rule LCrR57.2. Pending cases involving same defendant.**

Where there are two or more cases pending against the same defendant before more than one assigned judge, the United States Attorney or the defendant may move by written motion and proposed order to have any or all of the cases reassigned to the presiding judge with the lowest case number. This motion may be filed before any of the assigned judges with notice of the motion to the other assigned judge(s). Time is of the essence with this motion.

**Rule LCrR58.1. Forfeiture of collateral security in lieu of appearance.**

Pursuant to Rule 58, Federal Rules of Criminal Procedure, and Title 28, United States Code, Section 636(b)(3), and upon motion made by the United States of America in the interest of justice, good court administration, and sound law enforcement, the Collateral Forfeiture Schedule is hereby amended by adding a collateral forfeiture in the amount of $250 for first offense simple possession of marijuana having a weight not exceeding ¼ ounce or 7.78 grams occurring in the national parks or forests within the Western District of North Carolina. Such collateral may be made mandatory if, in the opinion of the arresting or citing officer, the offense was aggravated.

Such revision is reflected in the amended schedules annexed hereby and hereby incorporated into the overall Collateral Forfeiture Schedule.

## NATIONAL PARK SERVICE

| TITLE | OFFENSE | COLLATERAL |
|---|---|---|
| **PART 1 — GENERAL PROVISIONS** | | |
| 36 CFR 1.5 | Closures and public use limit<br>Closure, designation, restriction, Condition, visiting hours, public use limit | $25.00 |
| (see Compendium — not included here) | | |
| 36 CFR 1.6 | Permits<br>(8) Terms/conditions of permit | $25.00 |
| (see Compendium — not included here) | | |
| **PART 2 — RESOURCE PROTECTION — PUBLIC USE AND RECREATION** | | |
| 36 CFR 2.1 | Preservation of natural, cultural and archaeological resources<br>(1)(1) Possessing, destroying, injuring, defacing or distributing natural, cultural or archaeological resources | |
| | Minor | $50.00 |
| | Major | Mandatory |
| | (2) Introducing wildlife, fish or plants | $50.00 |
| | (3) Throwing/rolling rocks | $25.00 |
| | (4) Using/possessing wood | |
| | Minor | $25.00 |
| | Major | Mandatory |
| | (5) Walking on, climbing, entering, etc. | Mandatory |
| | (6) Possessing, disturbing, etc., a structure or cultural or archaeological resource | |
| | Minor | $50.00 |
| | Major | Mandatory |
| | (7) Possession or use of mineral or metal detector | |
| | Minor | $50.00 |
| | Major | Mandatory |
| 36 CFR 2.1 | (b) Shortcutting trail/walkway | $25.00 |
| | (3)(3) Gathering/possessing undesignated natural products | $25.00 |
| 36 CFR 2.2 | Wildlife Protection | |
| | (A)(1) Hunting/taking of wildlife | Mandatory |
| | (B) Disturbing wildlife | $25.00 |
| | (C) Possessing unlawfully taken wildlife/parts | Mandatory |
| | (d) Transporting lawfully taken wildlife — violation of conditions | $50.00 |
| | (e) Using artificial light to view wildlife in closed areas | $50.00 |
| 36 CFR 2.3 | Fishing | |
| | (A) Fishing in violation of State Laws | $50.00 |
| | (b)(1) Fishing with other than hook and line | $50.00 |
| | (2) Possessing/using unauthorized bait, etc. | $50.00 |

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| | (3) Feeding/attracting fish | $25.00 |
| | (4) Commercial fishing | Mandatory |
| | (5) Illegal fishing aids (drugs, poison, explosives, etc.) | Mandatory |
| | (6) Digging for bait | $25.00 |
| | (7) Improper catch and release | $50.00 |
| | Plus for each illegal fish | $25.00 |
| | [Prohibited species use 7.14(a)(4)] | |
| | (8) Fishing from bridges, docks, etc. | $25.00 |
| 36 CFR 2.4 | Weapons, Traps and Nets (P) | |
| | (a) Possessing, carrying, using | $100.00 |
| | (b) Improper transportation | |
| | Plain view | $50.00 |
| | Concealed | $150.00 |
| | (c) Use endangering persons or property | Mandatory |
| | (d) Violations of terms and conditions of permit | $150.00 |
| | (f) Compliance with Federal/State laws | Mandatory |
| 36 CFR 2.5 | Research Specimens | |
| | (a) Taking without permit | $25.00 |
| | (b) Terms/conditions of permit | $25.00 |
| 36 CFR 2.10 | Camping and Food Storage | |
| | (b)(1) Digging/leveling ground at campsite | $25.00 |
| | (2) Abandoning equipment after departure | $25.00 |
| | (3) Camping too near water | $25.00 |
| | (4) Unreasonable noise between 10:00 p.m. — 6:00 a.m. | $25.00 |
| | (5) Permanent camps | $100.00 |
| | (6) Displaying wildlife carcasses/parts | $25.00 |
| | (7) Utility connections | $25.00 |
| | (8) Failure to obtain permit | $50.00 |
| | (9) Superintendent's designated conditions | $25.00 |
| | (10) Undesignated area | $50.00 |
| | (c) Terms/conditioning of permit | $25.00 |
| | (d) Failure to properly store food | $25.00 |
| 36 CFR 2.11 | Picnicking | |
| | Violation of established picnicking conditions | $25.00 |
| 36 CFR 2.12 | Audio Disturbances — unreasonable noise | $25.00 |
| 36 CFR 2.13 | Fires | |
| | (a)(1) Fire in undesignated area | $50.00 |
| | (2) Improper use of stove/lantern | $25.00 |
| | (3) Stove/lantern creating a hazard | $50.00 |
| | (4) Unattended fire | |
| | Minor | $50.00 |
| | Major | Mandatory |
| | (5) Improper disposal of lighted/smoldering matter | $50.00 |
| | (b) Failure to extinguish fires | $50.00 |
| | (c) Violation of Superintendent Closures | $50.00 |
| 36 CFR 2.14 | Sanitation and Refuse | |
| | (a)(1) Improper disposal of waste | $75.00 |
| | (2) Unauthorized use of disposal receptacles | $100.00 |

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| | (3) Deposit of refuse in plumbing fixtures/toilets | $50.00 |
| | (4) Improper draining of refuse from vehicle/trailer | |
| | Minor | $50.00 |
| | Major | Mandatory |
| | (5) Improper use of public water outlets | $25.00 |
| | (6) Polluting/contaminating park water | $100.00 |
| | (7) Improper disposal of fish remains | $25.00 |
| | (8) Improper disposal of human body waste in developed areas | $50.00 |
| | (9) Improper disposal of human body waste in undeveloped areas | $50.00 |
| | (b) Violating conditions for disposal, containerization or carry out of body waste | $50.00 |
| 36 CFR 2.15 | Pets | |
| | (a)(1) Pets in closed area | $25.00 |
| | (2) Failure to crate, cage, restrain on leash | $25.00 |
| | (3) Unattended pet | $25.00 |
| | (4) Allowing pet to make unreasonable noise | $25.00 |
| | (5) Failure to comply with pet excrement disposal | $25.00 |
| | (e) Terms/conditions of pet permit by park residents | $25.00 |
| 36 CFR 2.16 | Horses and Pack Animals — improper use | $50.00 |
| | (g) Violation of conditions | $50.00 |
| 36 CFR 2.17 | Aircraft and Air Delivery — illegal use of | Mandatory |
| 36 CFR 2.18 | Snowmobiles violation of regulations | $25.00 |
| 36 CFR 2.19 | Winter activities violation of restrictions | $25.00 |
| 36 CFR 2.20 | Skating, skateboards and similar devices. Use of roller skates, skateboards, roller skis, coasting vehicles, etc., in undesignated areas | $25.00 |
| 36 CFR 2.21 | Smoking | $25.00 |
| 36 CFR 2.22 | Property-abandoning or failing to turn in found property | $50.00 |
| 36 CFR 2.23 | Recreation | |
| | (b) Failure to pay required fees | $25.00 |
| | Maximum penalty not to exceed | $100.00 |
| 36 CFR 2.30 | Misappropriation of property and services | Mandatory |
| 36 CFR 2.31 | Trespassing, tampering and vandalism | |
| | Minor | $100.00 |
| | Major | Mandatory |
| 36 CFR 2.32 | Interfering with agency functions | $100.00 |
| 36 CFR 2.33 | Report of injury or damage | |
| | (b) Failure to report (excess of $300) | $50.00 |
| 36 CFR 2.34 | Disorderly Conduct | |
| | Minor | $50.00 |
| | Major | Mandatory |
| 36 CFR 2.35 | Alcoholic beverages and controlled substances | |
| | (a)(2)(i) Sale or gift of alcohol to underage person | $100.00 |
| | (ii) Possession of alcohol by Underage person | $50.00 |
| | (3) Alcoholic beverage in closed area | $25.00 |
| | (b)(1) Unlawful delivery of controlled substance | Mandatory |

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| | (2) Unlawful possession of controlled substance | Mandatory |
| | (c) Under the influence of alcohol/controlled substance | Mandatory |
| 36 CFR 2.36 | Gambling | |
| | Gambling in any form prohibited | $50.00 |
| 36 CFR 2.37 | Noncommercial soliciting | $50.00 |
| 36 CFR 2.38 | Explosives | |
| | (a) Use, possession, transporting, storing explosives, etc. | Mandatory |
| | (b)(1) Unauthorized use of fireworks | $50.00 |
| | (b) Unauthorized possession of fireworks | $25.00 |
| | (c) Terms/conditions established or of permit | $50.00 |
| 36 CFR 2.50 | Special Events | |
| | (a) Terms/conditions of permit Minor | $50.00 |
| 36 CFR 2.51 | Public Assemblies, Meetings | |
| | Minor | $50.00 |
| 36 CFR 2.52 | Sale or distribution of printed matter | $100.00 |
| 36 CFR 2.60 | Livestock use and agriculture | $25.00 |
| 36 CFR 2.61 | Residing on federal lands | Mandatory |
| 36 CFR 2.62 | Memorialization | $25.00 |

**PART 4 — SIMPLE POSSESSION OF MARIJUANA, VEHICLES AND TRAFFIC SAFETY**

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| 36 CFR 4.2 | First offense simple possession of marijuana not exceeding ¼ ounce or 7.78 grams | $250.00 |
| 36 CFR 4.2(b) | Traffic and use of vehicles within a park area are governed by state law, unless specifically addressed by regulations in 36 CFR, Part 4. Violations of state law are prohibited. State statutes not listed below | $25.00 |
| 20-7(a) | Driver's license required | $100.00 |
| 20-7(n) | Failure to carry driver's license as required | $25.00 |
| 20-10.1 | Operate moped under age 16 | $25.00 |
| 20-28 | Operating a motor vehicle with a: Suspended license | $100.00 |
| | Revoked license | Mandatory |
| 20-30(1) | Possessing an operator's license which was canceled, revoked, suspended or altered | Mandatory |
| 20-32 | Allowing unlicensed minor to drive a motor vehicle | $100.00 |
| 20-50(a) | Operating a motor vehicle not properly licensed | $50.00 |
| 20-57(c) | Operating a motor vehicle without registration card | $25.00 |
| 20-63 | Displaying license plate which is mutilated, partially covered, not reasonably clean, or in other than a horizontal upright position | $25.00 |
| 20-67(a) | Failing to change address within 30 days | $25.00 |
| 20-111(2) | Operating a motor vehicle with an altered, suspended, canceled, revoked, or fictitious registration card, title, or license plate | Mandatory |
| 20-116(b) | Operating a passenger-type vehicle with a load extending beyond the left side fenders | |

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| | Or 6" beyond the right side fenders | $25.00 |
| 20-122.1 | Operating a motor vehicle with unsafe tires | $25.00 |
| 20-123(b) | Towing another vehicle with improper or unsafe towing equipment | $25.00 |
| 20-124(a) | Brakes required | $50.00 |
| | Defective/unsafe brakes prohibited | $50.00 |
| 20-126(a) | No rearview mirror | $25.00 |
| 20-126(b) | No outside mirrors (post 1966 models) | $25.00 |
| 20-127(a) | Obstructed windshield | $25.00 |
| 20-127(b) | Non-functioning windshield wipers/wipers required | $25.00 |
| 20-127(c) | Discoloration of windshield, rear, or side glass | $25.00 |
| 20-128(a) | Muffler missing, or defective excessive noise or smoke | $25.00 |
| 20-129(a) | Failing to burn headlights and taillights when visibility is under 400 feet | $25.00 |
| 20-129(b) | Failing to have at least two headlights in good working order (one on each side) | $25.00 |
| 20-129(c) | Operating a motorcycle without a headlight on during daylight hours/headlamp required | $25.00 |
| 20-129(d) | Operating a motorcycle without the taillight on during daylight hours | $25.00 |
| 20-129(g) | Failing to have at least one stop light in good working order | $25.00 |
| 20-135.2(a) | Failure to wear seat belt | $50.00 |
| 20-137.1 | Child restraint devices required for children under six years of age | $50.00 |
| 20-140(a) | Driving recklessly, in willful or wanton disregard of the rights or safety of others | Mandatory |
| 20-140.2 | Vehicle overloaded or crowded so as to obstruct driver's view or impair proper operation | $25.00 |
| 20-140.4(1) | Operating a motorcycle with more people than it was designed to carry | $25.00 |
| 20-140.4(2) | Operating or riding a motorcycle without a helmet | $25.00 |
| 20-141(j) | Speeding in excess of 55 mph and at least 15 miles over limit while fleeing or attempting to elude arrest or apprehension | Mandatory |
| 20-141(m) | Failing to decrease speed to avoid a collision | $25.00 |
| 20-141.3(b) | Engaged in speed competition with another vehicle (drag racing) | Mandatory |
| 20-146(a) | Failing to keep vehicle on right half of the road | $25.00 |
| 20-146.1(b) | Operating motorcycles within lanes, no more than two abreast | $25.00 |
| 20-148 | Failing to give oncoming vehicle at least half of the road | $50.00 |
| 20-149(a) | Failing to safely clear a passed vehicle before returning to the right side of the road | $50.00 |
| 20-149(b) | Failing to give audible signal when passing another vehicle | $25.00 |
| 20-150(a) | Passing another vehicle when left side of road was not clear for a sufficient distance | $50.00 |
| 20-150(b) | Passing on the crest of a grade or curve when view was obstructed within 500 feet | $50.00 |
| 20-150(c) | Passing in a marked intersection | $50.00 |
| 20-150(d) | Driving to the left of the center line upon the | |

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| | crest of a grade or curve | $50.00 |
| 20-150(e) | Passing in a posted or marked no passing zone | $25.00 |
| 20-151 | Failure of overtaken vehicle to give way to the right in favor of the overtaking vehicle | $25.00 |
| 20-152(a) | Following too closely | $25.00 |
| 20-154(b) | Failure to give a turn signal | $25.00 |
| 20-155(a) | Failing to yield to the right at an intersection | $25.00 |
| 20-155(b) | Failing to yield when turning left to oncoming traffic | $25.00 |
| 20-157(a) | Failure to obey visual and audible signal from an emergency | $100.00 |
| 20-158(b)(1) | Failing to yield, when at a stop sign, to through traffic | $50.00 |
| 20-166(b) | Failure to leave written notice of name and address if involved in a collision with an unattended vehicle | Mandatory |
| 20-174.1(a) | Standing, sitting, or lying upon the road to impede traffic | $50.00 |
| 20-181 | Failing to dim headlights when meeting an oncoming vehicle or following another vehicle within 200 feet | $10.00 |
| 20-183.2(a) | No current inspection sticker (Defense: provide inspection certificate receipt within 30 days of expiration) | $25.00 |
| 20-313 | Owning and operating, or permitting operation of a motor vehicle without financial responsibility (insurance) | $50.00 |
| 36 CFR 4.4 | Report of motor vehicle accident | |
| | (a) Failure to report motor vehicle accident | $100.00 |
| | (b) Moving/towing vehicle involved in motor vehicle accident prohibited | $100.00 |
| 36 CFR 4.10 | Travel on park roads and designated routes | |
| | (a) Operating motor vehicle off designated roads and parking areas | $50.00 |
| | (c)(2) Operating a motor vehicle in a manner that causes unreasonable damage to the surface of a park road or route | $100.00 |
| 36 CFR 4.11 | Load limitation, weight and size limits | |
| | Exceeding a load, weight or size limit designated by superintendent | $25.00 |
| 36 CFR 4.12 | Traffic control devices | |
| | Failure to comply with directions of traffic control device prohibited (parking) | $25.00 |
| | Failure to comply with directions of traffic control device prohibited (other than above) | $25.00 |
| 36 CFR 4.13 | Obstructing traffic | |
| | (a) Stopping or parking vehicle on park road excepting authorized or conditions beyond operator's control | $50.00 |
| | (Parking) | $25.00 |
| | (b) Operating vehicle so slowly as to interfere With normal flow of traffic prohibited | $25.00 |
| 36 CFR 4.14 | Open container of alcoholic beverage | |
| | (b) Carrying or storing a container, containing an alcoholic beverage that is open or whose | |

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| | seal has been broken within a motor vehicle in a readily accessible location, including the glove compartment, is prohibited and is the responsibility of the operator | $50.00 |
| 36 CFR 4.15 | Seat belts required (use state law) | |
| 36 CFR 4.20 | Right of way | |
| | Failure to yield to pedestrian, saddle horse, pack animal or animal-drawn vehicle | $25.00 |
| 36 CFR 4.21 | Speed limits | |
| | (c) Operating vehicle in excess of posted speed limit: | |
| | 1-10 m.p.h. over limit | $25.00 |
| | 11-15 m.p.h. over limit | $35.00 |
| | 16-20 m.p.h. over limit | $50.00 |
| | 21-25 m.p.h. over limit | $75.00 |
| | 26+ m.p.h. over limit | Mandatory |
| 36 CFR 4.22 | Unsafe operations | |
| | (b)(1) Operating motor vehicle without due care (careless driving) | $75.00 |
| | (2) Squealing tires | $50.00 |
| | (3) Failure to maintain control | $50.00 |
| | (4)(i) Allowing person to ride on or within trailer or conveyance towed, not designed to carry passengers | $50.00 |
| | (ii) Allowing person to ride on exterior portion of motor vehicle not designated for passengers | $50.00 |
| 36 CFR 4.23 | Operating vehicle under influence of alcohol or drugs | |
| | (a)(1) Operating or being in actual physical control of vehicle while under influence of alcohol, drugs or combination of both | Mandatory |
| | (c)(2) Refusal to submit to breath or blood test | Mandatory |
| 36 CFR 4.30 | Bicycles | |
| | (a) Use in undesignated area | $25.00 |
| | (c) Failure to obey applicable traffic regulations for motor vehicle except 4.4, 4.10, 4.11 and 4.14 | $25.00 |
| | (2) Operating bicycle during periods of low visibility; such as, between sunset and sunrise without lights and/or reflectors | $25.00 |
| | (3) Operating bicycles abreast | $25.00 |
| | (4) Operating bicycle while consuming alcohol or possession of open container in hand | $50.00 |
| 36 CFR 4.31 | Hitchhiking | $25.00 |

**PART 5 — COMMERCIAL AND PRIVATE OPERATIONS**

| | | |
|---|---|---|
| 36 CFR 5.1 | Advertising without a permit | $75.00 |
| 36 CFR 5.2(a) | Sale of alcoholic beverages or intoxicants | Mandatory |
| 36 CFR 5.3 | Unauthorized soliciting or engaging in business | $50.00 |
| 36 CFR 5.4(a) | Unauthorized commercial passenger-carrying motor vehicle | $50.00 |

| | | |
|---|---|---|
| 36 CFR 5.5 | Commercial photography, motion pictures filming and television or sound track production without a permit | $100.00 |
| 36 CFR 5.6 | Commercial vehicles | |
| | Use of park roads prohibited. | |
| | Pickup trucks, station wagons, vans and cars | $50.00 |
| | Trucks over 1½ tons and semi-trailers | $100.00 |
| 36 CFR 5.7 | Construction of buildings or other facilities | |
| | Constructing or attempting to construct without permit, contact, etc. | Mandatory |
| 36 CFR 5.8 | Discrimination in employment practices | Mandatory |
| 36 CFR 5.9 | Discrimination in furnishing public accommodation and transportation services | Mandatory |
| 36 CFR 5.10 | Selling food, drink or lodging-permit required | $50.00 |
| 36 CFR 5.13 | Creation/maintenance of nuisances prohibited | $50.00 |
| 36 CFR 5.14 | Prospecting, mining and mineral leasing | |
| | Prospecting, mining and location of mining claims except as authorized by law | Mandatory |

**PART 7 — SPECIAL REGULATIONS**

| | | |
|---|---|---|
| 36 CFR 7.14 | Great Smoky Mountains | |
| | (a) Fishing | |
| | (1) No valid fishing license | $50.00 |
| | (2) Fishing in closed or excluded waters | $50.00 |
| | (4) Taking protected fish | $50.00 |
| | Each additional fish (after 1st fish) | $50.00 |
| | (5) Fishing other than daylight hours | $50.00 |
| | (6) One rod and line per person | $50.00 |
| | (i) Artificial bait and single hook only | $50.00 |
| | (ii) Use or possession of bait other than artificial | $50.00 |
| | (7) Size limits | $25.00 |
| | Each fish under the limit | $25.00 |
| | (8) Possession limit | $50.00 |
| | Each fish over the limit | $25.00 |
| | (9) Violation of posted rules for Specially designated waters | $50.00 |
| | (b) Possession of open container of beer or alcoholic beverage other than in picnic, camping or overnight lodging | $25.00 |

**TITLE 16, UNITED STATES CODE**

| | | |
|---|---|---|
| Sec. 403h-3 | Hunting, killing, wounding or capturing at any time of any wild bird or animal, except dangerous animals when it is necessary to prevent them from destroying human lives or inflicting personal injury, is prohibited within the limits of said park, nor shall any fish be taken in any other way than by hook or line, and then in only such manner as directed by the Secretary of Interior | Mandatory |

**TITLE 18, UNITED STATES CODE**

| | | |
|---|---|---|
| Sec. 113(d) | Assault by striking, beating, or wounding | Mandatory |
| Sec. 113(e) | Simple assault | $50.00 |

**TITLE 21, UNITED STATES CODE**

| | | |
|---|---|---|
| Sec. 844 | Simple possession of | |
| | Controlled substance | Mandatory |
| | Marijuana | Mandatory |

**SPECIAL REGULATIONS APPLICABLE TO BLUE RIDGE PARKWAY**

| | | |
|---|---|---|
| 36 CFR 7.34(b) | Fishing within the Blue Ridge Parkway boundaries in violation of regulations as to places, times, bait, creel, and size limits | $50.00 |
| | Plus for each fish under-size or over limit | $25.00 |
| 36 CFR 7.34(k) | Use of boats of vessels on waters of Blue Ridge Parkway | $50.00 |
| 36 CFR 7.100(a) | Use of bicycles, motorcycles, or other motor vehicles on Appalachian National Scenic Trail | $50.00 |
| 36 CFR 7.100(b) | Horses or pack animals in prohibited areas Of the Appalachian National Scenic Trail | $50.00 |

**ASSIMILATED U.S. COAST GUARD REGULATIONS**

AUTHORITY: 36 CFR 3.1(a)

| | | |
|---|---|---|
| 33 CFR 81 | Lights required | $25.00 |
| 33 CFR 95 | Operating a vessel while intoxicated | Mandatory |
| 33 CFR 175.15 | Personal flotation devices required | |
| | (a) Vessels less than 16' and all canoes and kayaks | $25.00 |
| | (b) Vessels greater than 16' | $25.00 |
| 33 CFR 175.19 | Stowage | |
| | (a) Type I/II/III readily available | $25.00 |
| | (b) Type IV immediately available | $25.00 |
| 33 CFR 175.21 | Condition; size fit; approval marking | |
| | (a) Serviceable condition | $25.00 |
| | (b) Of an appropriate size | $25.00 |
| | (c) Legibly marked | $25.00 |
| 33 CFR 177.07 | Other safe conditions | |
| | (b) Navigational lights required | $25.00 |
| | (c) Boating while intoxicated | Mandatory |
| | (d) Fuel leaking from engine system or an accumulation of fuel in bilges or compartments | $25.00 |
| | (e) Ventilation requirements for tanks or compartments | $25.00 |
| | (f) Backfire flame control | $25.00 |
| | (g) Improper operating in a regulated boating area | $25.00 |
| | (h) Manifestly unsafe voyage | $25.00 |
| 33 CFR 183.23 | Capacity marking required | $25.00 |
| 46 CFR 25.35 | Flame arrestor | $25.00 |
| 46 CFR 25.40 | Ventilation | $25.00 |

(Other miscellaneous state statutes not specifically covered in Code of Federal Regulations)

Assimilated Crimes Act, 18 U.S.C. Section 13:

| NCGS Section | Offense | |
|---|---|---|
| 14-269 | Carrying a concealed weapon about one's person, except on own premises | Mandatory |
| 90-113.22 | Possession of drug paraphernalia with intent to use | Mandatory |
| 113-291.1(b)(2) | Taking, or attempting to take, wildlife with the use of an artificial light, electronic recorded call, or fire | Mandatory |
| | ********** | |
| | All pleas of not guilty | Mandatory |
| | All felonies | Mandatory |
| | Individual charged with more than two violations (other than multiple collateral fishing violations) | Mandatory |

# NATIONAL FOREST SERVICE VIOLATIONS
# TITLE 36, CHAPTER II
# CODE OF FEDERAL REGULATIONS

| SECTION NUMBER | OFFENSE | COLLATERAL |
|---|---|---|
| 261.3(a) | Interfering with Forest Officer or volunteer in performance of duties | Mandatory |
| 261.3(b) | Giving false or fictitious report or information to Forest Officer | Mandatory |
| 261.4(a) | Engaging in fighting | $100.00 |
| 261.4(b) | Offensive, derisive or annoying communication directed to others tending to cause violence | $100.00 |
| 261.4(c) | Inciting or producing imminent lawless actions | Mandatory |
| 261.4(d) | Causing unreasonably loud noise, annoyance or alarm | $75.00 |
| 261.5(a) | Throwing or placing ignited or other substance that may cause fire | Mandatory |
| 261.5(b) | Firing tracer bullets or other incendiary ammunition | Mandatory |
| 261.5(c) | Burning without a permit | Mandatory |
| 261.5(d) | Leaving a fire without extinguishing it | $35.00 |
| 261.5(e) | Allowing a fire to escape | Mandatory |
| 261.5(f) | Not removing flammable material from around campfire | $25.00 |
| 261.6(a) | Cutting timber not authorized by permit | $35.00 |
| 261.6(b) | Cutting trees under permit prior to marking | Mandatory |
| 261.6(c) | Removing forest products under permit prior to scaling | Mandatory |
| 261.6(d) | Illegally stamping or marking timber | Mandatory |
| 261.6(e) | Removing timber cut under permit without required identification | Mandatory |
| 261.6(f) | Selling timber or forest products obtained under FREE USE | $100.00 |
| 261.6(g) | Violating any timber EXPORT | Mandatory |
| 261.6(h) | Removing any timber or forest product without a permit | $100.00 |
| 261.7(a) | Unauthorized livestock | $25.00 |
| 261.7(b) | Failure to remove livestock | $25.00 |
| 261.7(c) | Failure to re-close gate | $25.00 |
| 261.7(d) | Releasing or removing impounded livestock | Mandatory |
| 261.8(a) | Hunting, fishing, trapping or catching wild animals, birds or fish illegally | $50.00 |
| | Exceeding creel or bag limit | $50.00 |
| | Plus, for each fish over limit | $10.00 |
| | Keeping undersized fish | $100.00 |
| | Plus, for each fish undersize | $25.00 |
| 261.8(b) | Possession of a firearm | $35.00 |
| 261.8(c) | Possession of hunting or trapping equipment | $25.00 |
| 261.8(d) | Possession of dog unconfined | $25.00 |
| 261.9(a) | Damaging any natural feature or property | $35.00 |
| 261.9(b) | Removing any natural feature or property | $25.00 |
| 261.9(c) | Damaging endangered or sensitive plants | $25.00 |
| 261.9(d) | Removing endangered or sensitive plants | $150.00 |
| 261.9(e) | Entering building closed to the public | Mandatory |

| | | |
|---|---|---|
| 261.9(f) | Herbicide or pesticide use | Mandatory |
| 261.9(g) | Disturbing or damaging archaeological site | Mandatory |
| 261.9(h) | Removing historic archaeological artifact or resource | Mandatory |
| 261.10(a) | Constructing or maintaining improvements without permit | $100.00 |
| 261.10(b) | Squatting (illegal occupancy) | Mandatory |
| 261.10(c) | Selling merchandise without a permit | $75.00 |
| 261.10(d) | Discharging firearms | $100.00 |
| 261.10(e) | Abandoning any personal property | $75.00 |
| 261.10(f) | Placing vehicle or object in such a manner as to be a hazard | $25.00 |
| 261.10(g) | Posting signs or notices without permit | $35.00 |
| 261.10(h) | Using device which produces noise to disturb others | $25.00 |
| 261.10(i) | Operating a P.A. System without permit | $25.00 |
| 261.10(j) | Use of land or facilities without authorization | $35.00 |
| 261.10(k) | Violating the terms of authorization contract or plan | $75.00 |
| 261.10(*l*) | Failing to stop vehicle on officer's order | $100.00 |
| 261.11(a) | Depositing in any toilet a substance to interfere with its operation | $75.00 |
| 261.11(b) | Leaving refuse in unsanitary condition | $75.00 |
| 261.11(c) | Polluting a stream with any substance | Mandatory |
| 261.11(d) | Failing to dispose of all garbage | $100.00 |
| 261.11(e) | Dumping into government receptacles garbage not generated in forests | $75.00 |
| 261.12(a) | Violating load, weight, height, length or width limitations of state law | $75.00 |
| 261.12(b) | Failure to weigh vehicle at Forest Service Station | Mandatory |
| 261.12(c) | Leaving a road or trail damaged | $100.00 |
| 261.12(d) | Blocking a road, trail or gate | $35.00 |
| 261.12(e) | Using a motorized vehicle in excess of 40" on trail | $25.00 |
| 261.13 | Operating vehicle off roads prohibited as follows: | |
| | (9) without valid license | $25.00 |
| | (10) without braking system | $25.00 |
| | (11) without lights during hours of darkness | $25.00 |
| | (12) in violation of noise standards | $35.00 |
| | (13) under influence of alcohol or drugs | Mandatory |
| | (14) creating excessive smoke | $25.00 |
| | (15) reckless driving | $50.00 |
| | (16) damaging land, vegetation or wildlife | $50.00 |
| | (17) in violation of state off-road laws | $25.00 |
| 261.14 | Prohibited at developed recreation sites: | |
| | (1) occupying site for other than recreational purposes | $25.00 |
| | (2) building fire outside fire ring | $25.00 |
| | (3) cleaning or washing anything at a hydrant not provided for that purpose | $25.00 |
| | (4) discharging fireworks | $35.00 |
| | (5) occupying day-use areas between 10 p.m. and 6 a.m. | $35.00 |
| | (6) failure to remove equipment | $25.00 |

| | | |
|---|---|---|
| | (7) placing, maintaining or using camping equipment except in places designated | $75.00 |
| | (8) failing to occupy camping area first night | $50.00 |
| | (9) leaving equipment unattended for 24 hours | $50.00 |
| | (10) unleashed animals | $50.00 |
| | (11) animals in swimming area | $50.00 |
| | (12) unauthorized pack, saddle or draft animal | $50.00 |
| | (13) parking in non-designated area | $25.00 |
| | (14) operating bicycle, motorbike or motorcycle on non-designated trail | $50.00 |
| | (15) operating motorbike, motorcycle or other vehicle except to enter or leave the site | $50.00 |
| | (16) distributing handbill, circular, paper or notice | $50.00 |
| | (17) depositing body waste where not authorized | $75.00 |
| 261.15 | Failure to pay admission, entrance or use fees | $25.00 |
| 261.16(a) | Possessing or using motor vehicle, motorboat, or motorized equipment in wilderness area | $100.00 |
| 261.16(b) | Possessing or using hand glider or bicycle in wilderness area | $75.00 |
| 261.16(c) | Landing of aircraft or dropping material in wilderness area | Mandatory |
| 261.19(a) | Landing of aircraft or using boat in primitive areas where not in use prior to 9/3/64 | Mandatory |
| 261.19(b) | Possessing or using undesignated motor or motorized equipment in primitive areas | $75.00 |
| 261.20(a) | Unauthorized use of "Smokey Bear" symbol | $75.00 |
| 261.20(b) | Unauthorized use of "Woodsy Owl" symbol | $75.00 |
| 261.52 | When provided by an order, the following are prohibited: | |
| | (1) building, maintaining, attending or using a fire, campfire or stove fire | $75.00 |
| | (2) using an explosive | $100.00 |
| | (3) smoking | $50.00 |
| | (4) smoking, except within an enclosed vehicle Or building or a developed recreation site | $50.00 |
| | (5) going into or being upon an area | $75.00 |
| | (6) possessing, discharging or using fireworks or pyrotechnic devices | $75.00 |
| | (7) entering area without firefighting tool | $50.00 |
| 261.52 | (h) operating an internal combustion engine | $50.00 |
| | (i) welding or operating a torch | $50.00 |
| | (j) operating or using any internal or external combustion engine without spark-arresting device | $75.00 |
| | (k) violating state burning laws | $75.00 |
| 261.53 | When provided in an order, it is prohibited to go into or be upon any area which is closed for the protection of: | |
| | (a) threatened, endangered, rare, unique, or vanishing species of plants, animals, birds or fish | $100.00 |

| | | |
|---|---|---|
| | (b) special biological communities | $100.00 |
| | (c) objects or areas of historical, archeological, geological, or paleontological interest | $100.00 |
| | (d) scientific experiments or investigations | $75.00 |
| | (e) public health or safety | $100.00 |
| | (f) property | $75.00 |
| 261.54 | When provided in an order, the following are prohibited on Forest Development Roads: | |
| | (a) using any type of prohibited vehicle | $75.00 |
| | (b) using by any type of prohibited traffic | $75.00 |
| | (c) unauthorized using for commercial hauling | $75.00 |
| | (d) operating a vehicle in violation of speed, load, weight, height, length, width, or other limitations specified by the order; or | $75.00 |
| | (a) operating motor vehicle without valid driver's license | $100.00 |
| | (b) operating vehicle without valid license plate and registration | $75.00 |
| | (c) operating motor vehicle without proper and workable safety equipment | $75.00 |
| | (d) failure to display valid driver's license upon request of any authorized officer | $75.00 |
| | (e) operating a vehicle while under the influence of intoxicating liquor or drugs | Mandatory |
| | (e) being on the road | $75.00 |
| | (f) operating a vehicle carelessly, recklessly or without regard for the rights or safety of other persons or in a manner or at a speed that would endanger any person or property | $100.00 |
| 261.55 | When provided in an order, the following are prohibited on Forest Development Trails: | |
| | (a) being on the trail | $75.00 |
| | (b) using any prohibited vehicle | $75.00 |
| | (c) use by prohibited traffic or mode of transportation | $75.00 |
| | (d) operating a vehicle in violation of width, weight, height, length, or other limitations specified | $75.00 |
| | (e) shortcutting a switchback | $75.00 |
| 261.56 | Possessing or using a vehicle off forest development roads in violation of an order | $75.00 |
| 261.57 | When provided by an order, the following are prohibited in National Forest wilderness: | |
| | (j) entering or being in the area | $75.00 |
| | (k) possessing specified camping or pack-outfitting equipment | $75.00 |
| | (*l*) possessing a firearm or firework | $75.00 |
| | (m) possessing any non-burnable food or beverage containers, including deposit bottles, except those containers designed and intended for repeated use | $75.00 |

| | | |
|---|---|---|
| | (n) grazing | $75.00 |
| | (o) storing equipment, personal property or supplies | $50.00 |
| | (p) disposing of debris, garbage, or other waste | $100.00 |
| | (q) possessing or using a wagon, cart, or other vehicle | $75.00 |
| 261.58 | When provided by an order, the following are prohibited: | |
| | (a) camping longer than allowed | $50.00 |
| | (b) entering or using a developed Recreation site or portion thereof | $75.00 |
| | (c) non-occupants entering or remaining in campground during night periods prescribed | $75.00 |
| | (d) occupying a developed recreation site with prohibited camping equipment | $75.00 |
| | (e) camping | $50.00 |
| | (f) using a campsite or other area described in the order by more than the number of users allowed by the order | $50.00 |
| | (g) parking or leaving a vehicle in violation of posted instructions | $25.00 |
| | (h) parking or leaving vehicle outside a parking space assigned to one's camp unit | $25.00 |
| | (i) possessing, parking, or leaving more than two vehicles, except motorcycles or bicycles, per camp unit | $25.00 |
| | (j) being publicly nude | $75.00 |
| | (k) entering or being in a body of water | $75.00 |
| | (*l*) being in the area after sundown or before sunrise | $75.00 |
| | (m) discharging firearm, air rifle, or gas gun | $75.00 |
| | (n) possessing or operating a motorboat | $75.00 |
| | (o) water skiing | $75.00 |
| | (p) storing or leaving a boat or raft | $50.00 |
| | (q) operating any water craft in excess of a posted speed limit | $50.00 |
| | (r) launching a boat except at a designated launching ramp | $50.00 |
| | (s) possessing, storing, or transporting any specified bird, fish or other animal or parts thereof | $75.00 |
| | (t) possessing, storing, or transporting any part of a tree or other specified plant | $75.00 |
| | first offense simple possession of marijuana not exceeding ¼ ounce or 7.78 grams | $250.00 |
| | (u) being in the area between 10 p.m. and 6 a.m., except a person who is camping or one who is visiting a camper | $50.00 |
| | (v) hunting or fishing | $100.00 |
| | (w) possessing or transporting any motor or mechanical device capable of propelling a water craft through water by any means | $50.00 |
| | (x) using any wheel, roller, or other mechanical | |

| | |
|---|---|
| device for the overland transportation of any water craft | $50.00 |
| (y) landing of aircraft, or dropping or picking up any material, supplies, or person by means of an aircraft, including a helicopter | $75.00 |
| (z) entering or being on lands or waters within the boundaries of a component of the National Wild and Scenic Rivers System | $75.00 |
| (aa) riding, hitching, tethering, or hobbling a horse or other saddle or pack animal in violation of posted instructions | $75.00 |
| (bb) possessing a beverage defined as alcoholic by state law | $75.00 |
| (cc) possessing or storing any food or refuse as specified in the order | $75.00 |
| ********** | |
| All pleas of not guilty | Mandatory |
| At discretion of United States Attorney, pursuant to 18 U.S.C. Section 13, any violation of state law, including felonies | Mandatory |
| All federal felonies | Mandatory |
| Defendant charged with more than two violations (other than multiple collateral fishing violations) | Mandatory |

# APPENDIX OF FORMS

## Appendix A. Certification and report of initial attorney's conference.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
_____ DIVISION
CIVIL NO _____

| | |
|---|---|
| _____ | ) |
| _____ | ) |
| _____ | ) |
| _____ | ) |
| _____ | ) |
| _____ | ) |
| **Plaintiff[s],** | ) |
| **vs.** | ) **CERTIFICATION AND REPORT OF INITIAL ATTORNEY'S CONFERENCE** |
| _____ | ) |
| _____ | ) |
| _____ | ) |
| _____ | ) |
| _____ | ) |
| _____ | ) |
| _____ | ) |
| _____ | ) |
| **Defendant[s]** | ) |
| _____ | ) |

*Please fill in or check the appropriate blanks (print legibly) to certify completion of the Initial Attorney's Conference and provide the required information to the Court. Where the parties were unable to agree on a specific provision or item, please so note and attach any necessary explanation. Please note that this information will be used as a guideline by the judge conducting the Initial Pretrial Conference or issuing the Pretrial Order and Case Management Plan.*

1. Certification of Conference. Pursuant to Fed. R. Civ. P. 26(f), a meeting was held on _____ *(date)* [ ] at _____ *(place)* or [ ] by telephone and was conducted by the undersigned counsel for the designated parties in the above-captioned case.

2. Pre-Discovery Disclosures. The information required by Fed. R. Civ. P. 26(a)(1)
*(check one)* [ ] has been exchanged [ ] will be exchanged by _____ *(date).*

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [*Use separate paragraphs or subparagraphs as necessary if parties disagree.*]

a) All discovery shall be commenced in time to be completed by _____ *(date, ordinarily nine months from the date of this Certification and Report).*

[*if needed*] Discovery on _____ _____ *(identify any issues requiring early discovery)* will be completed by _____ *(date)*.

b) Discovery Limits:

1) Maximum of _____ *(ordinarily 20)* interrogatories by each party to any other party.

2) Maximum of _____ *(ordinarily 20)* requests for admission by each party to any other party.

3) Maximum of _____ depositions by plaintiff(s) and _____ by defendant(s) *(ordinarily 6 each)* [or _____ by *each* plaintiff and _____ by *each* defendant].

c) Reports from retained experts under Rule 26(a)(2) will be due:
-from plaintiff(s) by _____ *(date)*
-from defendant(s) by _____ *(date)*
Supplementations under Rule 26(e) due _____ *(list time(s) or interval(s))*

4. Other Items. [*Attach separate paragraphs as necessary if parties disagree.*]

a) The parties [ ] request [ ] do not request a conference with the court before entry of the scheduling order.

b) All potentially dispositive motions should be filed by _____ *(date, ordinarily one month after the close of discover)*

c) Settlement:
[ ] is likely
[ ] is unlikely
[ ] cannot be evaluated prior to _____ *(date)*
[ ] may be enhanced by use of the following ADR procedure:
[ ] Mediated Settlement Conference
[ ] binding arbitration
[ ] judicial settlement conference
[ ] other _____

The parties agree that the above selected ADR procedure would be most useful if conducted:
[ ] after resolution of any outstanding dispositive motions, but prior to further discovery;
[ ] after an initial round of preliminary discovery discovery to be completed by _____ *(date)*;
[ ] after the completion of discovery;
[ ] after resolution of summary judgment motions, if any
[ ] not applicable.

d) Final lists of witnesses and exhibits under Rule 26(a)(3) are due:
from plaintiff(s) by _____ *(date)*
from defendant(s) by _____ *(date)*

e) If the case is ultimately tried, trial is expected to take approximately _____ days.

5. Please identify any other matters regarding discovery or case management which may require the Court's attention (e.g., concerns re: confidentiality, protective orders, etc., unmovable scheduling conflicts)

_____
_____
_____
_____
_____
_____

| *Plaintiff's Counsel* | *Party* | *Date* |
|---|---|---|
| *Plaintiff's Counsel* | *Party* | *Date* |
| *Plaintiff's Counsel* | *Party* | *Date* |
| *Plaintiff's Counsel* | *Party* | *Date* |

| *Defendant's Counsel* | *Party* | *Date* |
|---|---|---|
| *Defendant's Counsel* | *Party* | *Date* |
| *Defendant's Counsel* | *Party* | *Date* |
| *Defendant's Counsel* | *Party* | *Date* |

**Appendix B. Consent to proceed before a United States Magistrate Judge.**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CASE NO. _____

)
)
Plaintiff )
)
v. )
)
Defendant )
)

## CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE JUDGE

In accordance with 28 U.S.C. § 636(c) and Rule 73(b) of the Federal Rules of Civil Procedure, the undersigned counsel of record **CONSENTS** to have a United States Magistrate Judge conduct all further proceedings in this case, including bench or jury trial, and order the entry of final judgment.

Signed and dated this _____ day of _____, _____

_____
Attorney for _____

**MAGISTRATE JUDGES DO NOT CONDUCT TRIALS IN CRIMINAL FELONY CASES. ACCORDINGLY, CRIMINAL TRIALS DO NOT INTERFERE WITH THE SCHEDULING AND PROCESSING OF CIVIL CASES ASSIGNED TO MAGISTRATE JUDGES AND ARE THEREFORE RESOLVED SOONER.**

## REFUSAL TO CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE JUDGE

Consent to proceed before a United States Magistrate Judge for trial or order of an entry of final judgment is refused. I understand that a United States Magistrate Judge may retain jurisdiction of this matter for purposes of resolving non-dispositive motions.

Signed and dated this _____ day of _____, _____

_____
Attorney for _____

***PLAINTIFF IS TO SERVE THIS FORM ON ALL DEFENDANTS WITH THE COMPLAINT.**
*PLAINTIFF SHALL FILE THIS FORM ON OR BEFORE THE DATE THAT PLAINTIFF FIRST SEEKS SERVICE OF THE COMPLAINT UPON THE DEFENDANT(S) IN ANY MANNER PROVIDED BY RULE 4, Fed. R. Civ. Proc.
***DEFENDANTS MUST FILE THIS FORM WITH THEIR FIRST RESPONSIVE PLEADING.**

Please see the reverse side for further information and directions.

## CONSENT FORM INSTRUCTIONS

In the Western District of North Carolina, a new civil action is randomly assigned to either a District Judge or a Magistrate Judge at the time of filing. Upon filing, the plaintiff is to provide a copy of the Consent/Refusal Form to all defendants. **The plaintiff must serve this form on all defendants with their copy of the complaint.**

**Each plaintiff must file this Consent/Refusal Form on or before the date that plaintiff first seeks service of the complaint upon the defendant(s) in any manner provided by Rule 4, Fed. R. Civ. Proc.**

**Each defendant's Consent/Refusal Form must be filed with said defendant's first responsive pleading.**

A United States Magistrate Judge may, with the consent of the parties, conduct all proceedings in this civil action, including a bench or jury trial, and order the entry of final judgment. See 28 U.S.C. § 636 and F.R.C.P. 73. The statute provides for direct appeal to the U.S. Court of Appeals for the Fourth Circuit.

If this case has been randomly assigned to a District Judge and all parties consent to have the Magistrate Judge conduct all proceedings, the case may be referred to a Magistrate Judge.

If this case has been randomly assigned to a Magistrate Judge and not all parties consent, the Magistrate Judge may still be responsible for the pretrial processing of the case. The Magistrate Judge may hear and decide all non-dispositive pretrial and discovery matters. The Magistrate Judge may consider dispositive motions by issuing proposed findings and a recommendation to the District Judge in accordance with F.R.C.P. 72(a) and (b). When the Magistrate Judge has issued proposed findings and a recommendation on a dispositive motion, the case will be sent back to the Clerk of Court for random reassignment to a District Judge. Thereafter, if the dispositive motion does not resolve the case, the District Judge will return the file to the Magistrate Judge who will preside over the case until it is ready for trial. When the case is ready for trial, it will be returned to the District Judge for all further proceedings.

EACH PARTY HAS THE DUTY TO RESPOND TO THIS ADMINISTRATIVE ORDER BY FILING THE CONSENT/REFUSAL FORM. File the form on the reverse side of this Order with the Clerk of Court.

IT IS THEREFORE ORDERED that Plaintiff(s) serve a copy of the Consent/Refusal form on all defendants with the complaint.

Plaintiff must file an executed form on or before the date that plaintiff first seeks service of the complaint upon the defendant(s) in any manner provided by Rule 4, Fed. R. Civ. Proc.

Each defendant must file a Consent/Refusal Form with said defendant's first responsive pleading.

Frank G. Johns
Clerk, United States District Court

**Appendix C. Entities with a direct financial interest in litigation.**

ONLY ONE FORM NEED BE COMPLETED FOR EACH NONGOVERNMENTAL PARTY EVEN IF THE PARTY IS REPRESENTED BY MORE THAN ONE ATTORNEY. DISCLOSURES MUST BE FILED ON BEHALF OF INDIVIDUAL NONGOVERNMENTAL PARTIES AS WELL AS NONGOVERNMENTAL CORPORATE PARTIES. COUNSEL HAVE A CONTINUING DUTY TO UPDATE THIS INFORMATION. PLEASE FILE AN ORIGINAL

AND ONE COPY OF THIS FORM. PLAINTIFF OR MOVING PARTY MUST SERVE THIS ON THE DEFENDANT(S) OR RESPONDENT(S) WHEN INITIAL SERVICE IS MADE.

_____ who is _____
(Name of party.) (Plaintiff/moving party or defendant.)

makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?

[ ] Yes [ ] No

2. Does party have any parent corporations?

[ ] Yes [ ] No

If yes, identify all parent corporations, including grandparent and great grandparent corporations: _____

3. Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity?

[ ] Yes [ ] No

If yes, identify all such owners: _____

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation?

[ ] Yes [ ] No

If yes, identify entity and nature of interest: _____

_____ _____
(Signature) (Date)

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Effective April 3, 2000.

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# LOCAL BANKRUPTCY RULES

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1. *Joint petition.* When a joint petition is filed by a husband and wife who do not share the same surname, the debtors shall append to their petition a duly executed affidavit verifying that they are legally married at the time of the filing of the petition.

2. *Petition filed by a corporation.* When a voluntary bankruptcy petition if filed by a corporation, there shall be attached to the petition as an exhibit the original or a certified copy of the resolution of the debtor's board of directors authorizing the filing of the bankruptcy petition.

3. A petition submitted for filing without the affidavit or resolution referred to in paragraphs 1 and 2 will be filed by the Clerk, but subject to dismissal without notice or opportunity for hearing.

**Editor's note.** — For website, see www.ncwb.uscourts.gov.

## Rule 1006-1. Filing Fee.

*Failure to Pay Filing Fee in Installments.* In the event the debtor submits an application to pay the filing fee in installments, and subsequently fails to pay the filing fee in installments pursuant to the terms allowed by order of this court, the debtor's case will be subject to dismissal without further notice or opportunity for hearing.

## Rule 1007-1. Lists, Schedules, and Statements.

*Failure to File Lists, Schedules, Statements or Other Documents.* In the event a bankruptcy petition is filed with the Clerk of Court without all of the lists, schedules, statements, or other documents required to be filed in conjunction with the filing of a bankruptcy petition by the Federal Rules of Bankruptcy Procedure or these local Bankruptcy Rules, the Clerk of Court shall immediately serve upon the debtor(s), the debtor(s)' attorney, the trustee, and the petitioning creditors, if applicable, a notice of Deficient Filing. This notice notifies said parties that specified documents were not filed with the petition and that the bankruptcy case will be subject to dismissal, without further notice and opportunity for hearing, if the specified documents are not filed with the Clerk of Court within the time set forth in the applicable Federal Rules of Bankruptcy Procedure of Local Bankruptcy Rules.

## Rule 1007-2. Master Mailing Matrix.

1. As a requirement for filing, all bankruptcy petitions must be accompanied by an alphabetized matrix containing the names and addresses of all creditors, parties in interest and governmental agencies, excluding the debtor, debtor's attorney. Only the original matrix shall be filed. It is not necessary to file any copies.

2. The matrix shall be prepared according to the forms and instructions provided upon request by the Clerk's office. The matrix that accompanies all Chapter 7, 11, 12, and 13 petitions shall be prepared in a specific one-column format described in the Clerk's Administrative Guide and a Standing Order of this Court that was entered on October 3, 1990.

3. The matrix, and any amendments thereto, shall be certified in writing as clerically accurate by the filing attorney or party, and such person shall be responsible for any errors in or omissions from the listings.

4. In Chapter 13 Cases, creditors or contingent creditors to whom notice is intended to be sent must be listed on the schedule of creditors as well as on the matrix.

5. In all cases, the debtor shall submit to the Clerk of Court, at the time the petition is filed, a mailing matrix on a 3.5" computer disk, along with a printed hard copy, in a format set forth in the Bankruptcy Practice Guide, and upon request an instruction sheet is available from the Clerk of Court.

**Rule 1007-3. Compliance with Statement of Intentions.**

Within forty-five (45) days of the filing of the debtor's statement of intention, the debtor or the debtor's counsel shall serve on the trustee evidence of delivery of the collateral, evidence of reaffirmation of the debt or other evidence showing compliance with the statement of intention.

**Rule 1009-1. Amendments of Voluntary Petitions, Lists, Schedules and Statements.**

1. Amended voluntary petitions, lists, schedules, and statements shall be filed with the Clerk, along with a statement or notation stating the purpose of the amendment. The amended document should be verified and prepared as prescribed by the appropriate Official Forms. Notice of the amendment must be served on the trustee and to any entity affected thereby.

2. A party adding creditors after service of the 341 (a) meeting notice, must serve a copy of the 341 (a) meeting notice on added creditors. Service thereof shall be reflected in the certificate of service filed with the notice of amendment.

**Rule 1014-1. Transfers of Venue Within District.**

1. *Notice and Motion.* A request to change divisional venue of a case, adversary proceeding or contested matter shall be made as follows:

a. By filing a motion and a notice to all creditors and other parties in interest explaining the request and providing a ten (10) day opportunity for objections, the notice being substantially in the form of Local Form 1, and a certificate of service of the notice by the movant evidencing service on all creditors and other parties in interest, including all parties the Court requires on a standard matrix; and

b. By submitting a proposed Order after the objection period has expired.

c. An order changing divisional venue will not affect the appointment of the trustee or the original location of the § 341 meeting of creditors.

**Rule 1017-1. Debtor's Failure to Appear at First Meeting of Creditors.**

In the event the debtor fails to appear at his or her first meeting of creditors, the debtor's case will be subject to dismissal without further notice or opportunity for hearing.

**Rule 2002-1. Service of Papers in Chapter 11 Cases.**

1. *Papers Required to be Served by Chapter 11 Debtors.* In Chapter 11 cases, the debtor-in-possession shall be responsible for serving the following papers and for filing a certificate of service with the Clerk's office within five (5) days of the date of the mailing:

a. the debtor's plan;

b. the debtor's disclosure statement as approved by the Court;

c. the ballot;

d. notice regarding balloting and date for hearing on confirmation of the debtor's plan; and

e. any other notices as the Court or Clerk shall direct in a particular case. The form and content of the papers referred to in parts d, and e above, shall be approved by the Clerk's office.

2. *Service of Chapter 11 Fee Application and Notice of Hearing.* In addition to proper service of the notice, copies of the full applications for compensation shall be served by the applicant on the debtor, the debtor's counsel, the Bankruptcy Administrator and the trustee (if one has been appointed). In all cases in which there is any Court-appointed committee, a full copy of the fee application shall also be served on the chairman of each such committee and on its counsel if such has been appointed, or if no counsel so serves, then on all members of that committee who have accepted appointment.

**Rule 2014-1. Applications for Employment of Professionals.**

*Nunc Pro Tunc Applications.* Absent extraordinary circumstances, *nunc pro tunc* applications for appointment of professional persons pursuant to Sections 327 and 1103 of the Bankruptcy Code, and Bankruptcy Rule 2014, will not be considered. An application is considered timely if it is filed within thirty (30) days of the date of the filing of the petition in bankruptcy or the date the professional commences rendering services, whichever occurs later.

**Rule 2015-1. Claims Docket.**

The Chapter 13 trustee shall prepare a claims docket for each converted case and such claims docket shall be transferred to the Clerk's office within 120 days of the conversion order along with the original claims.

**Rule 2016-1. Professional Fee Applications.**

1. *Professional Fee Guidelines.* Professionals seeking compensation are encouraged to refer to the Guidelines for Compensation which are contained in the Clerk's Guide.

2. *Contents of Chapter 11 Fee Applications.* In addition to all other requirements for applications for fees of professional persons, fee applications in Chapter 11 cases shall also comply with the following requirements:

a. Application must eventually be made for all professional fees incurred during the pendency of the Chapter 11 case as well as those fees incurred prior to the filing of the Chapter 11 petition which are related to the bankruptcy case.

b. All Applications for Chapter 11 interim fees must contain a summary of prior fee awards including the amount of the prior Application, the period covered by each prior Application, the amount approved and the date of the order approving the prior fee awards. *See* Local Form 12.

3. *Security Interests.* Any agreements granting security interests in the debtor's property or other property for the benefit of the debtor to the debtor's attorney or any other professional employed by the debtor to secure the payment of professional fees must be fully disclosed in the petition and/or schedules and must be approved by the Court. Any party receiving such an interest must make application to the Court within fifteen days (15) days of the date of filing of the petition or the date of the agreement, whichever occurs later. Such application should be served on all parties in interest, including the trustee and the Bankruptcy Administrator, and may be on a "no-protest" basis pursuant to Local Rule 9013-1(2).

4. *Chapter 13 Plan and Disclosure of Attorneys Fee Procedure.* In addition to filing the petition and schedules as required by the Official Bankruptcy Forms,

the debtor shall file its Chapter 13 Plan in conformance with Local Form 20 and shall file an executed Disclosure to Debtor(s) of Attorneys Fee Procedure, in conformance with Local Form 11.

5. *Compensation of Attorneys in Chapter 13 Cases.*

a. *Amount of Fee.*

(i) The base fee in a Chapter 13 case is $1,300.

(ii) Any fee for non-base services that may be rendered a Chapter 13 debtor must be applied for and approved by the Court. For fees and expenses under $500, notice need only be sent to the debtor(s), the trustee and the Bankruptcy Administrator. For fees and expenses of $500 and above, all parties in interest must be noticed. If a no-protest notice is used, it shall be given using the form annexed to these Local Bankruptcy Rules as Local Form 4.

(iii) Where substitute counsel is retained by a Chapter 13 debtor, that attorney may collect a base fee of $350.

6. *Definition of Base Fee Services.*

a. The following services are deemed to be paid by the base fee:

(i) Preparation and filing of petition and attendance at Section 341 meeting.

(ii) Notice to stay state court actions.

(iii) Proof of claim filed by debtor for creditor.

(iv) Motions to Avoid liens.

(v) Rejections or assumptions of leases.

(vi) Motion to transfer venue.

(vii) Letter to trustee requesting payoff.

(viii) Letter to debtor about discharge.

(ix) Review of order confirming plan and ninety day report.

(x) Objections to claims listed on the schedules.

(xi) Valuation hearings.

b. The following services are presumed not to be covered by the base fee, and additional compensation may be awarded by the Court for the following services. Non-base fees may not be requested of the debtor or paid by the debtor, in trust or otherwise, prior to approval by the Court:

(i) Abandonment of property post-confirmation.

(ii) Motion for moratorium.

(iii) Motion for authority to sell property.

(iv) Motion to modify.

(v) Motion to use cash collateral or incur debt.

(vi) Defense of motion for relief from stay or co-debtor stay.

(vii) Defense of motion to dismiss.

(viii) Objections to claims not listed in schedules.

(ix) Non-base fee requests.

(x) Stay violation litigation.

(xi) Insurance inquiries.

(xii) Post-discharge injunction actions.

(xiii) Adversary Proceedings.

(xiv) Wage garnishment orders.

(xv) Turnover adversaries.

(xvi) Conversion to Chapter 7.

(xvii) Motions to substitute collateral.

(xviii) Any other matter not covered by (a) above.

c. In the Court's discretion, a debtor's attorney in a Chapter 13 proceeding may request, in open court, and without any further notice, non-base fees for the following services and in amounts not exceeding those shown below. Without other notice, the debtor's attorney may also request up to $1.00 for each item noticed to creditors as expense for postage, copying and envelopes.

(i) Defense of motion to dismiss. $100

(ii) Motion for Moratorium. $150

(iii) Motion to modify and order. $250
(iv) Substitution of collateral. $350
(v) Uncontested adversary lien stripping. $250
(vi) Defense of motion for relief from stay or co-debtor stay. $250
(vii) Motion for authority to sell property and order. $250
(viii) Conversion to Chapter 7. $350

These standard non-base fees are intended as a convention to reduce expense to the parties. Counsel may, alternatively, apply for non-base fees on a "time and materials" basis in accordance with Federal Rule of Bankruptcy Procedure 2016 and 11 U.S.C. 330.

7. *Fees Exceeding the Base Fee.* Any fee retainer and/or agreement for payment taken by an attorney for a Chapter 13 debtor in an amount which is in excess of the base fee shall be applied for by the debtor's attorney within sixty (60) days after the first creditors' meeting under Section 341 of the Bankruptcy Code. As to any amounts which the attorney continues to hold as a retainer after that time, application for services rendered in the interim shall be made every six months until all retainer is earned and paid.

8. *Disclosure of Fee.* Every attorney for a Chapter 13 debtor must disclose to the debtor the procedures applicable to awards of attorney's fees in Chapter 13 cases in this district. This disclosure shall be made by reviewing with the debtor the "Disclosure to Debtor(s) of Attorney's Fee Procedures for Chapter 13 Cases in the United States Bankruptcy Court for the Western District of North Carolina", which is annexed to these Local Bankruptcy Rules. This form must be fully completed, executed as indicated and the original must be filed with the Chapter 13 petition of that debtor.

9. *Payment of Attorney Fees in Chapter 13 Cases.*

a. An attorney may accept an amount of compensation in advance of the filing of the Chapter 13 case up to the maximum of $1,300.00 base fee on the following conditions:

(i) All Court filing fees must be paid in full at the time the case is filed (no installment fees to be applied for) and,

(ii) The debtor must appear at the time first set for the 341(a) meeting with no less than one (1) full month's Plan payment to turn over to the trustee.

b. If an attorney accepts a retainer and either (i) or (ii) of a. above is not met, the attorney must pay the delinquent fees and/or Plan payment from the retainer held.

**Editor's note.** — For Guidelines for Compensation see Appendix A to these Local Rules.

## Rule 2090-1. Representation of Business Entities.

All partnerships, corporations and other business entities, other than an individual conducting business as a sole proprietorship, that desire to appear in cases or proceedings before this Court, not including Section 341 first meetings of creditors, must be represented by a lawyer duly admitted to practice before this Court. For purposes of this Local Bankruptcy Rule, an appearance shall be defined as preparing and filing papers, such as complaints and, petitions, answers, applications, and motions, questioning witnesses in proceedings before the Court, and pursuing any action of any nature in this Cour t.

**Rule 2090-2. Special Admissions.**

Litigants in any adversary proceeding and in any contested matter in which the attorney appears at a hearing, except counsel representing governmental agencies and parties appearing pro se, must be represented by a least one member of the bar of this Court or by an attorney admitted to practice by this Court pursuant to this section. Any lawyer who is a member in good standing of the Bar of the Supreme Court of the United States may, in the discretion of the judges of this Court, be permitted to appear in a particular case. If such permission is granted, and if a member of the bar of this Court is not associated, said attorney and his client shall be deemed to have consented that service of all pleadings and notices may be made upon a deputy clerk in the appropriate division of this court as process agent. The Court encourages such out-of-state attorneys to associate a member of the bar of this Court in all cases, but will not require such association where the amount in controversy or the importance of the case do not appear to justify double employment of counsel. Special admissions will be the exception and not the rule, and no out-of-state counsel will be permitted practice frequently or regularly in this Court without the association of local counsel.

Where justice requires, the authorized deputy clerks at Asheville, and Charlotte may permit the filing of papers at the request of out-of-state counsel; provided, however, the further participation of out-of-state counsel shall be governed as herein above provided.

All counsel, except those representing governmental agencies, must pay a fee in the amount of $75.00 to the U.S. District Court for each special admission or whenever Pro Hac Vice admission is granted.

**Rule 2091-1. Extent of an Attorney's Duty to Represent.**

Any attorney who files a bankruptcy petition for or on behalf of a debtor shall remain the responsible attorney of record for all purposes including the representation of the debtor in all matters that arise in the case. This includes conversion to another chapter. An attorney is automatically deemed relieved of his or her duties when the debtor's case is closed. Otherwise, an attorney is relieved of his or her duty to represent the debtor only after notice and a hearing upon motion and Order of this Court.

**Rule 3001-1. Filing of Claims in Chapter 13 Proceedings.**

*Filing Claims.* Proofs of claim in Chapter 13 proceedings shall be filed directly with the office of the standing trustee to whom the case is assigned. The address of the proper standing trustee will be shown on the notice of creditors' meeting. Claims will be dated and stamped as received as of the date they arrive in the trustee's office and the claim shall be deemed filed with the Court as of that date.

**Rule 3015-1. Objection to Confirmation.**

Parties shall have fifteen (15) days after the 341(a) meeting within which to file an objection to confirmation of the Chapter 13 plan. If no objection is filed within that time, the Court will enter an order confirming the plan.

**Rule 3016-1. Motion to Extend Exclusivity Period.**

In all Chapter 11 cases, Motions to Extend the Exclusivity Period that are filed pursuant to 11 U.S.C. § 1121(d) may not be filed on a "no-protest" basis under Local Bankruptcy Rule 9013, and a Court hearing will be required for all such motions.

**Rule 3018-1. Chapter 11 Balloting.**

All original ballots must be returned to the Clerk by the voting parties. Any proponent of a plan shall file a summary of ballots as they appear in the Court record. The summary shall be filed with the Clerk prior to the hearing on confirmation.

**Rule 4001-1. Motions for Relief from Stay.**

1. In a motion for relief from stay, the following shall be included:

a. The amount of the movant's debt;

b. Brief description of security interest, if applicable (attach copy of documents evidencing interest and perfection);

c. Description of property encumbered by stay (include serial number, lot and block number, etc.). Failure to adequately describe the property may result in denial of the motion, even absent objection;

d. Basis for relief (i.e., property not necessary for reorganization, debtor has no equity, property is not property of estate; if brought "for cause," state specific facts constituting cause);

e. Valuation of property and basis and date of valuation (appraisal, blue book, etc., and attach copy if applicable).

2. *Application of Section 362(e) of the Bankruptcy Code.* If a movant desires the provisions of Section 362(e) of the Bankruptcy Code to apply, the movant must so state both in the caption of its motion and in the body of its motion. Otherwise, movant will be deemed to have consented to a waiver of the application of Section 362(e) and the stay shall remain effective notwithstanding the expiration of the thirty (30) day period. Similarly, if the movant desires the application of Section 362(e) and yet selects a hearing date outside the thirty (30) day period of Section 362(e), it shall be deemed a consent by the movant to the waiver of the application of Section 362(e) and the stay shall remain effective at least until the Court considers the matter at the hearing, and thereafter upon such terms as the Court orders. If the movant desires Section 362(e) to apply, and notifies the Court and the adverse party, the Court will schedule the initial hearing within the applicable thirty (30) day period.

**Rule 4002-1. Assets in Need of Trustee Attention.**

1. *Inventory or Equipment.* When a stock of goods or business equipment is listed in the schedules, the debtor shall, immediately after the general description thereof:

a. list the assets in need of attention, including the nature and value;

b. append a short explanation of its exact location;

c. list the name and address of the custodian thereof;

d. state the protection being given such property, and the amount and duration of fire and theft insurance, if any; and

e. list whether the asset is subject to any environmental hazards or concerns.

2. *Need for Immediate Action.* Where assets are in need of immediate attention, the debtor's attorney (or debtor if *pro se*) shall immediately contact the Clerk to ascertain the name of the trustee assigned to the case. If no trustee has been assigned, the attorney shall notify the Clerk of the necessity for immediate assignment. Upon determining the assigned trustee, the attorney shall then contact the trustee, or the Bankruptcy Administrator if the trustee is unavailable, and notify the trustee of the need for immediate attention and of the items listed in section 1 herein.

**Rule 4003-1. Exemption Election.**

1. *Content of Exemption Election.* The exemption election must comply with the Official Bankruptcy Form, and shall include the following:

a. *Property Description.* Each item of property claimed as exempt, except clothing, shall be specifically and individually listed. Generic terms, such as "household goods", "real property" and "jewelry", shall not be an adequate description of property. Real property shall be described by at least the full street address thereof, including the county and state. Vehicles shall be described by at least the make, model, year, and body type thereof. Other items of tangible personal property claimed as exempt shall be described by at least the make and model thereof. Intangible personal property shall be described by at least sufficient information to allow a reasonable person to identify and locate the same without further inquiry.

b. *Statute or Law Creating Exemption.* Each item of property claimed as exempt shall be accompanied by a reference to the specific law providing for the exemption, including applicable subparagraphs of statutes.

c. *Recently Purchased Property.* In addition to the list of property on Official Bankruptcy Form 6-C, there shall be a listing of each item of tangible personal property purchased by the debtor within ninety (90) days of the filing of the bankruptcy petition.

2. *Time Limit for Amending or Objecting to Exemption Election.* The debtor shall have up to and including the day of the Section 341(a) meeting of creditors in which to amend the exemption election. An amendment to the exemption election announced at the Section 341(a) meeting of creditors and filed with the Court in writing no later than ten (10) business days thereafter, shall be deemed filed within the time set forth above.

**Rule 4003-2. Lien Avoidance in Chapter 13 Proceedings.**

*Lien Avoidance in Chapter 13.* Unless the debtor files motions to avoid Section 522(f) liens within ninety (90) days of the date of the Section 341 creditors' meeting, the creditor's claim will be treated as a secured claim.

**Rule 4004-1. Certificates of Discharge.**

Certificates of Discharge will be issued by the Clerk upon affidavit of the Debtor, specifically identifying the following:

a. judgment creditor,
b. the court or public registry in which the judgment is recorded, and
c. judgment date, book, and page.

Additionally, the affidavit must contain the following averments:

a. The Debtor has received a discharge in the case;
b. The judgment creditor was given notice of the bankruptcy;
c. In counsel's opinion, the judgment debt was discharged; and
d. At the date of bankruptcy, the Debtor owned no real estate or any other property to which the judgment had attached.

The affidavit must be served upon the creditor.

**Rule 4071-1. Direct Creditor Communication with Chapter 13 Debtors.**

1. *Definition.* Direct creditor communication with a debtor shall mean written or oral communication which is truthful and commercially reasonable in all respects, including substance of message, timing of contact, and manner of delivery or transmission of such message.

2. *Contact by Secured Creditors.* A secured creditor may communicate with a debtor directly concerning (1) insurance coverage, (2) other encumbrances on

the collateral of the secured creditor, and (3) the location and inspection of collateral.

3. *Contact by Creditors Whose Claims are Paid Directly by the Debtor.* Any creditor of a Chapter 13 debtor, whose claim is not paid through the trustee but rather paid by the debtor directly, may communicate with the debtor concerning any of a debtor's post-petition obligations to that creditor under the debtor's contract with that creditor.

4. *Creditors' Responses to Debtors.* Any creditor may freely respond to any inquiry from a debtor on any subject matter.

**Rule 5005-1. Electronic Case Filing.**

The Court allows registered users to file petitions, make motions and submit documents to the Court through the use of electronic means. Requirements and procedures for electronic filing are established in the court's Administrative Order adopting electronic case filing procedures and the procedures for electronic case filing established by the Clerk.

**Rule 5009-1. Trustee's Duty to File Final Report.**

In the event a case is dismissed for failure of the debtor to appear at the first meeting of creditors, or if a case is converted to a case under a different chapter of the Bankruptcy Code, the trustee in the original case will not be required to file a Final Report in accordance with Federal Rule of Bankruptcy Procedure 5009 unless funds or assets are actually received by the trustee in any such case.

**Rule 5011-1. Abstention.**

1. *Adversary Proceedings.* In adversary proceedings, any motion for abstention pursuant to 28 U.S.C. Section 1334(c) shall be filed within thirty (30) days after the service of the summons, complaint or other pleading to which it is addressed.

2. *Contested Matters.* In contested matters, any motion for abstention pursuant to 28 U.S.C. Section 1334(c) shall be filed no later than the time allowed for response or objection.

3. *To Whom Abstention Motion is Directed.* Motions to abstain pursuant to 28 U.S.C. Section 1334(c), whether the requested abstention is mandatory or discretionary, shall be directed to the Bankruptcy Court, except with respect to claims within 28 U.S.C. Section 157(b)(5) in which cases motions to abstain shall be directed to the United States District Court.

**Rule 7003-1. Adversary Proceeding Cover Sheet.**

All complaints initiating adversary proceedings shall be accompanied by a fully completed Bankruptcy Cover Sheet (form BC-104). This form shall be provided by the Clerk upon request.

**Rule 7016-1. Limitation of Application of Federal Rule of Civil Procedure 16(b) to Bankruptcy Cases.**

Federal Rule of Civil Procedure 16(b) applies to all adversary proceedings, except those adversary proceedings to recover money or property having a value of less than $75,000.

**Rule 7026-1. Limitation of Application of Federal Rule of Civil Procedure 26 to Bankruptcy Cases.**

1. Unless otherwise ordered by the Court, Federal Rule of Civil Procedure (FRCP) 26 applies to all adversary proceedings, including but not limited to those actions described in Federal Rule of Bankruptcy Procedure (FRBP) 7001, except that FRCP 26(a) and (f) do not apply to adversary proceedings to recover money or property having a value of less than $75,000.

2. Unless otherwise ordered by the Court upon request of a party in interest or upon the Court's own motion, FRCP 26(a) and (f) do not apply to contested matters.

3. FRCP 26(d) applies to any adversary proceeding or contested matter to which FRCP 26(f) applies.

**Rule 7030-1. Limitation of Application of Federal Rule of Civil Procedure 30 to Bankruptcy Cases.**

Unless otherwise ordered, a deposition taken pursuant to the Federal Rules of Civil Procedure shall not exceed four hours in duration.

**Rule 7067-1. Deposit and Investment of Funds Held by Clerk.**

1. Whenever a party seeks a court order for money to be deposited by the Clerk in an interest-bearing account, the party shall personally submit the proposed order to the Clerk or financial deputy who will inspect the proposed order for proper form and content and compliance with this rule prior to signature by the Judge for whom the order is prepared.

2. Any order obtained by a party or parties in an action that directs the Clerk to invest, in any interest-bearing account or instrument, funds deposited in the registry of the Court pursuant to 28 U.S.C. Section 2041 shall include the following:

a. the amount to be invested;

b. the name of the depository approved by the Treasurer of the United States as a depository in which funds may be deposited;

c. a designation of the type of account or instrument in which the funds shall be invested;

d. wording which directs the Clerk to deduct from the income earned on the investment the fee authorized by law, not exceeding that authorized by the Judicial Conference of the United States and set by the Director of the Administrative Office whenever such income becomes available for deduction in the investment so held and without further order of the Court.

3. In the event that a depository intended by the Court to receive registry funds is not able to pledge sufficient collateral for receipt of those funds immediately upon the Court's receipt of the said funds, the Clerk may in his or her discretion, temporarily retain such funds or direct the party tendering such funds to temporarily retain them as necessary to arrange for their deposit in an interest-bearing registry accounts.

**Rule 9006-1. Time Limits.**

1. *Shortening of Notice.* The Court will consider shortening prescribed notice for a hearing on contested matters only in extraordinary cirucmstances and upon the following conditions:

a. The request to shorten notice must be made by written motion, which states the reasons why shortened notice is necessary, identifies the parties affected by the request; and describes the service of notice of the request on interested parties; and

b. The movant shall serve and provide notice of the motion of the 24 hours in advance of submitting an Order shortening notice; service and notice for the purpose of this Local Rule is accomplished upon actual delivery of the motion to the office of the party served; and service must be made upon the following parties (or their counsel):

(i) consumer case — trustee, Bankruptcy Administrator, debtor, and any party with a direct interest in the matter,

(ii) non-consumer case — debtor, trustee, Bankruptcy Administrator, examiner, and any official committee.

c. Relief may be had from the requirement of 24 hours advance notice of the request:

(i) upon demonstration of an emergency (not of movant's own creation) and the inability to notify affected parties in advance.

2. *Objection to Timing of Hearing on Shortened Notice.* If, at or before the hearing on the substantive motion, any opposing party objects to the shortened notice, the moving party shall have the burden of demonstrating good cause for the shortened notice, or a continuance shall be granted.

3. *Adversary Proceedings-Extensions of Time to Respond to Complaint.* Any motion for an extension of time to respond to a complaint shall be filed prior to the expiration of the initial period for filing the answer and shall set forth the reasons for the request. For cause shown, the Clerk may enter an *ex parte* order granting an additional thirty (30) days within which to answer or otherwise respond.

**Rule 9013-1. Motions Practice.**

1. *General Requirements.*

a. *Form and Content of Papers Filed.* In addition to requirements established by statute or Federal Rules of Bankruptcy Procedure, all motions shall:

(i) contain a statement of pertinent facts, including, but not limited to, a complete and concise description of any real property or personal property that is the subject thereof;

(ii) state with particularity the grounds therefor;

(iii) cite any statute, rule, procedure, case or other authority relied upon;

(iv) set forth explicitly the relief sought; and

(v) contain or be accompanied by separate notice of the time, date and place of the hearing on the motion, or contain or be accompanied by notice of opportunity for hearing in the instance of permitted "no-protest" motions.

b. *Response to Motions.* If a party elects to respond, and unless the Court orders otherwise, each Respondent to a motion should, within fifteen (15) days of service of the motion, serve upon the adverse party, and file with the Clerk a response which shall:

(i) acknowledge or dispute the accuracy of movant's statement of pertinent facts, and set forth any additional facts Respondent believes pertinent;

(ii) state with particularity the grounds for opposition to the motion;

(iii) cite any statute, rule, procedure, case or other authority relied upon; and

(iv) set forth explicitly why the relief sought by movant is opposed.

2. *Notice of Hearing on Motion.* A Motion will not be set for hearing unless properly noticed by the parties or by direction of the Court. It is duty of the party filing a motion to set a date for the hearing and to properly notify all persons entitled to receive notice as provided for by the Bankruptcy Rules. The appropriate dates for setting motion hearings are as follows:

1. *Asheville Division.*

a. Regular tem of court is scheduled for the third full week of each calendar month.

b. Chambers days are scheduled on Tuesday and Wednesday of the first full week of each calendar month.

c. Chapter 13, 12, and brief Chapter 7 matters are heard on Tuesday.

d. All other time-consuming matters are heard on Wednesday and carryover matters are heard on Thursday.

2. *Charlotte Division.*

a. Chapter 7 matters are heard on Thursday of the second and fourth full week of the calendar month.

b. Chapter 11 matters are as follows:

Judge Hodges: Wednesday of the second and fourth full week of the calendar month for routine matters.

Judge Whitley: Thursday of the first and third full weeks of the calendar month.

c. Chapter 13 and 12 motions are heard on Tuesday of the second and fourth full weeks of the calendar month. Chapter 13 dismissals hearings are held on Wednesday of the second and fourth full weeks of the calendar month. Time-consuming matters can be set at special times throughout the week after receiving prior Court approval.

3. *Shelby Division.*

a. Regular term of court is scheduled for Friday of the third full week of the calendar month.

4. *Statesville Division.*

a. Chapter 7, 12, and 13, and 11 matters are heard on Tuesday of the first full week of the calendar month. Time-consuming matters are heard on Wednesday of the first full week after receiving prior court approval.

The above are the standard settings for hearings. Deviations from this schedule may be required. The Court will post notices of such changes on the Court's web site. Motions may be set on other days with advance permission of the court. The court may set matters for hearing on its own initiative.

3. *"No Protest" Motions.* A hearing on those motions listed in a-o below may be noticed by "no protest" notice upon notice to the parties as required by the Federal Rules of Bankruptcy Procedure. The "no-protest" notice must specifically advise any interested party that it must file and serve any response, including an objection or request for a hearing, within the fifteen (15) day period from service of the Notice, and that if no hearing is requested the Court may decide the matter on the record before it. A hearing shall be requested by filing and serving a response, including an objection and request for hearing, within fifteen (15) days of the date of the service of the notice. Any response must specify exactly what motion is contested and the response should comply with Local Bankruptcy Rule 9013-1. The following are examples of motions which may be noticed by the use of "no protest" notices and determined by the Court without a hearing unless a hearing is specifically requested. If an Order is entered following this procedure on a motion other than the type listed below, that Order is not valid.

a. Motions to use, sell or lease property under Section 363(b)(1) of the Bankruptcy Code, except for sales of all or substantially all of the assets in a Chapter 9, 11, 12 or 13 Case;

b. Subject to the provisions of Bankruptcy Rule 6007, motions to abandon property of the estate by the trustee or debtor in possession under Section 554 of the Bankruptcy Code;

c. Motions to assume executory contracts or leases under Section 365 of the Bankruptcy Code, if the other parties to the contract or lease stipulate to the assumption;

d. Motions under Section 365 of the Bankruptcy Code to reject executory contracts or leases, except collective bargaining agreements under Section 1113 of the Bankruptcy Code;

e. Motions to avoid liens under Section 522(f) of the Bankruptcy Code;
f. Motions for relief from stay under Section 362 of the Bankruptcy Code (except that notices thereof shall state a specific hearing date in the event a hearing is requested);
g. Applications to pay compensation of professional persons, including applications pursuant to 11 U.S.C. Section 506(b);
h. Motions to change venue of a case or proceeding to another division within this District;
i. Motions to obtain post-petition credit in Chapter 13 cases;
j. Objections to claims;[1]
k. Motions for relief from the co-debtor stay provided in Sections 1201 and 1301 of the Bankruptcy Code;
l. Motions for approval of final report and account of trustee, application for commission and reimbursement of trustee expenses, application to disburse funds of estate, application to abandon, and to discharge trustee;
m. Motions to modify Chapter 13 plans without a request for other relief;
n. Motions or applications to approve security interest as set forth in Local Rule 2016-1(3);
o. Motions for Moratoriums in Chapter 13 cases.

**Rule 9013-2. Briefs in Adversary Proceedings and Contested Matters.**

If any party to an adversary proceeding or contested matter desires to file a brief, the brief shall include:
1. A concise statement of the facts of the case;
2. All admissions and stipulations, if applicable;
3. A summary of the points of law involved, citing authorities in support thereof; and
4. Any anticipated evidentiary problems, if applicable.

In all cases, briefs should be filed with the Clerk. In addition, two (2) full copies of all briefs should be furnished for the Judge assigned to the adversary proceeding or contested matter.
The brief shall be filed with the Clerk and received by opposing counsel at least three business days prior to the hearing. Reply briefs, if any, shall be filed with the Clerk and received by opposing counsel at least one business day prior to the hearing. A certificate of service must be filed with the original brief verifying the required service.

**Rule 9019-1. Settlements of Adversary Proceedings.**

All papers settling adversary proceedings (notices, motions, orders or judgments, and dismissals) shall contain the base case caption and the adversary proceeding caption(s). The original papers shall be filed in each adversary proceeding at issue regardless of whether the adversary proceeding is pending or closed. All creditors and interested parties in the base case shall be served with notice of settlements in adversary proceedings. Service thereof shall be reflected in the certificate of service filed with the settlement papers.

**Rule 9021-1. Tender of Judgments and Orders.**

1. *Orders and Judgments.* When a proposed order or judgment is submitted to the Clerk, it shall be accompanied by a properly completed Tender of Order or Judgment Form (Local Form 9). However, an order or judgment tendered in

[1] The minimum time period for notice of a hearing on an objection to a claim is thirty (30) days, plus the three day period, if applicable. *See* Bankruptcy Rule 3007.

open court to a Bankruptcy Judge need not be accompanied by Local Form 9. When applicable, any "no protest" response periods shall pass before the proposed order or judgment is submitted to the Clerk.

2. *Consent Orders.* Consent orders will not be entered unless also signed by the trustee in the case.

**Rule 9022-1. Certificate of Service for Orders.**

When a submitting party receives a signed order from the Court, the submitting party must immediately serve a copy of the order on the appropriate parties. The filing of a certificate of service with the Clerk's office is generally not required; however, the submitting party will maintain a contemporaneous record of the date of service and parties served. A certificate is required when signed Orders are submitted to the Clerk at the intake counter.

**Rule 9028-1. Disqualification of Judges.**

In furtherance of 28 U.S.C. 455 and Cannon 3C of the Code of Conduct for United States Judges, the court has adopted procedures for administration of cases in which a judge is disqualified for any reason:

a. Any circumstance that requires disqualification of the assigned judge should be brought to the court's attention at the earliest opportunity by the filing and service of a motion seeking disqualification — except that no motion is required with respect to events listed in paragraphs c of this Local Rule.

b. In any contested matter where the court is aware of an event requiring disqualification or is made aware of such an event by any party, the court will reassign the matter to another judge. Where the disqualification applies only to an isolated contested matter, it is not necessary for the court to reassign the base case. The court will determine whether reassignment shall apply to the contested matter only or to the entire case.

c. Events of disqualification regularly recur in the following events: Judge Hodges does not hear contested matters involving Bank of America (or its subsidiaries) and General Electric Company (or its subsidiaries).

d. Approval of uncontested settlements and agreed orders in cases which would otherwise require disqualification will not require reassignment.

e. Orders in contested matters that are reassigned may end up with the signature of the disqualified judge even though the matter was reassigned and heard by another judge. This may occur because orders submitted sometime after reassignment, hearing, and determination may be batched for signature by the Clerk's Office with other orders and have the wrong signature stamp applied to the order by inadvertence. (In fact, some signatures are applied electronically). In such event, the order is in fact the order of the reassigned judge who determined the matter.

**Rule 9035-1. Service of Papers on the Bankruptcy Administrator.**

All parties are required to serve upon the Bankruptcy Administrator, by regular mail, hand delivery, overnight courier or by facsimile machine copies of the papers specified in this Local Bankruptcy Rule which are Filed with the Bankruptcy Court or the Appellate Court. Appropriate certificates of service shall be Filed.

(a) *Chapter 11 papers.* All papers in Chapter 11 Cases and in adversary proceedings therein, except exhibits to be used at trials or hearings.

(b) *Chapter 12 papers.* All papers in Chapter 12 cases and in adversary proceedings therein, except exhibits to be used at trials or hearings.

(c) *Rule 2002 requests.* All papers in cases and adversary proceedings in which the Bankruptcy Administrator has filed a request for notice pursuant to Bankruptcy Rule 2002(i).

(d) *Appointment and removal of trustee or examiner.* All papers related to the appointment or removal of a trustee or examiner.

(e) *Compensation applications.* All applications for compensation in all cases and adversary proceedings.

(f) *Fraud or criminal activity.* All papers in any case or adversary proceeding in which fraud or criminal activity is alleged on the part of any party.

(g) *All papers by Chapter 7 trustees.* All papers filed in cases and adversary proceedings by Chapter 7 Trustees, except as the Bankruptcy Administrator may from time to time otherwise direct by notice to the Trustees on an *ad hoc* basis.

(h) *Conversions.* All Orders relating to conversions of a case to a case under another chapter.

# SUMMARY OF CHANGES TO LOCAL RULES (10/1/94)

| PRIOR RULE | ACTION |
|---|---|
| 100 | Repealed |
| 105(a) | Practice Guide |
| 105(b) (intro.) | Repealed |
| 105(b) (1) (i-ii) | Rule 1 |
| 105(b) (2-3) | Practice Guide |
| 105(c) | Repealed |
| 110 | Practice Guide |
| 115 | Rule 2 |
| 120 | Practice Guide |
| 121 | Practice Guide |
| 125 | Repealed |
| 130 | Practice Guide |
| 135 | Practice Guide |
| 140 | Rule 3 |
| 145 | Practice Guide |
| 150 | Practice Guide |
| 155 | Repealed |
| 160 | Practice Guide |
| 165 | Repealed |
| 170 | Repealed |
| 175 | Practice Guide |
| 200(a) | Practice Guide |
| 200(b-e), (g-i), (k) | Repealed |
| 200(f), (j) | Rule 4 |
| 205 | Repealed |
| 210 | Repealed |
| 300(a), (c) | Rule 5 |
| 300(b) | Repealed |
| 305(a) | Rule 6 |
| 305(b)(1), (b)(2)(part) | Repealed |
| 305(b)(3-5) | Repealed |
| 305(b)(remainder) | Practice Guide |
| 310(a)(1) | Repealed |
| 310 (a)(2) | Practice Guide |
| 310(a)(3-5) | Repealed |
| 310(a)(6) | Rule 7 |
| 310(a)(6)(last para.) | Repealed |
| 310(a)(7)(para. 1) | Repealed |
| 310(a)(7)(para. 2) | Practice Guide |
| 310(a)(8) | Rule 7 |
| 310(a)(8)(last para.) | Repealed |
| 310(a)(9-10) | Repealed |
| 310(a)(11)(sent. 1 & 2) | Repealed |
| 310(a)(11)(sent. 3) | Practice Guide |
| 310(b), (c) | Repealed |
| 310 (d) | Rule 7 |

# SUMMARY OF CHANGES TO LOCAL RULES (10/1/94)

| PRIOR RULE | ACTION |
|---|---|
| 310(d)(last para.) | Practice Guide |
| 310(e) | Practice Guide |
| 310(f) | Practice Guide |
| 310(g)(1)(i)(revised) | Rule 7 |
| 310(g)(1)(ii) | Repealed |
| 310(g)(2) | Repealed |
| 310(g)(3) | Repealed |
| 310(g)(4) | Rule 7 |
| 310 (h-k) | Repealed |
| 315(a) | Rule 8 |
| 315(a)(1-4) | Repealed |
| 315(b)(1) | Repealed |
| 315(b)(1)(last para.) | Practice Guide |
| 315(b)(2) | Practice Guide |
| 315(c)(revised) | Rule 8 |
| 315(d)(revised) | Rule 8 |
| 320(a)(revised) | Rule 9 |
| 320(b) | Repealed |
| 320(c) | Rule 9 |
| 320 (d-f) | Repealed |
| 325 | Repealed |
| 330 | Repealed |
| 335 | Repealed |
| 340 | Rule 10 |
| 400(a-b)(revised) | Rule 12 |
| 400(c) | Repealed |
| 405 | Rule 13 |
| 410 | Repealed |
| 415 | Repealed |
| 500(a) | Repealed |
| 500(b)(1-3) | Rule 14 |
| 500(b)(4-6) | Repealed |
| 500(b)(7) | Rule 14 |
| 500(c) | Repealed |
| 500 (d-e) | Rule 14 |
| 500(e)(last 2 sent.) | Repealed |
| 500(f) | Repealed |
| 505(a) | Repealed |
| 505(b) | Rule 15 |
| 505(c) | Repealed |
| 510 | Repealed |
| 511 | Repealed |
| 600 | Repealed |
| 601 | Repealed |
| 605 | Rule 16 |
| 610 (1st sent.) | Repealed |

# SUMMARY OF CHANGES TO LOCAL RULES (10/1/94)

| PRIOR RULE | ACTION |
|---|---|
| 610 (last sent.) | Practice Guide |
| 615 (a-c) | Repealed |
| 615(d) | Rule 17 |
| 615(e) | Repealed |
| 620 | Repealed |
| 700 | Repealed |
| 800(a)(last sent.) | Rule 18 |
| 800 (a)(part), (b) | Repealed |
| 805 | Repealed |
| 806 | Practice Guide |
| 810 (a-b) | Rule 19 |
| 810(c) | Rule 19 |
| 810 (d-e) | Repealed |
| 810 (f-g) | Repealed |
| 815 | Repealed |
| 820 (a-b) | Practice Guide |
| 820 (c) | Repealed |
| 825 | Repealed |
| 830 | Rule 20 |
| 835 | Rule 21 |
| 900-917 | Repealed |

# LOCAL FORMS

**Form 1.**

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
_____ DIVISION

| | | |
|---|---|---|
| IN RE: | ) | Case No. _____ |
| | ) | Chapter _____ |
| | ) | |
| | ) | **NOTICE OF MOTION FOR CHANGE OF VENUE AND OPPORTUNITY FOR HEARING** |
| Tax I.D.# | ) | |
| _____ Debtor(s) | ) | |

**TAKE NOTICE** that _____ has filed a motion to TRANSFER VENUE of the above-referenced Chapter ____ case to the _____ Division of the Western District of North Carolina. A copy of the motion accompanies this notice.

**TAKE FURTHER NOTICE** that any response, including objection, to the proposed transfer of venue, should be filed with the Clerk of the Bankruptcy Court no later than **thirteen (13)** days of the date of this Notice and a copy served on the attorney identified below and upon other parties as required by law or Court order. Any response shall clearly identify the motion to Transfer Venue, and it shall comply fully with Local Bankruptcy 1014-2.

**TAKE FURTHER NOTICE** that no hearing will be held on this motion or application unless a response is timely filed and served, in which case, the Court will conduct a hearing on _____, _____, _____, at ____ __.m., at _____, _____, North Carolina. No further notice of this hearing will be given.

Dated this _____ day of _____, _____.

_____
Attorney
Address/Telephone Number
Telecopy Number
State & Bar Number

Address of Court:

United States Bankruptcy Court
401 West Trade Street
Charlotte, NC 28202

**Form 2.**

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
_____ DIVISION

IN RE: )
)
) Case No. _____
) Chapter _____
)
) **MOTION FOR ADMISSION**
Tax I.D.# ) **PRO HAC VICE**
_____ Debtor(s) )

The undersigned, an attorney at law, licensed to practice by the State(s) of _____ and a member in good standing of the Bar of the following United States Courts:

_____
_____
_____

hereby requests, pursuant to Rule 1 of the Local Rules of the United States District Court for the Western District of North Carolina, the following:

1. Leave to appear as [co-counsel or attorney in charge] for [client] in the above-captioned matter.
2. Designation of the following local counsel:
   _____ [name]
   _____ [firm]
   _____ [address]
   _____
   _____ [telephone]
   as local [counsel/attorney in charge].
3. In connection with this request, if granted, movant agrees to be available on 48 hours' notice for hearings before this Court; and to accept service of all pleadings and notices by facsimile transmission at the telecopy number indicated below, in addition to all other methods of service provided by the Bankruptcy Code and Rules or Local Rules of this Court.

In support of this motion, the undersigned represents to this Court the following:

1. Movant is affiliated with the law firm listed below movant's signature on this motion.
2. Movant has not previously been convicted of a felony or a misdemeanor involving moral turpitude.
3. Movant has not been the subject of any disciplinary action by a court of record.
4. Movant has not previously appeared pro hac vice before this Court [except in the following matter:
   _____
   _____
   _____]
5. Movant has read and is familiar with the Local Bankruptcy Rules governing practice before this Court.

Dated this _____ day of _____, _____.

Respectfully submitted,

_____

Attorney
Address/Telephone Number
Telecopy Number
State & Bar Number

**Form 3.**

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
_____ DIVISION

IN RE: )
)
) Case No. _____
) Chapter _____
)
)
Tax I.D.# )
_____ Debtor(s) )

**ORDER FOR ADMISSION PRO HAC VICE**
**OF** _____

This matter coming on before the Court upon the Motion for Admission Pro Hac Vice of the above-identified attorney, and the Court, having considered the request and the representations of Movant; NOW THEREFORE, it is

ORDERED that the requests made in the Motion are granted and Movant is authorized to appear in the above-captioned matter representing _____. It is further ORDERED that _____ is designated as local counsel in the above-captioned matter.

DATED: _____.

_____
United States Bankruptcy Judge

**Form 4.**

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
_____ DIVISION

| | | |
|---|---|---|
| IN RE: | ) | Case No. _____ |
| | ) | Chapter _____ |
| | ) | |
| | ) | |
| | ) | |
| | ) | **NOTICE OF OPPORTUNITY FOR HEARING** |
| | ) | (No-Protest Notice) |
| Tax I.D. No. | ) | |
| Debtor(s) | ) | |

**TAKE NOTICE** that an application or motion has been filed by _____. A copy of the application or motion accompanies this notice.

**TAKE FURTHER NOTICE** that any response, including objection, to the relief requested in the attached application or motion, should be filed with the Clerk of the Bankruptcy Court within __(1)__ days of this Notice and a copy served on the attorney identified below and upon other parties as required by law or Court order. Any response shall clearly identify the specific motion or application to which the response is directed, and it shall comply fully with Local Bankruptcy Rule 9013-1.

**TAKE FURTHER NOTICE** that if no request is filed in a timely manner, no hearing will be held and the Court will consider the matter on the record and enter its ruling.

**TAKE FURTHER NOTICE** that if a response is timely filed and served, the Court will conduct a hearing on _____, _____, at ____.m., at _____, _____, North Carolina. No further notice of this hearing will be given.

Dated this _____ day of _____, _____.

_____
Attorney
Address/Telephone Number
Telecopy Number
State & Bar Number

Address of Court:
United States Bankruptcy Court
401 West Trade Street
Charlotte, NC 28202

(1) Enter number of days during which objection may be filed and served. Local Bankruptcy Rule 9013-1 requires fifteen (15) days unless the Court orders otherwise. Note that service by mail requires the addition of three days pursuant to Federal Rule of Bankruptcy Procedure 9006(f).

**Form 5.**

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
_____ DIVISION

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | Case No. _____ |
| | ) | Chapter _____ |
| | ) | |
| | ) | **NOTICE OF HEARING** |
| | ) | (Hearing Scheduled) |
| Tax I.D. No. | ) | |
| Debtor(s) | ) | |

**TAKE NOTICE** that an application or motion has been filed by _____. A copy of the application or motion accompanies this notice.

**TAKE FURTHER NOTICE** that any response, including objection, to the relief requested in the attached application or motion, should be filed with the Clerk of the Bankruptcy Court within (1) days of the date of this Notice and a copy served on the attorney identified below and upon other parties as required by law or Court order. Any response shall clearly identify the specific motion or application to which the response is directed, and it shall comply fully with Local Bankruptcy Rule 9013-1.

**TAKE FURTHER NOTICE** that a hearing will be held on this motion or application on _____, _____, at __.m., at _____ North Carolina.

Dated this _____ day of _____, _____.

_____
Attorney
Address/Telephone Number
Telecopy Number
State & Bar Number

Address of Court:
United States Bankruptcy Court
401 West Trade Street
Charlotte, NC 28202

(1) Enter number of days during which objection may be filed and served. Local Bankruptcy Rule 9013-1 requires fifteen (15) days unless the Court orders otherwise. Note that service by mail requires the addition of three days pursuant to Federal Rule of Bankruptcy Procedure 9006(f).

**Form 6.**

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

**NOTICE TO INDIVIDUAL CONSUMER DEBTOR**

---

The purpose of this notice is to acquaint you with the four chapters of the federal Bankruptcy Code under which you may file a bankruptcy petition. The bankruptcy law is complicated and not easily described. Therefore, you should seek the advice of an attorney to learn of your rights and responsibilities under the law should you decide to file a petition with the court. Neither the judge nor the court's employees may provide you with legal advice.

Regardless of which chapter of the Bankruptcy Code that you proceed under, if all lists, schedules, statements, or other documents that are required to be filed in conjunction with the filing of a bankruptcy petition by the Federal Rules of Bankruptcy Procedure or the Local Bankruptcy Rules of the Western District of North Carolina are not filed within the time set forth in the applicable rules, your bankruptcy case will be subject to dismissal by the Court without further notice and opportunity for hearing.

---

**Chapter 7: Liquidation ($160 fee)**

1. Chapter 7 is designed for debtors in financial difficulty who do not have the ability to pay their existing debts.

2. Under Chapter 7 a trustee takes possession of all your property. You may claim certain of your property as exempt under governing law. The trustee then liquidates the property and uses the proceeds to pay certain creditors according to priorities of the Bankruptcy Code.

3. The purpose of filing a Chapter 7 case is to obtain a discharge of your existing debts. If, however, you are found to have committed certain kinds of improper conduct described in the Bankruptcy Code, your discharge may be denied by the court and the purpose for which you filed the bankruptcy petition will be defeated.

4. Even if you receive a discharge, there are some debts that are not discharged under the law. Therefore, you may still be responsible for such debts as certain taxes and student loans, alimony and support payments, debts fraudulently incurred, debts for willful and malicious injury to a person or property, and debts arising from a drunk driving judgment.

5. Under certain circumstances you may keep property that you have purchased subject to a valid security interest. Your attorney can explain the options that are available to you.

**Chapter 13: Repayment of All or Part of the Debts of an Individual with Regular Income ($160 fee)**

1. Chapter 13 is designed for individuals with regular income who are temporarily unable to pay their debts but would like to pay them in installments over a period of time. You are only eligible for Chapter 13 if your debts do not exceed certain dollar amounts set forth in the Bankruptcy Code.

2. Under Chapter 13 you must file a plan with the court to repay your creditors all or part of the money that you owe them, using your future earnings. Usually the period allowed by the court to repay your debts is three

years, but not more than five years. Your plan must be approved by the court before it can take effect.

3. Under Chapter 13, unlike Chapter 7, you may keep all your property, both exempt and non-exempt, as long as you continue to make payments under the plan.

4. After completion of payments under your plan, your debts are discharged except alimony and support payments, certain kinds of taxes owed for less than three years, and long term secured obligations.

**Chapter 11: Reorganization ($800 fee)**

Chapter 11 is designed primarily for the reorganization of a business but is also available to consumer debtors. Its provisions are quite complicated, and any decision for an individual to file a Chapter 11 petition should be reviewed with an attorney.

**Chapter 12: Family Farmer ($200 fee)**

Chapter 12 is designed to permit family farmers to repay their debts over a period of time from future earnings and is in many ways similar to a Chapter 13. The eligibility requirements are restrictive, limiting its use to those whose income arises primarily from a family owned farm.

I hereby certify that I have read this notice.

Dated: _____

_____ _____

Debtor Joint Debtor

**Form 7.**

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
_____ DIVISION

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | Case No. _____ |
| | ) | Chapter _____ |
| | ) | |
| | ) | |
| | ) | **EX PARTE MOTION FOR ORDER SHORTENING NOTICE** |
| Tax I.D.# | ) | |
| | ) | |
| _____ Debtor(s) | ) | |

NOW COMES [name and capacity (debtor, creditor)], Movant herein, and respectfully moves the Court, pursuant to Local Rule 9006-1.1, for an Order Shortening Notice and says:

1. The above-referenced is a debtor under Chapter _____ of Title 11 pursuant to a petition filed on _____.

2. Movant has filed or will simultaneously herewith file a motion seeking to [relief requested in base motion].

3. Movant requests that notice for the hearing on the motion as set forth in the above paragraph be shortened because [state specific grounds[1]].

4. Movant certifies that he/she is prepared to present evidence at the hearing on the substantive motion that good cause exists for the request for shortened notice.

WHEREFORE, Movant prays the Court as follows:

1. For an order that objections or responses to the motion shall be filed and served no later than _____.

2. For an order shortening the notice period such that a hearing on the motion may be held on _____.

3. For such other and further relief as the Court deems just and proper.

Dated this _____ day of _____, _____.

_____
Attorney
Address/Telephone Number
Telecopy Number
State & Bar Number

[1]The Court will not grant the motion shortening notice without good cause.

**Form 8.**

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
_____ DIVISION

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | Case No. _____ |
| | ) | Chapter _____ |
| | ) | |
| | ) | **ORDER SHORTENING NOTICE** |
| Tax I.D. # | ) | |
| Debtor(s) | ) | |

THIS CAUSE coming on to be heard before the undersigned United States Bankruptcy Judge upon the Motion of _____ for the entry of an Order Shortening Notice of its Motion seeking to _____, and the Court, having reviewed the pleadings, the motion filed herein, and the Court's file, it is hereby ORDERED:

1. That _____ is the deadline for serving responses, including objections, to the Motion seeking to _____. All responses must be filed prior to the hearing.

2. That a hearing on the Motion seeking to _____ will be held on _____ at _____ __.m. in the Bankruptcy Courtroom located at _____.

3. Movant shall be prepared to present evidence of good cause for the shortened notice at the hearing on the Motion.

4. Movant shall serve the Notice of hearing, this Order and a copy of the Motion Shortening Notice no later than _____.

Dated: _____.

_____
United States Bankruptcy Judge

**Form 9.**

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

Form for Tender of Order or Judgment

Case Name: _____
**I.** Base Case No.: _____ Chapter: _____ Adv. Proc. #: _____
Adv. Proc. Name: _____
Primary Relief: _____

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

_____ Consent Order _____ Order after "No-Protest Notice" with No Objection or Response

**II.** _____ Ex Parte Order Submitted with Motion
_____ Pursuant to Court's Oral Ruling at Hearing on: _____
_____ Other Order _____

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

_____ No Opposing Counsel or Party (Objection to Form of Order Waived)
**III.** _____ Form of Order Approved by Opposing Counsel
_____ Date Opposing Party/Counsel was Served with Copy of Proposed Order and this Form: _____.

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

**IV.** Order will be Tendered to the Court on: _____

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

_____ Return filed copy of order in enclosed self-addressed, stamped envelope to attorney who prepared order.
**V.** _____ Call attorney who prepared order (tel. _____) when signed order can be picked up.

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

Attorney preparing order: _____
Address: _____
**VI.** City, State and Zip: _____
Telephone and Bar Number: _____
Representing: _____

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

**INFORMATION MUST BE COMPLETED IN EACH SECTION (I - VI) OR THE COURT MAY REJECT THE ORDER AS SUBMITTED**

**REPRODUCE THIS FORM ON GREEN STOCK AND SUBMIT IT WITH ORIGINAL AND FOUR COPIES OF ORDER. SUBMIT ORDER WITH EX PARTE MOTION. SUBMIT OTHER ORDERS ONLY AFTER EXPIRATION OF NOTICE OR OBJECTION PERIODS (IF APPLICABLE).**

**Form 10.**

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
_____ DIVISION

IN RE: )
)
) Case No. _____
) Chapter _____
)
Tax I.D.# )
_____ Debtor(s) )

DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR
(RULE 2016)

1. Pursuant to 11 U.S.C. Section 329(a) and Bankruptcy Rule 2016, I certify that I am the attorney for the above-named debtor(s) and that compensation paid to me within one year before the filing of the petition in bankruptcy, or agreed to be paid to me, for services rendered or to be rendered on behalf of the debtor(s) in contemplation of or in connection with the bankruptcy case is as follows:

For legal services, I have agreed to accept $_____
Prior to the filing of this statement I have received $_____
Balance due $_____

2. The source of the compensation paid to me was:

☐ Debtor ☐ Other (specify)

3. The source of compensation to be paid to me is:

☐ Debtor ☐ Other (specify)

4. ☐ I have not agreed to share the above-disclosed compensation with any other person unless they are members and associates of my law firm.

☐ I have agreed to share the above-disclosed compensation with a person or persons who are not members or associates of my law firm. A copy of the agreement, together with a list of the names of the people sharing in the compensation is attached.

5. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

a. Analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether to file a petition in bankruptcy;

b. Preparation and filing of any petition, schedules, statement of affairs and plan which may be required;

c. Representation of the debtor at the meeting of creditors and confirmation hearing, and any adjourned hearings thereof;

d. Representation of the debtor in adversary proceedings and other contested matters;

e. [Other provisions as needed].

6. By agreement with the debtor(s), the above-disclosed fee does not include the following services:

CERTIFICATION

I certify that the foregoing is a complete statement of any agreement or arrangement for payment to me for representation of the debtor(s) in this bankruptcy proceeding.

| | |
|---|---|
| Date | Attorney Signature<br>Attorney Name<br>Address/Telephone Number<br>Telecopy Number<br>State & Bar Number |

**Form 11.**

Debtor(s) _____

**DISCLOSURE TO DEBTOR(S) OF ATTORNEYS FEE PROCEDURE FOR CHAPTER 13 CASES IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA**

After consultation with the undersigned attorney, you have decided to file a petition for relief under Chapter 13 of the United States Bankruptcy Code. Accordingly, you are hereby given notice that pursuant to local rule of the Bankruptcy Court, the base fee for a Chapter 13 case is established at $1300. Payment of all or part of this fee is included in your payments to the trustee. The attorney's services included in the base fee are those normally contemplated in a Chapter 13 case. They are the following:

(a) Preparation and filing of petition and attendance at Section 341 meeting.
(b) Notice to stay state court actions.
(c) Proof of claim filed by debtor for creditor.
(d) Rejections or assumptions of leases.
(e) Motion to transfer venue.
(f) Letter to Trustee requesting payoff.
(g) Letter to debtor about discharge hearing.
(h) Review of order confirming plan and six-month report.
(i) Objections to claims listed on the schedules.
(j) Valuation hearings.
(k) First and second motions to dismiss.
(l) Incurring credit (no motion filed).
(m) Motions to avoid liens.

In some Chapter 13 cases, it becomes necessary for legal services to be performed which are beyond those normally contemplated. These are legal services not covered by the base fee. These "non-base" services include the following:

(a) Abandonment of property post-confirmation.
(b) Motion for moratorium.
(c) Motion for authority to sell property.
(d) Motion to modify.
(e) Motion to incur credit.
(f) Defense of motion for relief from stay or co-debtor stay.
(g) Defense of motions to dismiss (after second).
(h) Objections to claims not listed in schedules.
(i) Non-base fee requests.
(j) Stay violation litigation.
(k) Insurance inquiries.
(l) Post-discharge injunction actions.
(m) Adversary proceedings.
(n) Wage garnishment orders.
(o) Turnover adversaries.
(p) Adversary to strip a lien.
(q) Motion to substitute collateral.

For such "non-base" services you will be charged on the basis of attorney's time expended at the rate of $_____ per hour plus the amount of expenses incurred (such as court fees, travel, long distance telephone, photocopying, postage, etc.). Such "non-base" fees are chargeable only after the same are approved by the Bankruptcy Court. Except as set forth below, before any such fees are charged you will receive a copy of my motion filed in the court requesting approval of any such "non-base" fees as well as a notice explaining your opportunity to object if you do not agree with the fee applied for. Any fees awarded for "non-base" services will be paid to the undersigned attorney from your payments to the trustee in the same way as payment of "base" fees. **It is possible that "non-base" fees approved by the court may cause your payment to the trustee to be increased, or the term of your Chapter 13 plan extended.** Whether or not a payment increase or an extension will be necessary depends upon the facts of your case. If a payment increase is necessary because of a court approved "non-base" fee, the Trustee will notify you of the amount of the increase.

In the court's discretion, a debtor's attorney in a Chapter 13 proceeding may request, in open court, and without any further notice, "non-base" fees for the following services and in amounts not exceeding those shown below. Without other notice, the debtor's attorney may also request up to $1.00 for each item noticed to creditors as expense for postage, copying and envelopes.

(a) Defense of motion to dismiss (after 2nd). $100
(b) Motion for moratorium. $150
(c) Motion to modify and order. $250

| | | | | | |
|---|---|---|---|---|---|
| (d) | Substitution of collateral. | $350 | | property and order. | $250 |
| (e) | Uncontested adversary lien strip. | $250 | (g) | Defense of motion for relief from stay or co-debtor stay. | $250 |
| (f) | Motion for authority to sell | | | | |

**ACKNOWLEDGEMENT**

I hereby certify that I have read this notice and that I have received a copy of this notice.

Dated: _____ _____
Debtor's Signature

Dated: _____ _____
Spouse's Signature

I hereby certify that I have reviewed this notice with the debtor(s) and that the debtor(s) have received a copy of this notice.

Dated: _____ _____
Attorney

**Form 12.**

SUMMARY OF PRIOR FEE APPLICATIONS

| Application Date | Period Covered | Fees Requested/Allowed | Expenses Requested/Allowed | Order Date |
|---|---|---|---|---|

**Form 13.**

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
_____ DIVISION

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | |
| | ) | Case No. _____ |
| | ) | Chapter 11 |
| | ) | |
| Tax I.D.# | ) | |
| Debtor(s) | ) | |

CHAPTER 11 OPERATING ORDER

This Order, although effective immediately upon entry, is subject to objection by the Debtor. If the Debtor files written objections to this Order within twenty-five (25) days of the date of entry of this Order, a Court date will be set and all interested parties will be given notice of the hearing on the Debtor's objections.

The Debtor is hereby **ORDERED** to comply with the following:

A. *Status Meeting with Bankruptcy Administrator*: At the place and time below, unless otherwise agreed to by the parties, the Debtor and its attorney shall meet with the Bankruptcy Administrator, or her designee, to certify that all provisions of this Order required to be done by that date have been done and that all mechanisms are in place to assure future compliance.

DATE:
TIME:
PLACE:

The Debtor shall supply the Bankruptcy Administrator with any documents or records requested by the Bankruptcy Administrator prior to or at the time of said meeting.

B. *Books and Records*: The Debtor's prepetition books and records should have been closed and new postpetition books and records should have been opened as of the date of filing the petition. If this has not been done, it shall be done upon receipt of this Order; however, regardless of the time of actual closing and opening, the date of the filing of the petition is the point of separation. From that point forward the new books and records shall be kept in accordance with generally accepted accounting principles.

C. *Bank Accounts:*

(1) New Accounts: The Debtor's prepetition bank accounts should have been closed and new postpetition bank accounts should have been opened as of the date of filing the petition. If this has not been done, it shall be done with appropriate adjustments on the date of this Order; however, regardless of the time of actual closing and opening, the date of the filing of the petition is the point of separation. New bank accounts must be opened and shall consist of at least a general account, a tax account and, at the Debtor's election, a payroll account. The new bank signature cards of these accounts shall clearly indicate that the Debtor is a "Chapter 11 Debtor-In-Possession".

(2) Collateralization of Accounts: The Debtor is directed to comply with the provisions of 11 U.S.C. Section 345 regarding deposit or investment of money of the estate. The Debtor shall immediately notify the Bankruptcy Administrator in the event a bond or deposit of securities is required by law. In

addition, the Debtor shall supply the Bankruptcy Administrator with copies of all agreements, bonds, securities, safekeeping receipts issued by the Federal Reserve Bank or other evidence of compliance with 11 U.S.C. Section 345.

(3) Tax Account, Deposits and Filing of Tax Returns: During the pendency of this proceeding:

(a) The Debtor shall segregate and hold in a separate bank account, all taxes deducted and withheld from employees (including Social Security taxes) or monies collected under any law of the United States, or any state or subdivision thereof, and the State of North Carolina. Monies withheld shall be deposited in a National Bank or other authorized depository, and shall include the aggregate of the Debtor's share of Social Security taxes, plus all other withholdings, F.I.C.A., and excise taxes so deducted, withheld, collected, or otherwise due by the Debtor.

(b) The Debtor is directed and empowered to pay from said bank account to the appropriate taxing authorities the appropriate amounts at the times and in the manner prescribed by law. Deposits shall be made timely and reported in the manner required by the Internal Revenue Service or other taxing authorities.

(c) The Internal Revenue Service and the North Carolina Department of Revenue are hereby authorized to contact the Debtor and designated bank to verify that all required tax deposits are being made and reported and that all tax returns are being filed and remittances paid in the manner prescribed by law.

(d) Evidence of payment of taxes and/or deposit of monies for tax payments shall be included in the Debtor's Monthly Status Report. A copy of the bank receipt evidencing said deposit shall be attached to the Debtor's Monthly Status Report.

(e) The Debtor shall file all past due delinquent tax returns within ninety (90) days of this Order unless otherwise ordered by this Court or as otherwise provided by law. Federal tax returns shall be filed with the Internal Revenue Service, Special Procedures Division. In addition, the Debtor shall file all post-petition tax returns as required by law in a timely manner.

D. *Proof of Insurance*: Within ten days of the date of this Order, the Debtor shall file with the Bankruptcy Administrator's Office a copy of all insurance policies held by the Debtor. The policies shall include liability, hazard, workman's compensation and all other insurance held by the Debtor.

If notice of cancellation or of non-renewal is given on any of the insurance policies listed before their expiration dates, the Debtor shall notify the Bankruptcy Administrator's Office of cancellation or non-renewal, by telephonic notice within 48 hours, and in writing within five (5) days, after notice of cancellation or notice of failure to renew. If any such notice is given effective as of the date of expiration, the same notification to the Bankruptcy Administrator shall be given.

E. *Cash Collateral*: The Debtor shall, in addition to other notice as required by the Bankruptcy Rules, notify the Bankruptcy Administrator of all motions and hearings on the use of cash collateral. The Debtor shall not use cash collateral as defined by 11 U.S.C. Section 363 unless each entity that has an interest in such cash collateral consents, or the Court, after notice and hearing, authorizes such use, sale, or lease in accordance with the provisions of 11 U.S.C. Section 363.

F. *Inspection of Property and Records*: The Debtor shall permit the Bankruptcy Administrator or her designee reasonable inspection of its business premises, properties, books and records.

G. *Monthly Status Reports*: Pursuant to 11 U.S.C. Sections 704, 1106 and 1107 and Bankruptcy Rule 2015, the Debtor shall file with the Court, and serve upon the Bankruptcy Administrator and the members of the Creditors' Committee, or their duly designated representative, monthly written reports on the status of this Chapter 11 proceeding. Said reports shall be prepared in accordance with the form entitled "Monthly Status Report" which is provided by the Clerk of the Bankruptcy Court. The Debtor shall complete all information requested by and attach all documentation required by said report. Said report shall be reviewed and signed by both the representative of the Debtor and the Debtor's attorney. The first "Monthly Status Report" shall include the period between the date the petition was filed and the last date of the calendar month. The first "Monthly Status Report" shall be due within thirty days after entry at the Order for Relief. All subsequent reports shall be for the entire calendar month and shall be due within thirty (30) days following the end of the calendar month.

H. *Plan and Disclosure Statement Due Date*: The Debtor shall file a plan of reorganization and disclosure statement within 120 days after entry of the order for relief, unless the Court, by subsequent Order, after Notice and Hearing within the 120-day period, grants the Debtor an extension of time or requires the Debtor to file a plan and disclosure statement prior to the expiration of the 120-day period.

I. *Notice of Section 341 Meeting of Creditors*: The Debtor shall, in accordance with the instructions from the Clerk of the Bankruptcy Court, serve the notice of the Section 341 Meeting of Creditors in a timely manner. The service of said notice shall be certified to the Court.

J. *Appointment of Professionals and Professional's Fees*: Absent extraordinary circumstances, attorneys and other professionals will not be appointed *nunc pro tunc*. Applications for appointment filed within 30 days of the filing of the petition or within 30 days of the date services commence, whichever occurs later, shall be considered timely.

Debtor's attorneys may disburse expenses and attorney fees from retainers held in segregated trust accounts, only to the extent that said amounts are disclosed in a monthly report detailing expenses and attorney, professional or paraprofessional fees. Said report shall be filed with the Clerk of the Bankruptcy Court, with copies to the Bankruptcy Administrator and the Creditors Committee. All disbursements from retainers shall be provisional only. All fees and expenses remain subject to proper application, notice, hearing and Court order. Requests for interim fees should be made on a quarterly basis. However, applications for fees will be considered on a more frequent basis, calendar permitting, upon application and proper notice.

K. *Addresses for Service Upon the Bankruptcy Administrator, the Internal Revenue Service and the State of North Carolina*: The Bankruptcy Administrator's address for service is 402 W. Trade Street, Suite 200, Charlotte, NC 28202-1669. The Internal Revenue Service shall be served by mail at: Internal Revenue Service, Special Procedures Division, Room 411, 320 Federal Place, Greensboro, NC 27401. The North Carolina Department of Revenue shall be served by mail at: North Carolina Department of Revenue, Central Collection Unit, Post Office Box 1168, Raleigh, NC 27602. The Debtor shall effectuate service upon the Internal Revenue Service and the North Carolina Department of Revenue as otherwise required by law.

L. *Compensation and Compensation Plans*: During the pendency of this Chapter 11 proceeding, the Debtor shall not increase compensation or modify plans of compensation without prior Order of this Court, after notice and hearing. Compensation and plans of compensation shall include, but shall not be limited to, salaries, hourly wages, benefits, commissions structure, bonuses,

or other forms of compensation for service, and shall be applicable, but shall not be limited to, officers, insiders, employees, independent contractors, consultants, commissioned salespersons and other entities providing services to the Debtor. Although the Debtor shall not increase any compensation without prior Order of this Court, after notice and hearing, this Court will consider motions for adjustments to entire compensation plans or packages as well as adjustments as they relate to particular individuals or entities.

M. *Disposition of Assets*: The Debtor shall not hypothecate, mortgage, pledge, or otherwise encumber any property of the estate or dispose of any property of the estate, other than in the ordinary course of business, without Order of this Court.

N. *Compliance with Code Provisions*: The operation of the business by the Debtor shall be in strict conformity with the provisions of the Bankruptcy Code, the Bankruptcy Rules, and the Local Bankruptcy Rules of Practice and Procedure.

IT IS SO ORDERED this _____ day of _____, _____.

_____
UNITED STATES BANKRUPTCY JUDGE

Copies to: Debtor, Debtor's Attorney, Bankruptcy Administrator, Internal Revenue Service, North Carolina Department of Revenue

**Form 14.**

## UNITED STATES BANKRUPTCY COURT
## Western District of North Carolina

## MONTHLY STATUS REPORT

**IN RE:** _____

**CASE NO.:** _____

**Reporting Period:** **FROM:** _____
**TO:** _____

I certify under penalty of perjury that the information contained in the attached Monthly Status Report consisting of _____ pages (including exhibits and attachments) is true and correct to the best of my knowledge and belief.

Dated: _____

_____
Debtor Representative

I certify that I have reviewed the information contained in the attached Monthly Status Report consisting of _____ pages and based on my knowledge of this case and the debtor's financial and business affairs, this Monthly Status Report is accurate, complete, and does not contain any misrepresentation of which I am aware. I further certify that this report has been served on all parties as required by law or court order.

Dated: _____

_____
Attorney for Debtor

**NARRATIVE ON PROGRESS OF CASE:**

# CASH RECEIPTS AND DISBURSEMENTS

_____

_____

BEGINNING CASH POSITION is the same figure as the ENDING CASH POSITION of prior month.

BEGINNING CASH POSITION

DATE: _____ AMOUNT: $_____

| CASH RECEIPTS | | CASH DISBURSEMENTS | |
|---|---|---|---|
| Description | Amount | Description | Amount |
| _____ | $_____ | Inventory Purchased | $_____ |
| _____ | $_____ | Salaries/Wages | $_____ |
| _____ | $_____ | Taxes (Total) | $_____ |
| _____ | $_____ | Insurance (Total) | $_____ |
| _____ | $_____ | Unsecured Loan Pymts | $_____ |
| _____ | $_____ | Utilities (Total) | $_____ |
| _____ | $_____ | Rent | $_____ |
| _____ | $_____ | Professional Fees | $_____ |
| _____ | $_____ | Maintenance/Repair | $_____ |
| _____ | $_____ | OTHER DISBURSE- | |
| _____ | $_____ | MENTS (List) | |
| _____ | $_____ | _____ | $_____ |
| _____ | $_____ | _____ | $_____ |
| _____ | $_____ | _____ | $_____ |
| _____ | $_____ | _____ | $_____ |
| _____ | $_____ | _____ | $_____ |
| **TOTAL CASH RECEIPTS:** | $_____ | **TOTAL DISBURSE-MENTS:** | $_____ |

ENDING CASH POSITION

DATE: _____ AMOUNT: $_____

# PAYMENTS TO SECURED CREDITORS

_____

_____

_____ No Secured Debt

_____ No Secured Debt Payments Made During Reporting Period

_____ All Secured Debt Payments Made During Reporting Period Are Listed Below:

| CREDITOR | COLLATERAL | DATE OF PAYMENT | AMOUNT |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | TOTAL: | |

## PAYMENTS ON PRE-PETITION DEBT

_____ No payments have been made on pre-petition unsecured debt during the reporting period.

_____ All payments made on pre-petition unsecured debt during reporting period are listed below:

| CREDITOR | DATE OF PAYMENT | AMOUNT | ORDER DATE AUTHORIZING PAYMENT |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| TOTAL: | | | |

## BANK ACCOUNTS

**ALL BANK STATEMENTS MUST BE ATTACHED FOR EACH ACCOUNT. PLEASE REPRODUCE THIS PAGE AND COMPLETE A SEPARATE PAGE FOR EACH ACCOUNT. ATTACH BANK STATEMENT TO CORRESPONDING PAGE.**

Name of Bank: _____
Address: _____
Street and/or P. O. Box Number
_____
City State Zip Code

Type of Account
(i.e., Payroll, Tax, Operating): _____
Account Number: _____

_____

DATE PERIOD BEGINS: _____

Ending Balance $_____
(per the attached bank statement for this period)

Outstanding Deposits and Other
Credits Not On Statement $_____

Outstanding Checks and Other
Debits Not On Statement $_____

Ending Reconciled Balance*
$_____

DATE PERIOD ENDS: _____

Highest Daily Balance
During Above Period $_____

## SALARY/COMMISSION/INDEP. CONTRACTOR PAYMENTS

_____

Insiders** (List name(s) and describe type of insider):

| NAME | TYPE | AMOUNT PAID |
|---|---|---|
| _____ | _____ | $_____ |
| _____ | _____ | $_____ |
| _____ | _____ | $_____ |
| _____ | _____ | $_____ |

Non-Insider Employees:

| TYPE (i.e., Salaried, Wage) | AMOUNT PAID |
|---|---|
| _____ | $_____ |
| _____ | $_____ |
| _____ | $_____ |
| _____ | $_____ |

*The sum of the ending balances of all accounts must reconcile with the Ending Cash Position on the Cash Receipts and Disbursements page.

**"Insider" is defined in 11 U.S.C. § 101(31).

Commission/Bonus Payments:

_____ $_____
_____ $_____
_____ $_____

Independent Contractors:

| NAME | TYPE | AMOUNT PAID |
|---|---|---|
| _____ | _____ | $_____ |
| _____ | _____ | $_____ |
| _____ | _____ | $_____ |
| _____ | _____ | $_____ |

TOTAL SALARY/WAGE/ COMMISSION PAYMENTS $_____

## SALES/ACCOUNTS RECEIVABLE

_____
_____

I. Accounts Receivable Pending As of: _____
(Date of Reporting Period)
II. Sales (gross) During Reporting Period: $_____
III. Collections of Accounts Receivable During Reporting Period: $_____
IV. New Accounts Receivables Generated During Reporting Period: $_____

| Pending Pre & Post Petition | Total | Collectible | Uncollectible |
|---|---|---|---|
| 0-30 DAYS | $ | $ | $ |
| 31-60 DAYS | $ | $ | $ |
| 61-90 DAYS | $ | $ | $ |
| 91-120 DAYS | $ | $ | $ |
| 120 DAYS AND OVER | $ | $ | $ |
| TOTAL | $ | $ | $ |

## INVENTORY (Cost Basis)

_____
_____

Beginning Date: _____ Ending Date: _____

LIST BY CATEGORY OF INVENTORY USED FOR PRODUCTION OR RESALE:*

| Category | Beg. | Used | Added | Adjusted | Ending |
|---|---|---|---|---|---|
| | $ | $ | $ | $ | $ |
| | $ | $ | $ | $ | $ |
| | $ | $ | $ | $ | $ |
| | $ | $ | $ | $ | $ |
| | $ | $ | $ | $ | $ |
| TOTALS | $ | $ | $ | $ | $ |

*Exclude capital items such as machinery and equipment and consumable items such as fuel and general supplies.

## ACCRUED POST-PETITION LIABILITIES

_____ No accrued liabilities existed at the end of this reporting period.

_____ All accrued liabilities existing at the end of this reporting period are listed below or on the sheet(s) attached. (Exclude current liabilities which are NOT past due).

| NAME OF CREDITOR | DUE DATE | AMOUNT DUE |
|---|---|---|
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
| | | |
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| | | |
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| | | |
| | | |
| | | |
| | | |

TOTAL ACCRUED LIABILITIES $_____

## AFFIRMATIONS

| | | |
|---|---|---|
| 1. Yes _____ | No _____ | All tangible assets of this bankruptcy estate are adequately and properly insured and all other insurance policies required by law or prudent business judgment are in force. |
| 2. Yes _____ | No _____ | All insurance policies and renewals, if applicable, have been submitted to the Bankruptcy Administrator. |
| 3. Yes _____ | No _____ | All tax returns have been filed timely and payments made. Copies of returns filed post-petition have been submitted to the Bankruptcy Administrator. |
| 4. Yes _____ | No* _____ | All post-petition taxes have been paid or deposited into a designated tax account. |
| 5. Yes _____ | No _____ | New Debtor-In-Possession (DIP) bank accounts have been opened and have been reconciled. |
| 6. Yes _____ | No _____ | New DIP financial books and records have been opened and are being maintained monthly and are current. |

*If the response in "no", a listing must appear on the Accrued Post-Petition Liabilities sheet. The listing must include the name of the taxing authority, the type of tax, the amount due and the period the tax was incurred.

**Form 15.**

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
_____ DIVISION

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | Case No. _____ |
| | ) | Chapter 11 |
| Tax I.D.# | ) | |
| _____ Debtor(s) | ) | |

CHAPTER 11 MONTHLY POST-CONFIRMATION REPORT

For period _____
(due within **fifteen (15)** days following end of above reporting period):

**I. NARRATIVE REPORT ON PROGRESS TOWARD CONSUMMATION OF THE CONFIRMED PLAN OR REORGANIZATION/LIQUIDATION**

— must be filled out in detail in all Chapter 11 cases
— include the estimated date for filing the motion for final decree pursuant to 11 U.S.C. § 1101(2) and Bankruptcy Rule 3022
— all bank statements for the period covered must be attached if the confirmation order was entered within six (6) months of the reporting period
— the plan should be consummated by _____

I certify under penalty of perjury that I have read the information contained in the foregoing report and that it is true and correct to the best of my knowledge and belief.

(**Both** the debtor's representative and attorney must sign)
For the Debtor _____
Dated _____
Attorney for the Debtor _____
Dated _____

**Form 16.**

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
_____ DIVISION

IN RE: )
)
) Case No. _____
) Chapter 11
)
Tax I.D.# )
_____ Debtor(s) )

## FINAL REPORT AND ACCOUNTING

I. **Payment of Expenses of Administration Other than Operating Expenses [§507(s) (1)]**

A. Trustee Commission _____
1. Expenses _____
B. Attorney for Trustee Fees _____
1. Expenses _____
C. Other Professional Fees paid by Trustee (specify) _____
D. Chapter 11 Debtor in Possession
1. Attorney's Fees _____
a. Expenses _____
2. Accountant's Fees _____
a. Expenses _____
3. Other Professional Fees (specify) _____
a. Expenses _____
E. Chapter 11 Creditors' Committee _____
1. Attorney's Fees _____
a. Expenses _____
2. Accountant's Fees _____
a. Expenses _____
3. Other Fees & Expenses (specify) _____
F. Taxes, Penalties, etc. [§ 503(b)(1)(B) & (C)] _____
G. Other Expense of Administration (itemize on attached sheet) _____

II. **Actual/Estimated Payments to Creditors**

A. Priority Payments
§ 507(a)(2) _____
§ 507(a)(3) _____
§ 507(a)(4) _____
§ 507(a)(5) _____
§ 507(a)(6) _____
§ 507(a)(7) _____
B. Payments to Secured Creditors _____
C. Payments to Unsecured Creditors _____
1. Percentage Payout on Allowed Unsecured Claims _____%

III. **Other Payments**

A. Surplus Returned to Debtor _____
B. Amount Returned to Debtor _____
C. Exemptions _____
D. Other Distributions _____

IV. **Trustee Disbursements**

A. Total distribution by trustee minus any surplus, exemptions or other payments to debtor _____
B. Operating expense disbursements _____

V. **Value of abandoned property or exempt property on which a security interest was attached** _____

VI. **Attorney fees paid or to be paid by debtor from assets not part of estate (Chapter 7 non-business cases only) or paid by debtor outside of plan (Chapter 13 non-business cases only)** _____

I hereby certify that I have read the information contained in this report and that it is true and correct to the best of my knowledge.

Preparer: _____

Dated: _____

Attorney for Debtor in Possession: _____

Dated: _____

**Form 17.**

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
_____ DIVISION

IN RE: I.D.# _____ Case # _____

CHAPTER 13 PLAN SUMMARY

The following is a summary of the proposed Chapter 13 plan of the above-referenced debtor(s). The plan provisions as set forth herein are those proposed by the debtor(s) and are **subject to** modification as recommended by the trustee at the scheduled Section 341 meeting of creditors. **ALL CREDITORS ARE HEREBY NOTIFIED THAT THE PLAN AS PROPOSED HEREIN OR AS MODIFIED AT THE MEETING OF CREDITORS MAY BE CONFIRMED BY THE COURT AND THEREAFTER ALL TERMS OF THE PLAN WILL BE BINDING UPON ALL PARTIES UNLESS OBJECTIONS TO CONFIRMATION ARE TIMELY FILED WITH THE COURT ACCORDING TO THE PROCEDURES AS SET FORTH IN THE "NOTICE OF MEETING OF CREDITORS, CONFIRMATION HEARING, AND OTHER RELEVANT MATTERS" WHICH ACCOMPANIES THIS SUMMARY.** The plan is bound by and must comply with all appropriate provisions of the Bankruptcy Code which affect Chapter 13 proceedings.

1. The plan proposes payments of $_____ per month for _____ months or for a _____% payout to the general unsecured creditors.

2. The attorney for the debtor(s) has already received $_____ of the total base attorney's fee of $_____, with the balance of the fee, if any, to be paid through the plan by the trustee.

3. From the payments received, the trustee shall make disbursements as follows and in the following order of priority:

**Administrative Costs**
Trustee's fees and costs (up to a maximum of 10%), court costs, attorney's fees and costs, and other administrative claims as ordered by the court.

**Secured Claims**
Holders of secured claims (including any arrearages on fully secured claims) which are actually filed with the trustee shall retain the liens securing such claims and shall be treated and paid as secured claimants to the extent of the collateral values shown below. To the extent that a creditor's claim is shown as undersecured, it shall be treated and paid in the same manner as general unsecured claims.

| Claimant | Collateral Value | Claimant | Collateral Value |
|---|---|---|---|

**Priority Claims**
The debtor shall make full payment in deferred cash payments of all claims entitled to priority under Sections 507 and 1322 of the Bankruptcy Code, as shown below. To the extent that such claims are not shown as entitled to priority, they shall be treated and paid in the same manner as general unsecured claims.

| Claimant | Priority Amount | Claimant | Priority Amount |
|---|---|---|---|

**General Unsecured Claims**
The debtor shall provide for the pro-rata payment of all non-priority, unsecured claims after payment of all administrative, secured and priority claims as set forth above. If the plan proposes payments for a term of months, the anticipated payout to the general unsecured creditors is approximately _____%.

4. Special Plan Terms

**Separate Classifications of Unsecured Claims**
The following general unsecured claims shall be separately classified and paid in full:

| Claimant | Claim Amount | Reason for Classification |
|---|---|---|

**Property to be Surrendered**
The debtor shall surrender the collateral securing the claims of the following creditors in satisfaction of the secured portion of such creditors' allowed claims. To the extent that the collateral does not satisfy such a creditor's claim, the creditor shall hold a general unsecured claim. All such unsecured deficiency claims must be filed with the trustee to be included for payment.

| Claimant | Claim Amount | Value of Collateral |
|---|---|---|

**Lien Avoidance**
The following liens shall be avoided pursuant to 11 U.S.C. 522(f) or other applicable sections of the Bankruptcy Code:

| Claimant | Claim Amount |
|---|---|

**Executory Contracts and/or Unexpired Leases**
The following executory contracts and/or unexpired leases shall be **assumed:**

The following executory contracts and/or unexpired leases shall be **rejected:**

**Direct Payments by Debtor**
The debtor will make regular payments directly to the following creditors:

| Claimant | Monthly Payment |
|---|---|

5. Effect of Discharge
Upon the debtor's completion of the confirmed plan (as proposed herein or as subsequently modified), all claims provided for by the plan will be discharged as provided for in Section 1328 of the Bankruptcy Code, including the cancellation of liens which secured such claims and were paid by the plan.

Dated _____ _____
Debtor's Signature

Dated _____ _____
Debtor's Signature

Dated _____ _____
Attorney for the Debtor(s)

## SUMMARY OF CHANGES TO LOCAL FORMS (10/1/94)

| PRIOR FORM | ACTION |
|---|---|
| 105-1 | 1 |
| 105-2 | Repealed |
| 110-1 | 2 |
| 110-2 | 3 |
| 125-1 | 4 |
| 125-2 | 5 |
| 205-1 | 6 |
| 315-1 | 7 |
| 315-2 | 8 |
| 315-3 | Repealed |
| 315-4 | Repealed |
| 320-1 | 9 |
| 325-1 | Repealed |
| 335-1 | Repealed |
| 405-1 | 10 |
| 405-2 | 11 |
| 405-3 | 12 |
| 405-4 | 13 |
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# WESTERN DISTRICT BANKRUPTCY PRACTICE GUIDE

Revised effective October 1, 1994,
with amendments through February 8, 2001.


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## I. Introduction to bankruptcy practice guide.

This Administrative Guide ("Guide") has been prepared to assist all interested parties in their use of the services of this Court and the Clerk's Office. Prior to October 1, 1994, many of this Court's Local Rules of Bankruptcy Practice and Procedure ("Local Bankruptcy Rules") were not phrased in terms of mandatory rules. Instead, they simply provided information or recommended guidelines for all interested parties. Therefore, the Local Bankruptcy Rules were substantially revised on October 1, 1994. Many of the non-mandatory provisions that were a part of the Local Bankruptcy Rules prior to October 1, 1994 have now been moved to this Guide. Although the provisions of this Guide have been approved by this Court, its requirements do not have the full force of law.

The Guide shall be updated periodically as necessary. Each revised page will bear a revision date in the upper right hand corner. All parties on the Court's mailing list will receive notice of all future revisions to the Guide.

The Clerk has arranged for a local copy service to prepare copies of the Guide for purchase by all interested parties. Copies of this Guide can be obtained from Kwik Copies, 333 S. Kings Drive, Charlotte, North Carolina 28204, (704) 332-6521. Contact the Chief Deputy Clerk, Linda Anderton, for further information.

## II. Court personnel.

### A. JUDGES' OFFICES

#### 1. Personnel

| | |
|---|---|
| **Chief Bankruptcy Judge** | **George R. Hodges** |
| Secretary | Julie G. Brodhag |
| Law Clerk | Jennifer Youngs |
| **Bankruptcy Judge** | **J. Craig Whitley** |
| Secretary | Penny Love |
| Law Clerk | Timothy Arant |
| **Recalled Bankruptcy Judge** | **Marvin R. Wooten** |

2. **Mailing Address**

United States Bankruptcy Court
Charles R. Jonas Federal Bldg.
Room #128
401 West Trade Street
Charlotte, NC 28202

3. **Telephone**

(704) 344-6169

4. **Facsimile**

(704) 344-6314

**B. CLERK'S OFFICE**

1. **Personnel**

| | |
|---|---|
| Clerk | J. Baron Groshon, Esq. |
| Chief Deputy Clerk | Linda G. Anderton |
| Automation Systems Manager | John Bain |
| Automation Asst. Systems Mgr. | Kent Creasy |
| Systems Administrator | John Schifano |
| Data Quality Analyst | Karen Heavner |
| Budget Analyst | Linda V. Bishop |
| Financial Administrator | Carol C. Caldwell |
| Docket Clerks | |
| (Terminal Digit Noted) | Elouise Cummings (0) |
| | Alesia Wallace (1) |
| | Vickie Burns (2) |
| | Cynthia P. Putnam (3) |
| | Barbara J. Sifford (4) |
| | Julie Adams (5) |
| | Deborah K. Leonard (6) |
| | Kimberly VanDyke (7) |
| | Robin Shackelford (8) |
| | Robin M. Ward (9) |
| Court Recorder Operators | Shirley A. Rico |
| | Cecelia Burr |
| Courtroom Deputy | Robin K. Felts |
| Intake Clerks | Carrie Vereen |
| | Shelia Hyde |
| | Sherrie Green |
| | Patsy Pugh |

2. **Mailing Address**

United States Bankruptcy Court
Charles R. Jonas Federal Bldg.
Room #111
401 West Trade Street
Charlotte, NC 28202

3. **Telephone**

(704) 344-6103

4. **Facsimile**

(704) 344-6404

5. **Public Office Hours**

8:30 a.m. — 4:30 p.m.
Monday through Friday

6. **Emergency Hours**

The Clerk of Court's home telephone number is listed in the Huntersville telephone directory. If he is unavailable after regular office hours, a message can be left on his telephone answering machine.

## C. BANKRUPTCY ADMINISTRATOR

1. **Responsibility**

All matters relating to estate administration and the supervision of trustees and other court appointed fiduciaries are the official responsibility of the office of the Bankruptcy Administrator — an independent, non-judicial officer of the Federal Judiciary. The Bankruptcy Administrator is not an employee of the Bankruptcy Court itself, but, rather, is appointed by and under supervision of the Court of Appeals for the Fourth Circuit.

Implementation of the U.S. Trustee program has been deferred in the judicial districts of Alabama and North Carolina. The Bankruptcy Administrator performs essentially the same functions as the U.S. Trustee does in other states.

2. **Personnel**

| | |
|---|---|
| Bankruptcy Administrator | Linda W. Simpson, Esq. |
| Bankruptcy Attorney | John L. Bramlett, Esq. |
| Bankruptcy Analysts | Jeanette M. Sartoris |
| | Bonnie A. Kamyabi |
| | M. Susan Allen |
| Secretary to Bankruptcy Adm. | Phyllis A. White |
| Clerk, Case Closing | Venitra E. White |

3. **Mailing Address**

402 West Trade Street
Room 200
Charlotte, NC 28202-1669

4. **Telephone**

(704) 344-6894

5. **Facsimile**

(704) 344-6666

## D. BANKRUPTCY TRUSTEES

1. **Chapter 13 Standing Trustees**

a) Charlotte Division

Warren L. Tadlock, Esq.
P.O. Box 30097
Charlotte, NC 28230-0097
(704) 372-9650
Fax: (704) 335-0267

b) Asheville/Bryson City Divisions

David G. Gray, Esq.
81 Central Avenue
Asheville, NC 28801
(704) 254-6315
Fax: (704) 255-0305

c) Shelby/Statesville Divisions

Steven G. Tate, Esq.
Post Office Box 1778
Statesville, NC 28677
(704) 872-0068
Fax: (704) 873-3476

2. **Chapter 7 Panel Trustees**

a) Charlotte Division

Langdon M. Cooper, Esq.
Post Office Box 488
Gastonia, NC 28053-0488
(704) 864-6751
Fax: (704) 861-8394

R. Keith Johnson, Esq.
Suite 600
312 W. Trade Street
Charlotte, NC 28202
(704) 372-3867
Fax: (704) 342-0429

Richard M. Mitchell, Esq.
1800 Carillon Bldg.
227 W. Trade Street
Charlotte, NC 28202
(704) 376-6574
Fax: (704) 342-1531

Holcomb and Pettit, P.A.
227 W. Trade Street
Suite 2170
Charlotte, NC 28202
(704) 333-5800
Fax: (704) 377-1045

A. Burton Shuford, Esq.
Cameron Brown Building
301 S. McDowell Street
Suite 707
Charlotte, NC 28204
(704) 377-0280
Fax: (704) 377-8666

Wayne Sigmon, Esq.
Post Office Box 2636
Gastonia, NC 28053
(704) 865-6265
Fax: (704) 866-8010

Susan Sowell, Esq.
2020 Charlotte Plaza
Charlotte, NC 28244
(704) 333-1200
Fax: (704) 377-9630

James T. Ward
1515 Mockingbird Lane
Suite 903
Charlotte, NC 28209
(704) 529-0887
Fax: (704) 529-6090

Albert Durham
227 W. Trade Street
1200 Carillon Building
Charlotte, NC 28202
(704) 334-0891
Fax: (704) 377-1897

b) Asheville Division
David R. Hillier, Esq.
Post Office Box 7115
Asheville, NC 28802
(704) 258-3368
Fax: (704) 252-6721

Roberts, Stevens, & Cogburn, P.A.
Marc Rudow, Esq.
Marjorie Mann, Esq.
Post Office Box 7647
Asheville, NC 28802
(704) 252-6600
Fax: (704) 253-7200

Whalen, Hay, et al., P.A.
Robert M. Pitts, Esq.
Post Office Box 2868
Asheville, NC 28802
(704) 255-8085
Fax: (704) 251-2760

Special Trustee
Langdon M. Cooper, Esq.
Post Office Box 488
Gastonia, NC 28053-0488
(704) 864-6751
Fax: (704) 861-8394

c) Shelby Division
Langdon M. Cooper, Esq.
Post Office Box 488
Gastonia, NC 28053-0488
(704) 864-6751
Fax: (704) 861-8394

Wayne Sigmon, Esq.
Post Office Box 2636
Gastonia, NC 28053
(704) 865-6265
Fax: (704) 866-8010

Special Trustee
James E. Wall, Sr.
1409 East Boulevard
Charlotte, NC 28203
(704) 333-7496
Fax: (704) 377-6123

d) Statesville Division
J. Samuel Gorham, Esq.
Post Office Box 2507
Hickory, NC 28063-2507
(704) 322-5505
Fax: (704) 328-1882

Robert H. Gourley, Esq.
Post Office Drawer 1776
Statesville, NC 28687-1776
(704) 873-2131
Fax: (704) 872-7629

Barrett L. Crawford, Esq.
P.O. Box 2901
Hickory, NC 28603-2901
(704) 328-9292
Fax: (704) 529-6090

Special Trustee
James E. Wall, Sr.
1409 East Boulevard
Charlotte, NC 28203
(704) 333-7496
Fax: (704) 377-6123

Special Trustee
James B. Mallory, III, Esq.
Post Office Box 7
Statesville, NC 28687
(704) 872-8189
Fax: (704) 873-1687

3. **Chapter 12 Trustees**

a) Asheville/Bryson City Divisions8
Marc Rudow, Esq.
Post Office Box 7647
Asheville, NC 28802
(704) 258-2573
Fax: (704) 253-7200

b) Charlotte Division
Warren L. Tadlock, Esq.
Post Office Box 30097
Charlotte, NC 28230-9922
(704) 372-9650
Fax: (704) 335-0267

c) Statesville/Shelby Division
Steven G. Tate, Esq.
P.O. Box 1778
Statesville, NC 28677
(704) 872-0068
Fax: (704) 873-3476

*Special Trustees are not generally assigned cases except where other divisional trustees have conflicts of interests or special circumstances so warrant.

## III. Rules governing practice before the court.

A. *Admission to practice.*

All duly licensed lawyers who are admitted to practice before the District Court shall be allowed to practice law before this Court. Admission to practice before the District Court is governed by Rule 1 of the Local Rules of Practice of the United States District Court for the Western District of North Carolina. "Practice of law" includes, but is not limited to, preparing and filing papers, such as complaints, petitions, applications, and motions, questioning witnesses in proceedings before the Bankruptcy Judge and pursuing or defending any action of any nature in this Court. "Practice of law" does not include questioning a debtor at a meeting of creditors in that debtor's case.

All partnerships, corporations and other business entities (other than an individual conducting business as a sole proprietorship) that desire to appear in cases or proceedings before this Court must be represented by a lawyer duly admitted to practice before this Court. Licensed attorneys who are not admitted to practice before the District Court may be permitted by the Court to appear *pro hac vice* from time to time in a case or proceeding, upon motion and a certificate of service evidencing service of the motion and order upon counsel for the adverse party, the counsel for the debtor, the debtor, the creditors' committee (Chapter 11), the trustee and the Bankruptcy Administrator. A motion requesting admission *pro hac vice* must specifically recite that the movant is familiar with and will comply with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules for the Western District of North Carolina. There is no specific requirement for obtaining local co-counsel. However, any local co-counsel should be identified in a motion requesting admission *pro hac vice* and the accompanying order. The movant may submit a proposed *ex parte* order with the Court allowing the appearance.

An individual may represent himself or herself in a case or a proceeding, and an individual may represent an unincorporated business if that individual is the sole proprietor of that business. Furthermore, an individual may represent a creditor or any other non-debtor entity at a first meeting of creditors.

B. *Disclosure of State Bar number.*

All attorneys shall disclose their State Bar number below their signature line and name and address/telephone number on all papers filed with or submitted to the Court. Attorneys shall indicate the state of admission preceding the respective number(s).

C. *Local Bankruptcy Rules.*

The Court has enacted a revised set of Local Rules of Practice and Procedure. A reference copy of the Local Rules is available at the front counter of the Clerk's office for use by the public. Copies of the Local Rules may be purchased from Kwik Copies, 333 S. Kings Drive, Charlotte, North Carolina 28204, (704) 332-6521. The Local Bankruptcy Rules can also be reviewed through the use of the PACER automation system. For further information concerning purchase, contact the Chief Deputy Clerk of Court, Linda Anderton.

Included in the Local Rules is an appendix of forms for use by the bankruptcy bar in this District. The forms must be substantially complied with at all times.

The Local Rules may be amended from the time to time after a period of public review and comment. The amendment process will begin on May 1 of each year. Any proposed changes in the Local Bankruptcy Rules should be submitted in writing to the Clerk of Court on or before May 1 of each year. All proposed amendments will be on display for review and comment at the Intake Section of the Bankruptcy Clerk's Office from June 1 through June 15. Proposed amendments will also appear in the Local Rules Directory in the PACER automation system from June 1 through June 15 of each year. Any amendments to the Local Bankruptcy Rules will become effective on June 30 of each year. At that time, the amended Local Bankruptcy Rules will be available at the Intake Section of the Clerk's Office, at Kwik Copies in Charlotte, and through the PACER automation system.

Should any matter of practice or procedure require the attention of the Court on a more frequent basis, the Court shall from time to time enter standing orders which will have the same force and effect as the Local Bankruptcy Rules. The Clerk maintains a file of all standing orders entered by the Court and enters the standing orders on an accompanying docket sheet. This standing order file and docket shall be available for public inspection, subject to reasonable terms and conditions, at all times during regular business hours of the office of the Clerk. Standing orders which relate to administrative matters will be incorporated into either the Local Bankruptcy Rules or this Guide on an annual basis. Several standing orders of general interest to the bar are appended to this Guide.

## IV. Clerk's office services.

A. *Information services.*

Unless otherwise ordered by the Court, all documents filed with the Clerk are public records and available for in person inspection at no charge. The Clerk may require a receipt from parties reviewing a file. If the services of the Clerk's staff are requested to locate a particular document in a case or adversary proceeding file, a $15.00 search fee must be paid. All requests for information made by mail or by telephone that require a physical search of the case file are subject to the $15.00 search fee; however, the Clerk's office will provide the following information concerning any pending bankruptcy case at no charge to any interested person:

1. The name and address of any debtor;
2. The bankruptcy case number;
3. The case filing date;
4. The name and address of the debtor's counsel if any;
5. The name and address of the trustee, if any; and
6. The date of the entry of discharge, if applicable;

In addition, and subject to the continuing availability of adequate administrative resources, the Clerk's office will respond at no charge to inquiries concerning specific matters that may have been entered on any pending bankruptcy case electronic docket. Each telephone inquiry shall be limited to any combination of three (3) bankruptcy cases and/or adversary proceedings.

Attorneys and their staff are invited to use the computer terminals that are located at the Intake Counter in the Clerk's office in order to locate case information. The use of these computer terminals will often result in the user being able to locate case information faster than it can be obtained by having the Intake Clerks retrieve a case file.

B. *Voice Case Information System (V.C.I.S.)*

Attorneys and the general public may now obtain basic information concerning active cases by dialing the Court's V.C.I.S. telephone line, which is (704) 344-6311, on a touchtone telephone. V.C.I.S. or Voice Case Information System is a set of computer programs that interface the Bankruptcy Court's BANCAP database with another piece of equipment (DECtalk), which in turn gives a caller information stored on the Court's computer system.

The V.C.I.S. works using a device called a voice synthesizer. This is a box which contains a high-powered processor running a special program, as well as a dictionary of English words and standard rules of pronunciation. The synthesizer (DECtalk) will take words transmitted by the computer and read them over the phone. Unlike bank voice computer systems that are able to use pre-recorded human speech as a result of the limited phrases produced by the system, there is no limit to the various words that must be produced by V.C.I.S. (i.e., debtor's names). Therefore, V.C.I.S. cannot use pre-recorded speech and must use the synthesizer to generate words electronically. The voice synthesizer cannot generate as high a voice quality as a system that uses pre-recorded speech. Nevertheless, V.C.I.S. has been fine-tuned to provide very acceptable understandability for most purposes.

In order to get information from V.C.I.S., you must dial the Court's V.C.I.S. telephone line on a touchtone telephone. When the line connects, the DECtalk will answer the call and begin its speech as follows:

> "This is a computerized name look-up system at the United States Bankruptcy Court for the Western District of North Carolina. Type the name of a participant in a bankruptcy case, using the letters shown above the keys on your telephone. Type the last name, followed by the first name, if any, ignoring any spaces or other non-letters. Use the 1 key for the letters Q and Z. Press the pound key when done."

You would then begin quickly to type the name of the bankruptcy case about which you are inquiring and press the # key. The V.C.I.S. would then make the following statement:

> "I'll look that up and read the name or names that match, if there are any. If more than one name matches the keys you pressed, I'll read each and every one of them. Please stand by, and I'll have this for you momentarily. Just a moment."

V.C.I.S. will then provide the caller with the appropriate case number, chapter, filing date, debtor's name, name and phone number of debtor's attorney, trustee's name, name of Judge assigned to the case, status of the case, 341 meeting date if applicable, and discharge date. It will then thank you for calling and hang up.

C. *Public Access to Court Electronic Records (PACER).*

The Federal Court system has introduced a new service designed to provide attorneys and the general public with easier and better access to court information. This system is an electronic public access system called PACER (Public Access to Court Electronic Records). PACER has been operational since March, 1992, and the Court's PACER telephone numbers are 344-6121, 344-6122, 344-6123, and 344-6124.

This system allows attorneys and the general public to use a terminal or computer and modem to dial into the Court's computer system, connect to a special information computer, and request information about a case. The system will provide lists of cases, searched by name, as well as the full electronic docket for each case. Users may save the docket on their computer or print it out in their office. This allows users to get docket information on any of thousands of cases in the Bankruptcy Court. PACER allows users to:

1. Track updates to a case of interest in less than a minute;
2. Get a printed history of a case by retrieving the public docket in less than a minute;

3. Research litigants by name;
4. Obtain copies of Court calendars;
5. Review and download the Local Bankruptcy Rules for the Western District of North Carolina;
6. Review and download proposed amendments to the Local Bankruptcy Rules; and
7. Review and download the Bankruptcy Practice Guide for the Western District of North Carolina.

The Clerk's office will provide documentation on the use, restrictions, and capabilities of the PACER system, as well as a PACER registration form, upon request. Anyone who has questions concerning this system should direct those questions to the Court's Systems Manager or Assistant Systems Manager at (704) 344-6103.

Potential users can be certain that the following equipment will be needed in order to utilize the PACER system:

1. *Terminal or computer.* A computer has the added advantage of being able to download data (case information) onto a disk for later reviews, printing, or even editing (such as with a word processor). However, even a dumb terminal will be sufficient for retrieving information.
2. *Printer.* A printer will give the user the option of making a copy of the information received for later reference.
3. *Modem.* The system will accept both 2400 baud and 1200 baud modems. The former is twice as fast, and it will make the system more pleasant to use if the user is downloading large docket reports.

All users will be billed quarterly at the rate of $.60 per minute of use. However, information can be downloaded instantaneously, thereby minimizing the cost to users. Registration of all new users will be handled by the PACER Billing Center, U.S. Courts — CVB (S.A.), P. O. Box 740026, Atlanta, Georgia 30374-0026, 1 (800) 827-2982.

When a user logs into PACER, the Billing Center software will post a date and time in a log file. The user will be permitted to enter a fifteen character client identification code which can be used to track the transaction and bill the user's clients. When the user logs out of PACER, the user's total time will be posted to the log file. Users will also have the ability to review their transactions on line and change their password. Each month, the prior month's log file will be electronically sent to the Billing Center for processing.

Itemized statements will be sent on a quarterly basis. All funds collected by the Billing Center will be forwarded to a U.S. Treasury account established by the Administrative Office of the United States Courts.

D. *Photocopying documents.*

Copy requests for three or fewer pages can be honored while the requestor waits. Copy requests for more than three pages must be left with the counter deputy and will be completed in the order received. A charge of $.50 per page applies to all copy requests and must be paid in advance of receiving the copies.

E. *Transcripts and tape duplications.*

Transcript requests are made directly to the Electronic Court Recorder Operator ("ECRO") by telephone, in person, or in writing. A follow-up letter is required for those requests made by telephone or in person. The Clerk's office will not honor requests for transcripts consisting of various portions of a witness's testimony on direct examination or cross-examination. However, the Clerk's office will honor requests for transcripts of the entire direct examination and/or the entire cross-examination of a single witness. The ECRO will estimate the number of pages and provide an estimated cost which must be paid before the Clerk's office begins any work required for the preparation of the transcript.

There will be a $15.00 service charge (payable to the Clerk, U.S. Bankruptcy Court) if an attorney or representative requests a transcript and does not

follow through with the request. This service charge provides a nominal fee for the ECRO's time spent in processing the transcript request. Federal government agencies are exempt from paying in advance.

Tapes of Section 341 creditors' meetings are retained by the Bankruptcy Administrator for two (2) years, and requests for tape duplications of any first meeting shall be made, in writing, directly to the Office of the Bankruptcy Administrator and shall include payment of the prescribed fee to the Clerk, U.S. Bankruptcy Court. There is no longer a charge for duplication of these tapes. However, the party requesting the tape must provide blank tape(s) which will be used to make the copy and then returned.

F. *Record retrieval.*

Case and adversary proceeding files are maintained on Court premises for a limited period of time after the case is closed before being shipped to a Federal Records Center for storage. Upon request, the Clerk can arrange for retrieval of a particular file from the Federal Records Center located in Atlanta, Georgia, upon payment of a $25.00 fee. Alternatively, an interested party may arrange for inspection directly with the Center itself. Contact the Chief Deputy Clerk for details on this procedure.

G. *Filing papers after business hours.*

In a genuine emergency, petitions or other papers may be filed by contacting the Clerk at the residential telephone number published in the Huntersville telephone directory. If the Clerk is unavailable after regular work hours, a message can be left on his telephone answering machine. The Bankruptcy Judges may also accept emergency filings.

H. *Legal advice.*

A bankruptcy case is a formal legal case affecting the rights of both debtors and creditors. For that reason, the Clerk's and the Bankruptcy Administrator's offices are prohibited from giving any advice which may be considered legal in nature. Bankruptcy is sufficiently complicated that most individuals find it desirable to obtain the services of an attorney.

## V. Financial information.

A. *Bankruptcy fees.* (as established per 28 U.S.C. §1930)

1. Chapter 7 or 13 case filing fee
(Including $30.00 Administrative Fee) ..... $ 160.00
2. Chapter 9 case filing fee ..... $ 300.00
3. Chapter 11 case filing fee ..... $ 800.00
(Railroad) ..... $1,000.00
4. Chapter 12 case filing fee ..... $ 200.00
5. Conversions: Upon request of the debtor, if a case under Chapter 7 or Chapter 13 is converted to a case under Chapter 11 ..... $ 400.00
Note: All other conversion fees previously included in the federal bankruptcy fee schedule have been repealed.
6. Reopening cases — Unless a case is being reopened to correct administrative error or for actions related to the debtor's discharge, the moving party must tender payment equal to the current case filing fee.
7. Photocopying ..... $ .50 per page
8. Document certification ..... $ 5.00 per document
9. Magnetic tape reproduction ..... $ 15.00 per tape
10. Amendments to Debtor's Schedules or List of Creditors after service of the 341 first meeting of creditors notice ..... $ 20.00 per amendment
Note: Pursuant to Federal Rule of Bankruptcy Procedure 1009, the debtor shall provide written notice to all affected parties of all amendments except those ordered by the court.
11. Record Search by Clerk ..... $ 15.00 per name or item

12. Complaint Filing Fee ..... $ 120.00
(no charge where plaintiff is a Chapter 7, 12 or 13 debtor)
13. Filing or indexing any document from a case pending in another district
..... $ 20.00
14. Notices generated by Clerk on behalf of the estate .. $ .50 /addressee
15. Claims processing charge (for each proof of claim filed in excess of 10)
$ .25 /claim
16. Filing notice of appeal ..... $ 5.00
(including cross-appeals)
17. Appeal Docketing Fee ..... $ 100.00
18. Retrieval of Court File from Federal Records Center or any off-premises
location ..... $ 25.00
19. Insufficient Funds Check Charge ..... $ 25.00
20. Mailing Matrix Labels ..... $ 5.00 /page
IMPORTANT NOTE: As a result of actions taken by the Congress and the Judicial Conference of the United States during 1989 and 1990, certain additional bankruptcy court fees have been established. They are as follows:
21. For the *deconsolidation* of any joint petition at the request of the debtor, a fee equal to one-half of the current fee for filing a petition for the chapter under which the joint case was originally filed. The fee is applicable to case conversions, also, and it applies whether the joint case was previously substantively consolidated or not.
22. For filing motions to vacate or modify the automatic stay, to withdraw the reference of a case or proceeding, or to compel abandonment of property of the estate ..... $ 60.00
23. For docketing cross appeals ..... $ 100.00
24. Pursuant to action of the Judicial Conference of the United States, an administrative fee of $30.00 is required to be paid upon the filing of all petitions for relief under Chapter 7 and Chapter 13 of the Bankruptcy Code. This fee is in lieu of the noticing fee the Clerk is required to charge as provided in paragraph 14 above. This fee may be included in one check with the filing fee because it is assessed, and is to be collected, at the time the petition for relief is filed. This means that payment at the time of filing of a Chapter 7 or Chapter 13 case should be in the total amount of $160.00.

B. *Methods of payment.*

Cash, certified check, personal check, money order. Personal checks are not accepted from debtors or debtors in possession. The Clerk reserves the right to refuse to accept personal checks from any other parties, included but not limited to, those who have written checks to the Court that are subsequently returned NSF. The Court does not keep funds for making change. Exact change is required.

On October 12, 1990, the Court entered an Order Establishing Methods of Payment for Court Fees and for Satisfaction of all Judgments of the Court. This Order provides that any party who tenders payment of any bankruptcy court fees established pursuant to 28 U.S.C. Section 1930 or any party who tenders payment in satisfaction of any judgment or order of this Court shall do so in such a manner as to minimize the inconvenience of collection for the person or entity to whom the payment is tendered. In furtherance of this policy, the Order directs all payments to be made by check, draft, money order, currency and/or coin. The Order further provides that when payment is to be made by currency and/or coin, the tendering party shall make such payment using the largest denominations of such currency and/or coin as are possible, given the total amount of said payment. Violation of this Order shall subject the violating party to such sanctions as the Court deems appropriate.

C. *Unclaimed funds.*

All unclaimed funds collected by the Court in Chapter 7, 12 and 13 cases and deposited into the registry of the Court shall be transferred to the United

States Treasury as soon as is practicable thereafter. Unclaimed funds in Chapter 11 cases shall not be deposited into the registry of the Court unless specifically allowed by order of the Court. These funds should be distributed according to the debtor's Chapter 11 Plan. All requests for the disbursement of unclaimed funds and the actual disbursement of such funds shall comply with the following:

1. Each request for the disbursement of unclaimed funds shall be verified in writing and filed with the Clerk of Court in the form of a verified Motion for Disbursement of Unclaimed Funds, which shall be accompanied by a Notice of Hearing.

2. The requestor shall serve a copy of the motion and notice of hearing on the United States Attorney, the Bankruptcy Administrator, and the case trustee. The notice shall further advise said parties that they have fifteen (15) days following service of the notice to object to or otherwise respond to the request and ask for a hearing before the Court. The notice and a written certificate of service shall be filed with the Clerk of Court within three (3) days following service as required herein.

3. An individual claimant may file a Motion for Disbursement of Unclaimed Funds and Notice of Hearing pro se, but all other claimants must be represented by an attorney who is a member in good standing of the North Carolina State Bar and who has been admitted to practice before the United States District Court for the Western District of North Carolina by taking the prescribed oath in open Court, as set forth in Rule 1 of the Rules of the United States District Court for the Western District of North Carolina. Licensed attorneys who are not admitted to practice before the United States District Court for the Western District of North Carolina shall not be permitted to appear *pro hac vice* for the purpose of filing a Motion for Disbursement of Unclaimed Funds on behalf of a claimant.

4. An individual claimant shall establish full proof of his or her right to the unclaimed funds by personally appearing at the hearing and presenting testimony in open Court which convinces the Court of the claimant's right to the unclaimed funds. A partnership claimant shall establish full proof of its right to the unclaimed funds by having a general partner personally appear at the hearing and present testimony in open Court which convinces the Court of the claimant's right to the unclaimed funds. A corporate or other business claimant shall establish full proof of its right to the unclaimed funds by having an officer or director personally appear at the hearing and present testimony in open Court which convinces the Court of the authority of the officer or director to act on behalf of the claimant and of the claimant's right to the unclaimed funds.

5. If the requestor is a representative of the estate of a deceased individual, the requestor shall provide the Clerk with certified copies of all probate documents to substantiate the requestor's right to act on behalf of the decedent as additional proof of entitlement to the funds.

## VI. Document filing requirements.

A. *Petitions and accompanying documents.*

The Court requires the following number of full copies of bankruptcy petitions, including all schedules, the statement of financial affairs, exhibits and all other papers filed with a bankruptcy petition:

| | |
|---|---|
| Chapter 7: | Original plus three (3) copies |
| Chapter 9: | Original plus five (5) copies |
| Chapter 11: | Original plus five (5) copies for a corporation or partnership debtor |
| | Original plus four (4) copies for an individual debtor |

Chapter 12: Original plus four (4) copies
Chapter 13: Original plus four (4) copies

The copy requirements listed above include those required for service of one (1) copy on the Bankruptcy Administrator and for one (1) filed stamped office copy for the debtor or the debtor's attorney.

All petitions, schedules, statements and other papers filed with a bankruptcy petition shall conform, in all respects, to the Official Bankruptcy Forms, as promulgated by the Judicial Conference of the United States, effective August 1, 1991. Normally defective papers will be accepted by the Clerk. However, conforming papers must be filed within fifteen (15) days of the original filing. Failure to do so may result in dismissal of the case without further notice.

B. *Return of file stamped office copies of documents.*

Recent cuts in the operating budget of the Federal Judiciary have resulted in substantial reductions in this Court's annual allocation for postage. We must, therefore, insist that any person desiring return of a file-stamped, office copy of any document filed with or submitted to the Clerk provide the extra copy of the document plus a self-addressed envelope with sufficient return postage. The Clerk's office has discontinued its practice of returning filed copies of pleadings and orders to attorneys who do not enclose a self-addressed, stamped envelope with the copies of pleadings to be returned to the attorneys.

The Clerk's office will maintain a mailbox at the Intake Section that will contain mail slots for the seventy-two most active members of the bankruptcy bar. A separate box will be used to retain pleadings for all other attorneys. Copies of filed pleadings that are not mailed back to the submitting attorneys will be retained in this area for a two-week period. Attorneys will be given the opportunity to appear at the Clerk's office and collect these documents during such two-week period.

Attorneys and their staff who visit the courthouse on a regular basis are encouraged to ask the Intake Deputies for their mail. This will not only save on postage expenses that would otherwise be incurred by the Clerk's office or the attorneys, but it will also result in a quicker return of copies of filed documents to attorneys. During such two-week period, attorneys may also send the Clerk's office a self-addressed, stamped envelope of sufficient size and containing sufficient postage for the return of these documents. After such time, the pleadings will be disposed of by depositing them in the paper recycling bin.

C. *Facsimile filings.*

With one exception, the Clerk will not accept "fax" transmissions or other facsimiles for filing unless a prior Order has been entered by the Court directing the Clerk to do so. The one exception to this rule will apply to trustees who are appointed by the Court to serve in a Chapter 7 or 11 case. As a result of the short time period in which a trustee may reject his or her appointment, trustees will be permitted to fax their rejections of appointment to the Court. However, a trustee must file an original document rejecting his or her appointment within two days of his or her facsimile transmission. Any other party who wishes to file a facsimile of a document should direct his or her request to the appropriate Bankruptcy Judge. The Clerk is not permitted to address such a request.

If the Court authorizes the Clerk to accept a facsimile for filing, the filing party must present the original document to the Clerk for filing within two (2) business days after the facsimile filing. Failure to file the original document within two (2) business days of the facsimile filing may cause the facsimile filing to be stricken by the Court. Pleadings and other documents that have been mailed to the Clerk's office to be filed should not also be faxed to the Clerk's office for informational purposes.

D. *Bancap mailing matrix.*

During late 1990, the Court converted to the BANCAP automated case management system. This is the same docketing system now in use in the bankruptcy courts of the Middle District of North Carolina and the District of South Carolina.

Use of the BANCAP system will require strict adherence to certain operating procedures by both the Clerk and the bankruptcy bar. For example, all master mailing matrices required to be filed pursuant to Local Bankruptcy Rule 4 will have to be prepared in a specific format and conform to certain type-styles.

On October 3, 1990, the Court entered a standing order requiring each Chapter 7, 11 or 12 petition filed on or after November 1, 1990 to be accompanied by a mailing matrix creditor list prepared in the one-column format specified by the Clerk. In addition, any Chapter 13 debtor that converts to Chapter 7, 11 or 12 must file with the Notice of Conversion or proposed order a revised mailing matrix creditor list that conforms to the one-column format. Chapter 13 debtors in the Charlotte, Shelby and Statesville Divisions may file either the one-column BANCAP matrix or the three-column matrix that is commonly filed with Chapter 13 petitions.

On October 3, 1990, the Court entered a standing order requiring each Chapter 7, 11 or 12 petition filed on or after November 1, 1990 to be accompanied by a mailing matrix creditor list prepared in the one-column format specified by the Clerk. In addition, any Chapter 13 debtor that converts to Chapter 7, 11 or 12 must file with the Notice of Conversion or proposed order a revised mailing matrix creditor list that conforms to the one-column format. Chapter 13 debtors in the Charlotte, Shelby and Statesville Divisions may file either the one-column BANCAP matrix or the three-column matrix that is commonly filed with Chapter 13 petitions.

Although the majority of BANCAP matrices submitted to the Clerk's office are in the proper format, these matrices are often submitted in formats that do not comply with the instructions set forth in this Bankruptcy Practice Guide. When a matrix is submitted in a noncomplying format, the Clerk's office staff must make a decision whether to retype the matrix itself or return the matrix to the filing party with instructions to correct the format of the matrix. The Clerk's office has recently experience[d] a forced staff-reduction that makes it exceedingly more difficult for the remaining staff to retype a non-conforming matrix. Furthermore, if a noncomplying matrix is returned to the filing party, it may necessitate a delay in the scheduling of the first meeting of creditors. Therefore, all members of the bankruptcy bar are asked to comply with the BANCAP matrix instructions that are set forth herein.

1. *General instructions.*

The BANCAP system in this court provides a program for the computerized processing of creditors listed in each case filed to enable a high volume of cases to be processed within limited time constraints. Creditors are initially loaded into the computer data base for each case in one of two ways: (1) by "scanning" the hard copy matrix supplied by the debtor at the time of filing the case, or (2) by loading information from a diskette supplied by the debtor.

"Scanning" is a process which enables a deputy clerk to feed the matrix sheets into an optical character reader. The OCR reads the matrix and transmits the creditor information directly into the BANCAP system, thus eliminating the need to type each creditor individually into the system. If a diskette is provided, it is "loaded" into the system. All creditors on the matrix are available for retrieval for query, noticing or updating purposes within one day after entry into the system.

Hard copy matrices or diskettes must be submitted in the format utilized by the BANCAP system. When submitting matrices or diskettes, debtors and their attorneys are asked to adhere to the following:

(1) All matrices with less than 1000 creditors may be submitted by a hard copy matrix or on a diskette.

(2) If the matrix contains over 1000 creditors, the Court's Systems Manager should be contacted at (704) 344-6103 for specific instructions.

(3) Regardless of whether a diskette or a hard copy matrix is submitted, the instructions set forth herein regarding the preparation of an original matrix or diskette or supplemental matrix must be observed.

An incorrect matrix or diskette will result in delay in noticing the § 341 first meeting of creditors. Failure to comply with these matrix requirements will result in this matter being brought to the attention of the Court. The Clerk's office staff will answer any questions concerning the proper preparation of a BANCAP matrix. In addition, copies of these instructions are available upon request from the Clerk's office.

2. *Hard copy matrices.*

In order to ensure that the hard copy matrix to be filed can be properly read by the optical scanner, the following guidelines must be complied with when preparing the BANCAP matrix:

(1) Lists must be typed in one of the following standard typefaces or print styles: Courier 10 Pitch, Prestige Elite or Letter Gothic.

(2) Lists should be typed in a single column on the page.

(3) No letters should be closer than one (1) inch from any edge of the paper.

(4) Each name and address must consist of no more than five (5) total lines, with at least two (2) blank lines between each name and address.

(5) Each line must not exceed forty (40) characters in length.

(6) Do not include the following parties on your matrix: debtor, joint debtor, attorney(s) for the debtor(s), Bankruptcy Administrator, or case trustee. These parties will be added by Clerk's office staff and retrieved from the system for noticing.

(7) Do not put any other information on the matrix, such as a heading, date, lines, and page numbers, etc. The case number and the debtor's name should be listed on the reverse side.

(8) Do not staple or hole punch the matrix.

(9) Be sure the paper is inserted straight in the typewriter or printer and do not remove the list and reinsert it to complete the matrix.

(10) If you are using a 10 pitch element, make sure that your typewriter or printer is set to 10 pitch, not 12 pitch.

(11) Do not use all caps. Use both upper and lower case, where appropriate.

(12) Zip codes must be placed on the last line along with the city and state. Use the standard two-letter abbreviations for states. Use capital letters for state abbreviations (i.e., FL). Do not use periods to separate these initials (i.e., N.C.). Use a hyphen for nine digit zip codes. Do not put attention lines or account numbers on the last line. Put this information on the second line following the creditor's name, if needed.

(13) Do not use onion skin, colored or half-sized paper, or erasable bond.

(14) Make sure your matrix is clean and reads easily. Do not use correction fluid.

(15) List the creditor's first name first, last name last, without titles (i.e., Mr., Mrs., Ms., etc.).

(16) Submit only clear originals. Photocopies or carbon copies are unacceptable.

(17) Printing from dot matrix printers or worn out typewriter or printer ribbons is unacceptable.

(18) Do not use the letter "l" for the number "1". Do not use % as a substitute for c/o. Do not use \ as a substitute for /. Do not use +, use either "and" or "&". Do not use /eqv as a substitute for -. Do not use [ ] as a substitute for ( ).

(19) The matrix must be accompanied by a properly completed certification of accuracy. The certification can not be made on the matrix form itself.

3. *Matrices on diskette.*

The Clerk's office will accept filing of matrices on floppy diskettes using ASCII text format. The equipment that will be needed to submit matrices on diskettes is an IBM compatible PC with DOS, a 3½″ double-sided, double-density or high-density diskette, and a program that will produce ASCII text files such as a word processor or text editor, or other programs with the capability of producing output in ASCII format.

The following guidelines must be complied with:

(1) Lists should be typed in a single column.

(2) Each name and address must consist of no more than five (5) single-spaced lines, with at least one blank line between each of the name/address blocks.

(3) Zip codes must be located on the same line as the city and state. This must be the last line of each name/address block.

(4) Nine-digit ZIP codes should be typed with a hyphen separating the two groups of digits.

(5) All states must be two-letter abbreviations. Example: correct = CA; incorrect = Cal., Calif., California.

(6) Each line must be forth (40) characters or less in length.

(7) Entities with more than one address may be listed as many times as necessary to ensure proper notice.

(8) Do not include the following entities, since they will be added by the Clerk's office: the debtor, the joint debtor, the attorney for debtor(s), the Bankruptcy Administrator, and the case trustee.

(9) Do not use upper case only (all capital letters). Type in upper and lower case as you would a letter.

(10) Do not type "attention" lines or account numbers on the last line. If needed, this information must be placed on the second line of the name/address block. Account numbers may not exceed fifteen (15) characters.

(11) Do not use a header or footer to identify your case.

(12) Save the date in ASCII format in a file called creditor.scn.

(13) Label the floppy diskette with the case name and date, and file it with the petition.

(14) Only one case should be included on each floppy diskette. Only one creditor.scn file can be processed from a single floppy diskette.

Accuracy and completeness in preparing the mailing matrix are the sole responsibility of the debtor and the debtor's attorney. The Court will rely on the creditor listing for mailings. Please be certain to include all listed creditors, including priority creditors such as the IRS.

4. *Matrices filed subsequent to filing of original matrix.*

If the debtor files schedules or amended schedules subsequent to the filing of the original matrix, or if the debtor files a schedule of unpaid debts pursuant to FRBP 1019 which requires the addition, deletion or correction of names already listed or to be added to the original BANCAP matrix or diskette, special instructions apply in addition to the instructions for preparing original matrices, as set forth above. These special instructions are as follows:

(1) The debtor should never re-submit a name on a supplemental matrix which was submitted on the original matrix unless the name and/or address is being corrected or updated. The debtor should not re-list all creditors that appeared on the original matrix in addition to the changes that he or she is attempting to make by filing the supplemental matrix. Only the changes should be listed.

(2) Separate matrices must be filed when submitting creditor additions, corrections or deletions at the same time. The debtor should indicate on the reverse side of each such matrix whether the matrix lists "added", "modified", or "to be deleted" creditors.

The Clerk's automation staff may be able to develop programs that will accept matrices that are prepared on Apple or other non-IBM/PC computers. Anyone who has questions concerning the submission of matrices on diskettes is urged to contact the Court's Systems Manager, or Assistant Systems Manager, at (704) 344-6103.

The BANCAP attorney data base will be indexed by bar number rather than by name; therefore, all papers filed in the Court will have to include the filing attorney's State Bar number. Therefore, the Court asks that all attorneys begin to use their bar numbers on all pleadings as soon as possible.

E. *Proofs of claim.*

As provided by Local Bankruptcy Rule 3002-1.1., Chapter 13 proofs of claim are to be filed directly with the standing trustee. When filing a proof of claim, be certain that the case name and number are noted on the claim form. The form must also be signed by the claimant or his attorney or agent, as appropriate. In order to receive a filed copy of a proof of claim, the claimant must submit a copy of the original document and include a stamped, self-addressed envelope.

F. *Adversary proceeding cover sheet.*

Local Bankruptcy Rule 7003-1 requires a cover sheet to be filed with any adversary proceeding.

G. *Briefs.*

Any Brief or other paper filed subsequent to the related motion or other pleading should be filed and served on all parties who are required to be served so that actual receipt of the Brief or other paper occurs at least three (3) business days prior to the scheduled trial or hearing. If service of a Brief or other paper is made close to this deadline, it is the obligation of the party serving the Brief or paper to determine that the party to be served will be available within the three (3) business days immediately preceding a scheduled trial or hearing. When the Court enters a pre-trial order, it may specify different time periods for service of papers and exchange of exhibits in adversary proceedings, which would preempt the time period specified herein.

Failure to comply with this requirement may be grounds for a continuance. The Court will not permit a party to be prejudiced by late filing of a Brief or other paper. In all cases, in addition to filing originals with the Clerk, two (2) full copies of all Briefs should be delivered directly to the Judge's chambers.

H. *Scheduling judgment creditors.*

If a judgment creditor is scheduled in the bankruptcy, it is necessary that the Judgment Book and Page Number of the judgment be set out beside the creditor's name. This information will be required if a Certificate of Discharge is requested by the debtor for filing in state court. All Certificates of Discharge that are submitted to the Clerk for execution must conform to the form that is attached to this Guide as Appendix 1.

I. *Debtor's change of address.*

Federal Rule of Bankruptcy Procedure 4002 places an affirmative duty on the debtor to file a statement of any change of address with the Court. Failure to do so not only violates the rule, but it also exposes the debtor to the risk of not receiving important notices in the mail.

## VII. Assignment of venue and judges.

A. *Divisional venue of cases and proceedings.*

The Western District of North Carolina encompasses thirty-two (32) North Carolina counties. In this district there are five divisions — the Asheville Division, the Bryson City Division, the Charlotte Division, the Shelby Division and the Statesville Division. The Asheville Division contains the counties of Avery, Buncombe, Haywood, Henderson, Madison, Mitchell, Transylvania and

Yancey. The Bryson City Division contains the counties of Cherokee, Clay, Graham, Jackson, Macon and Swain. For purposes of bankruptcy, cases filed in the Bryson City Division are heard in the Asheville Division. The Charlotte Division contains the counties of Anson, Gaston, Mecklenburg and Union. The Shelby Division contains the counties of Burke, Cleveland, McDowell, Polk and Rutherford. The Statesville Division contains the counties of Alexander, Alleghany, Ashe, Caldwell, Catawba, Iredell, Lincoln, Watauga and Wilkes.

Upon the filing of any bankruptcy petition, the case shall be assigned to its proper divisional venue according to the residence of an individual debtor or principal place of business of any other debtor. If the debtor's residential address or principal place of business lies in a different county than the mailing address included in the petition and the debtor wishes for that residential or business address to be used in assigning divisional venue instead, that fact must be noted conspicuously for the Clerk on the petition. Otherwise, divisional venue assignments will be based upon the debtor's mailing address as provided on the petition.

The initial assignment and transfer of divisional venue of all cases and proceedings is governed by 28 U.S.C. § 1408, 28 U.S.C. § 1409, 28 U.S.C. § 1412, Federal Rule of Bankruptcy Procedure 1014, and Local Bankruptcy Rule 1. Regardless of the timing of the filing of a Motion to Change Venue, the Section 341(a) First Meeting of Creditors shall be held in the division to which the case was originally assigned. In addition, if venue is transferred, the initial trustee shall not be changed unless the Court so orders. In certain routine administrative matters, such as hearings on applications for compensation of professionals or for approval or confirmation of sales, the Court may *ex parte* order a divisional venue change for convenience of the parties.

Divisional venue is currently indicated numerically in the case number. The two-digit number to the left of the hyphen is the year in which the case was filed. The first numeral in the five-digit number to the right of the hyphen represents the venue to which the case has been assigned according to the following code:

| | |
|---|---|
| 1 | Asheville |
| 2 | Bryson City |
| 3 | Charlotte |
| 4 | Shelby |
| 5 | Statesville |

B. *Assignment of judges.*

In the absence of a conflict of interest, cases filed in the Western District will be assigned between the judges as follows:

1. Asheville Division
   - All Cases — Judge Hodges
2. Charlotte Division
   - Chapter 7 — Judge Hodges
   - Chapter 11 — Judges Hodges/Whitley-Random
   - Chapter 12 — Judge Whitley
   - Chapter 13 — Judge Whitley
3. Shelby Division
   - All Cases — Judge Wooten
4. Statesville Division
   - Chapter 7 and 11 — Judge Whitley
   - Chapter 12 and 13 — Judge Hodges
5. Converted cases in all divisions

   Upon conversion, a case will be assigned to the judge who would otherwise have received it if it had been an initial filing, using 1-4 above.

## VIII. Calendar matters.

A. *Trials.*

Trials are scheduled by the Court as the calendar permits. The parties will receive notice of trial dates by the Court.

The Bankruptcy Judges have adopted a series of standard orders designed to incorporate the Federal Rules of Bankruptcy Procedure dealing with discovery matters into the Court's pre-trial procedures. The general format of the series of orders is 1) a first order governing timing of initial disclosures, discovery and preliminary matters (appended to this Bankruptcy Practice Guide as Appendix 8); 2) a notice after the end of the discovery period to solicit a mutually convenient trial date or alert the Court that the case has not proceeded as planned (appended to this Bankruptcy Practice Guide as Appendix 9); and 3) a final order governing the exchange of exhibits and other matters immediately prior to trial (appended to this Bankruptcy Practice Guide as Appendix 10).

This format is designed to allow the case to proceed initially with only minimal Court attention or management. If all goes well, Court case management will be minimal. The Notice to Counsel serves as the Court's check on the status of the case. If the case is not ready for trial at that point, then the Court will become involved with management of the case from that point forward. Ultimately, the final pre-trial order will be entered to govern matters immediately prior to trial. The orders permit a party to request the Court's intervention in case management at any point that is deemed necessary.

The *substance* of what is required of parties is largely left to the Federal Rules. These orders seek to control the *timing* of those matters. The format of the orders is designed to use actual dates rather than time periods. Although this is initially a bit more burdensome on the Clerk's office, the Court believes that it will be helpful in communicating the exact deadlines that are established. The Court expects all parties to respect these deadlines.

The Federal Rules' provisions on the timing of initial disclosure effectively delay discovery at the beginning of a case. Therefore, the total time from the entry of the initial pre-trial order to the close of discovery will be approximately four (4) months.

These orders attempt to avoid the Federal Rules' requirements of multiple meetings/conferences. The Court believes that economy of everyone's time would be served by eliminating artificial appearances. The Court is hopeful that the bankruptcy bar can accomplish what the Federal Rules require without Court appearances or conferences. The benefits of meetings/conferences are preserved for cases where they are necessary by providing that parties may seek modification of the orders, or Court intervention, at any time.

The Court anticipates that the deadlines established in these orders will be satisfactory for the great majority of cases. In any case in which the deadlines are not realistic, the parties may propose modifications to the orders.

B. *Motions.*

Special motion days are scheduled each month for each chapter and each divisional venue. Counsel should make a reasonable effort to coordinate hearings on motions with the calendars of opposing counsel and the trustee in the case. Parties shall make every effort to notice their motions for hearing on special motion days.

When preparing to notice a motion for hearing, contact the judge's secretary or the assigned deputy clerk for the upcoming hearing dates for the appropriate chapter and division. The deputy clerk will not take calendaring information at that point. The motion will be added to the calendar only when an original motion and a notice of hearing are filed with the Clerk. When a "no protests" notice containing a specific hearing date is used and filed with the Clerk, the matter will not be calendared unless an objection or other request

for hearing is filed thereafter. A certificate of service of the mailing of the notice of hearing must be filed with the Clerk within three days of the date of service.

The special motion days are currently scheduled as follows:

1. *Asheville Division.*

a) Regular term of court is scheduled for the third full week of each calendar month.

1) Chapter 13 and brief Chapter 7 matters are heard on Tuesday, only.

2) All other matters are heard on Wednesday and Thursday, with Monday afternoon available, if needed.

b) As a result of courtroom renovation work, the additional term of court previously held on the Wednesday of the first full week of each calendar month will be suspended until further notice by the Court.

c) The Court address for the Asheville Division is:

Main Courtroom, Third Floor
United States Post Office and Courthouse
100 Otis Street
Asheville, North Carolina

2. *Charlotte Division.*

a) Chapter 7 matters are heard on Thursday of the second full week of the calendar month.

b) *Chapter 11 matters.*

1) Judge Hodges: Wednesday of the second full week of the calendar month for routine matters. Other times are available upon request for more time-consuming matters.

2) Judge Whitley: Thursday of the first and third full weeks of the calendar month.

c) Chapter 12 matters: Monday of the first full week of the calendar month.

d) Chapter 13 motions are heard on Tuesday of the second, third, and fourth weeks of the calendar month. Chapter 13 dismissal hearings are held on Wednesday of the second and fourth full weeks of the calendar month. Time consuming matters can be set at special times throughout the week after receiving prior court approval.

e) The calendars for hearings in the Charlotte Division are now prepared by grouping all cases according to the debtor's attorney. This practice occasionally results in the need to calendar a matter for an afternoon hearing even though it has been noticed for a hearing to be held in the morning. Therefore, all out-of-town creditors' attorneys are invited to verify hearing times by reviewing the court calendars on PACER. An out-of-town creditors' attorney who does not have access to PACER can call the Clerk's office on the day before the scheduled hearing in order to verify the time of the hearing.

f) Pretrial hearings (both judges) will be set on the respective motion days above.

g) The court address for the Charlotte Division is:

Bankruptcy Courtroom, First Floor
Charles R. Jonas Federal Building
401 West Trade Street
Charlotte, North Carolina

h) Judge Wooten normally holds court in Room 122.

i) Judge Hodges normally holds court in Room 126.

j) Judge Whitley normally holds court on Chapter 13 matters in Room 126. Judge Whitley's other hearings will normally be held in Room 122.

3. *Shelby Division.*

a) Regular term of court is scheduled for Friday of the fourth full week of the calendar month.

b) An emergency term of court will be scheduled on an "as needed" basis. Contact the appropriate judge or the judge's secretary to obtain an emergency hearing date.

c) The court address for the Shelby Division is:
Cleveland County Courthouse
Assigned Bankruptcy Courtroom
100 Justice Place
Shelby, North Carolina

4. *Statesville Division.*

a) Chapter 13 matters are heard on Tuesday of the first full week of the calendar month.

b) Chapter 7 and 11 matters are heard on Wednesday of the first full week of the calendar month.

c) An emergency term of court will be scheduled on an "as needed" basis. Contact the appropriate judge or the judge's secretary to obtain an emergency hearing date.

d) The court address for the Statesville Division is:
Main Courtroom, Second Floor
United States Post Office and Courthouse
Broad Street
Statesville, North Carolina

C. *Emergency hearings and hearings on shortened notice.*

1. *Motions for order shortening time.*

A motion for order shortening time will generally be determined *ex parte* by the Court on the basis of the papers submitted with the motion, subject to the right of any party to subsequently object to the adequacy of notice. The motion should be substantially in the form of Local Form 7. The request for an order shortening time may be contained in the motion seeking the relief in the matter, and need not be made by separate motion. The notice on the underlying motion shall state that the movant has submitted an order shortening with the Court.

2. *Orders shortening time.*

The proposed order shortening time shall be submitted as a separate document at the time of the filing of the motion and shall substantially comply with Local Form 8. The proposed order shall specify the nature and timing of the proposed shortened notice, and leave appropriate blanks for the Court to insert the date and time of hearing on the underlying motion, and the date for serving and filing papers in opposition to the underlying motion. Counsel for the movant is encouraged to confer in advance with the appropriate judge's secretary to secure appropriate dates so they may be completed in the order being submitted. In order to secure expedited processing of motions to shorten notice, parties should advise the appropriate chapter deputy clerk of the need for expedited handling at the time of filing.

D. *First meetings of creditors.*

First meetings are normally held according to the following schedule which may be changed from time to time:

1. *Charlotte Division.*

a) Chapter 13 first meetings are normally held on Wednesday and Thursday of the first full week of the month, and on Thursday and Friday of the third full week of the month, and they are staggered beginning at 9:30 a.m.

b) Chapter 7 first meetings are normally held on Tuesday of the first, second, third, and fourth full week of the month. Chapter 11 and 12 first meetings are normaliy held on Tuesday of the first, second, and fourth full week of the month. Chapter 12 meetings are held at 9:00 a.m. and Chapter 11 meetings are held at 10:00 a.m. Chapter 7 cases begin at 2:00 p.m.

2. *Asheville Division.*

a) Chapter 13 first meetings are normally held on Monday of the third full week of the month at 9:30 a.m.

b) Chapter 11 and 12 first meetings are normally held on Tuesday of the third full week of the month at 1:30 p.m.

c) Chapter 7 first meetings are normally held on Monday of the fourth full week of the month beginning at 9:00 a.m.

d) Asheville first meetings will be held in Suite 103, 11 N. Market Street, Asheville, North Carolina.

3. *Shelby Division.*

a) All first meetings are normally held on Friday of the second full week of the month. The meetings are held at the following times:

1) Chapter 7 — 9:30 a.m.

2) Chapter 13 — 10:30 a.m.

3) Chapter 11 and Chapter 12 — 1:30 p.m.

b) Shelby first meetings will be held where regular court hearings are held, as noted above.

4. *Statesville Division.*

a) All first meetings are normally held on Monday of the first full week of the month.

b) The meetings are held at the following times:

1) Chapter 13 and Chapter 7 — 9:00 a.m.

2) Chapter 11 and Chapter 12 — 1:30 p.m.

c) Statesville first meetings will be held where regular court hearings are held, as noted above.

E. *Court calendars.*

Budgetary considerations have forced the Clerk's office to discontinue its prior practice of mailing copies of the Court calendars to the attorneys whose names appear thereon. Instead, copies of the Court calendars will be made available at the Intake Section of the Clerk's office. In addition, copies of the Court calendars can be obtained by all attorneys who subscribe to the Court's PACER automation service. The Court calendars can be downloaded into a subscriber's own computer system in less than one minute.

F. *Motions for continuance and settlement.*

Motions for continuance of any matter should be filed as far in advance as possible, should set forth in detail the reasons for the request, and should advise the Court whether any continuance has previously been granted for the same matter. Every effort should be made with opposing counsel to coordinate calendars and obtain consent to continuances. The Court may award costs, including attorney's fees, for any party who suffers a monetary loss because of a last minute request for a continuance. The Court encourages parties to stipulate to continuances where the requests are reasonable. Last minute continuances are disruptive to the Court's calendar, and they are an inconvenience to all parties.

Parties should advise the Court as soon as possible concerning settlements, and all interested parties should be given the courtesy of such notice as soon as reasonably possible.

## IX. Orders, notices of hearings, and judgments.

A. *Orders.*

1. *Submission of orders.*

Proposed orders should not be submitted with the Clerk's office for the Court's consideration until the matter is ready for consideration. Any objection periods which must have first expired before the order can be entered should pass before the document is submitted. The time requirements of Federal Rules of Bankruptcy Procedure 2002 and 9006 apply.

Parties must be careful to provide sufficient copies of all proposed orders to the Clerk for service. The Clerk's office asks that all parties submit an original and at least four copies of every order to be signed and entered. If any question concerning the correct number of copies in a particular situation arises, contact the respective deputy clerk.

All papers, including proposed orders, shall be filed with the Clerk's office, rather than directly with the Bankruptcy Judge. The Clerk shall perform any necessary processing of such papers before forwarding the papers to the Bankruptcy Judge for consideration. It is recognized that occasionally a matter may be discussed by counsel directly with a Bankruptcy Judge and that the Bankruptcy Judge will sign the order before the motion or application is actually filed with the Court. In such situations, the signed order and the motion or application shall be filed simultaneously with the Clerk's office.

Should expedited processing of papers be required during a term of Court in a division of the District not regularly staffed by the Clerk, the Court may, upon a showing of compelling need by a party, direct the courtroom deputy to enter a judgment, final order or other paper on the docket. The party shall arrange for prompt service of the paper and shall execute and deliver a certificate of service to the courtroom deputy at the time of the docket entry.

2. *Orders affecting title to real property.*

Pursuant to Federal Rule of Bankruptcy Procedure 5003(c), the Clerk is required to keep an additional copy of every final order affecting title to or liens on real property in a judgment book. Parties must include an extra copy of any such proposed orders submitted to the Court. Such orders must describe the encumbered real property with specificity, either by its metes and bounds description, its complete street address, or a reference to the book and page at which the deed or deed of trust is recorded in the appropriate county registry.

3. *Orders avoiding liens.*

All orders avoiding liens and the corresponding motions must describe the encumbered property with particularity. A reference to "household goods" or "real property" is generally considered an insufficient description of property. If the property is real estate, it must be described by either its metes and bounds description, its street address, or a reference to the deed book and page at which the deed or deed of trust is recorded. The movant may attach to the motion a copy of a security agreement or financing statement that contains a list of the encumbered property. The orders and motions must also set forth how the lien was perfected, the Judgment Book and Page Number at which the lien is recorded, a statement concerning the basis of the lien avoidance, the value of the movant's interest in the encumbered property, and the amount of the exemption that is impaired by the lien.

The Judges will not sign orders directing creditors to personally cancel liens that have been avoided. It is the debtor's responsibility to ensure that the avoidance of liens is noted in the appropriate public records.

Orders avoiding liens pursuant to 11 U.S.C. § 522(f) should clearly state that the lien is avoided "to the extent it impairs the debtor's exemptions."

4. *Joint administration or consolidation orders.*

Whenever two or more cases are to be substantively consolidated or jointly administered, the proposed order that is submitted for this purpose must specify which of the two procedures is being invoked and the order must also identify which case is to be deemed the lead case. If two or more cases are administratively consolidated, all docket entries will be made in a lead case, but separate final reports shall be filed in each case. If two or more cases are substantively consolidated, all docket entries will be made in the lead case, but only one final report shall be filed.

5. *Docketing of final orders or judgments / appeals.*

Federal Rules of Bankruptcy Procedure 5003 and 9021 provide that, for appeal purposes, a final order or judgment becomes effective only when the ministerial act of docketing by the Clerk is performed. Parties are, therefore, advised not to serve a final order until it has been so docketed by the Clerk.

6. *Service of docketed orders.*

Prompt service of docketed final orders, or notice of the entry of such orders, is, as provided by Federal Rule of Bankruptcy Procedure 9022, essential.

Where the Clerk has arranged for service of a final order to be handled by a particular party, care must be taken to ensure that this is done.

B. *Notices of hearing.*

1. *Responsibility for providing notice.*

Pursuant to the Federal Rules of Bankruptcy Procedure, responsibility for providing notice has been delegated to the movants to the extent permitted by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. The Court will provide original notice of filing of the case to creditors in Chapter 7, 12 and 13 cases and notice of discharge in those chapters. All other notices must be mailed by the party requesting relief. Notice of a continued hearing will be sent by the party requesting the continuance.

The Clerk must approve the form and content of any notice sent as a Court notice prior to mailing and, upon request, can furnish a mailing list to the party sending the notice. A certificate of service must be filed with the Clerk within three days of service and include a copy of the notice and a list of the parties upon whom it was served.

2. *"No protest" notices.*

In Local Bankruptcy Rule 7007-1.2, matters which can be determined by the Court without the need for an actual hearing unless an objection is filed and/or a hearing is specifically requested are listed. Local Form 4 provides a model "no protest" notice for use in these situations.

The notice form provides for the inclusion of a specific hearing time and location in the event that one becomes necessary. Parties are urged to obtain and include a specific hearing date and time in their notices rather than using language simply stating that "if objections or requests are received, a hearing subsequently will be scheduled and noticed." If such language is used in a "no protest" notice and hearing is requested, the movant, and not the Clerk, will be responsible for sending the follow-up notice of hearing if an objection or other request for hearing is filed. If the objection period expires without the filing of any objection or request for hearing, the movant shall promptly submit a proposed order, which shall be accompanied by Local Form 9, which itself is a representation to the Court of movant's timely service of the motion and "no-protest" notice and constituting advice by the movant to the Court that no objections were served upon the movant or filed with the Court.

3. *Notices of motions to dismiss.*

Federal Rule of Bankruptcy Procedure 2002 provides that motions to dismiss a case must be served upon all creditors. All motions for relief from stay that include in the prayer for relief a request for the alternative relief that the case be dismissed must be served on all creditors, and the certificate of service must indicate such service. An accurate mailing matrix may be obtained from the Clerk.

4. *Notice to bankruptcy administrator.*

All parties are required to serve upon the Bankruptcy Administrator, by regular mail, hand delivery, overnight courier or by facsimile machine copies of the following documents:

a) *Chapter 11 papers.* All papers in Chapter 11 cases and in proceedings therein, except exhibits to be used at trials or hearings.

b) *Chapter 12 papers.* All papers in Chapter 12 cases and in proceedings therein, except exhibits to be used at trials or hearings.

c) *Rule 2002 requests.* All papers in cases and proceedings in which the Bankruptcy Administrator has filed a request for notice pursuant to Federal Rule of Bankruptcy Procedure 2002(i).

d) *Appointment and removal of trustee or examiner.* All papers related to the appointment or removal of a trustee or examiner.

e) *Compensation applications.* All applications for compensation in all cases and proceedings.

f) *Fraud or criminal activity.* All papers in any case or proceeding in which fraud or criminal activity is alleged on the part of any party.

g) *All papers by chapter 7 trustees.* All papers filed in cases and proceedings by Chapter 7 Trustees, except as the Bankruptcy Administrator may from time to time otherwise direct by notice to the Trustees on an *ad hoc* basis.

h) *Conversions.* All orders relating to conversions of a case to a case under another chapter. Debtors or their attorneys shall serve on the Bankruptcy Administrator a copy of all schedules and statements filed following conversion of a case to a Chapter 7 proceeding.

5. *Ex parte motions.*

Except as otherwise ordered by the Court, the following motions are common examples of some matters which may be determined by the Court *ex parte*:

a) *Conversions upon debtor's first request.* Unless the case has previously been converted, a debtor's motion to convert a case under Sections 1112(a), 1208 or 1307(a) of the Bankruptcy Code does not require a hearing. Notice of the motion must be given to the trustee in the case and the Bankruptcy Administrator. Notice of an order converting a case to a case under another chapter must be given by the Clerk to all creditors and interested parties.

b) *Motions for examination under Federal Rule of Bankruptcy Procedure 2004.* Motions and proposed orders permitting examination under Federal Rule of Bankruptcy Procedure 2004 must be served on the debtor, trustee (if any), and the party whose examination is requested. The motion shall state, if known, the place of residence and the place of employment of the party whose examination is requested. Unless otherwise ordered by the Court, no hearing is required, and the Court will enter an *ex parte* order permitting the examination. At least twenty (20) days prior notice of the examination must be provided, unless otherwise ordered by the Court for cause shown. The party whose examination is requested or any other interested party may file a motion for a protective order if grounds exist under Federal Rule of Civil Procedure 26(c).

c) *Applications to retain professionals.* Applications to retain professionals under Section 327 of the Bankruptcy Code require no notice and no hearing unless the Court so orders. Proposed orders of appointment should be submitted to the Court when the application is filed.

d) *Extension of time to file schedules and statement of affairs.* Motions to extend time to file lists of creditors and equity security holders, or to file schedules and statements of affairs, must comply with Federal Rule of Bankruptcy Procedure 1007. Absent extraordinary circumstances, the Court will not allow extensions beyond the first date set for the Section 341 first meeting of creditors. The proposed order should be submitted to the Court when the motion is filed.

e) *Motion for reduction or limitation of notice period.* Motions to reduce the time of any notice period or limit the parties to whom notice shall be given, shall state the reasons therefore. A proposed order should be submitted to the Court when the motion is filed.

f) *Motion for admittance pro hac vice.* Attorneys not admitted to practice in the United States District Court for the Western District of North Carolina must be admitted *pro hac vice* prior to entrance of an appearance. A proposed order should be submitted with the Court when the motion is filed.

C. *Judgments.*

1. *Certification of judgments for registration in other districts.*

Certification of a judgment of this Court is a prerequisite to registration of the judgment in another district. Once registered in this manner, the judgment may then be enforced by execution and orders for supplementary proceedings anywhere in the state where registered.

The Clerk will perform the certification procedure upon payment of the certification fee plus a copy charge for each page of the judgment itself. (See Chapter V. A. 8. above).

Note that the official certification form provided by the Clerk is used only where the appeals period has clearly expired without an appeal having been taken or where all appeals have been finally disposed of. Where this is not the situation, an order of the Court directing the registration must be obtained by the party. That order must then be transmitted with a copy of the judgment to the court where registration will take place.

2. *Registration of judgments from other districts.*

Judgments from other districts may be registered in this Court as a prerequisite to execution after the following steps have been taken:

a) Delivery to the Clerk of a Certificate of Registration prepared by the court in which the judgment was obtained, or, a copy of the order referred to above.

b) A certified copy of the judgment to be registered.

c) Payment of the registration fee (See Chapter V. A. 13. above for fee).

Once the above requirements are met, the judgment will be registered on this Court's miscellaneous docket. Note that such judgments can be registered in the Bankruptcy and/or the District Court. If registered in both courts, two registration fees must be paid.

## X. Discovery documents, subpoenas, and trial exhibits.

A. *Discovery documents.*

Depositions, interrogatories and answers thereto, requests for production or inspection, and requests for admission and responses thereto shall be served upon other counsel or parties, but shall not be filed with the Court.

B. *Subpoenas.*

The Clerk will provide blank, unissued subpoena forms in reasonable numbers to any requesting party.

Certain fees for attendance, mileage and service may be applicable as noted in Federal Rule of Civil Procedure 45(c). See 28 U.S.C. §§ 1821 and 1921 for further information.

Prior to the issuance of a subpoena in a case or proceeding pending in another district, the Clerk must collect the fee cited in Chapter V. A. 13. above.

Please refer to Federal Rule of Bankruptcy Procedure 9016, which incorporates Federal Rule of Civil Procedure 45 in its entirety.

C. *Trial exhibits.*

All models, diagrams, exhibits, depositions and other material admitted into evidence or filed in any case or proceeding shall be placed in the custody of the Clerk, unless otherwise ordered by the Court. These items shall be claimed by the party offering such evidence, or filing such materials, within 30 days after the expiration of the time for appeal from final judgment, unless otherwise directed by the Court.

At the time of removal, a detailed record of the disposition of the items shall be filed in the case or proceeding jacket. If the party who offered the items in evidence or filed the items fails to claim these materials as provided herein, the Clerk shall write the attorney of record, or if none, the party on whose behalf the items were filed or offered into evidence, calling attention to this policy. If after the mailing of such notice the materials have not been claimed and removed within 30 days, they may be destroyed by the Clerk. Because of space limitations within the Clerk's office, this disposal provision will be closely followed.

Unless otherwise ordered by the Court, all exhibits shall be numbered and marked for identification prior to the day of trial or motion hearing with appropriate labels. The Court will not permit attorneys or litigants to waste time numbering, marking and exposing exhibits for the first time to opposing counsel during trial. Each party intending to present exhibits shall number and mark its exhibits, prepare an index of the exhibits, and deliver the index

and deliver or make available for copying or review one (1) complete set of numbered and marked exhibits with the index to each party at least three (3) court days before the date of the trial or motion hearing. In addition, each party shall bring to trial sufficient copies of each numbered and marked exhibit and the index for the witness, the Judge, the Judge's law clerk, and the court recorder operator. The courtroom deputies and electronic court recorder operators have found that receipt of a list of exhibits prior to commencement of the trial or motion hearing is particularly important to them.

## XI. Removal procedure and withdrawal of reference.

A. *Removal.*

1. *Procedure.*

Consult Federal Rule of Bankruptcy Procedure 9027 as to procedure governing removals. Note that the proceeding must be removed to the district or bankruptcy court for the district in which the civil action is pending. If the action is not pending in the Western District of North Carolina, it must first be removed to the court for that particular district and then — in the Court's discretion — transferred elsewhere.

Federal Rule of Bankruptcy Procedure 7001 provides that a cause of action removed pursuant to 28 U.S.C. § 1452 is an adversary proceeding and the adversary rules apply. Therefore, the $120.00 adversary filing fee must accompany all removals when applicable. In addition, an adversary cover sheet must be prepared and submitted with the removal application.

2. *Transfer of removed proceeding to another district.*

The Court will consider a request to transfer a proceeding originally removed to the Western District to another district only upon written motion and a ten-day "no protest" notice to all affected parties. Every effort will be made to schedule such matters for a hearing, if necessary, as soon as possible. Contact the appropriate Judge's secretary for the next available hearing date.

B. *Withdrawal of reference.*

Motions for withdrawal of reference of a case or proceeding pursuant to Federal Rule of Bankruptcy Procedure 5011 shall be filed with the Clerk, who shall promptly forward them to the Clerk of the District Court.

## XII. Chapter 13 matters.

A. *Claims.*

1. *Filing claims.*

Proofs of claim in Chapter 13 proceedings shall be filed directly with the office of the Standing Trustee to whom the case is assigned. The address of the proper Standing Trustee will be shown on the notice of creditors' meeting. Claims will be dated and stamped as received as of the date they arrive in the Trustee's office and the claim shall be deemed filed with the Court as of that date.

2. *Claims docket.*

The staff of the Chapter 13 Trustee shall prepare a claims docket for each proceeding referred to that trustee and such claims docket shall be transferred to the Clerk's office at the closing of the case along with the original claims and made a part of the permanent record.

3. *Allowance of claims.*

Following the expiration of the claims bar date set forth in Federal Rule of Bankruptcy Procedure 3002 or the debtor's confirmed plan, the Standing Trustee shall file with the Court and serve upon all parties a Motion for Allowance of Claims Determination which shall include a report of all claims filed in the case and the Standing Trustee's proposed treatment of such claims under the plan. The motion shall also set forth the minimum percentage

dividend that the Standing Trustee believes should be paid to the general unsecured creditors through the plan and request approval of the same.

The motion shall be accompanied by a notice to all parties which shall provide that any party objecting to the proposed treatment of any claim, or the proposed dividend as reported therein must file a written response and request for hearing with the Clerk within the appropriate time period as prescribed by the Federal Rules of Bankruptcy Procedure. If no written responses are filed as set forth therein, the Standing Trustee's motion shall be granted. The Court has entered a Standing Order regarding the above matter which is attached to this Guide as Appendix 3.

4. *Property tax claims.*

The Standing Trustee shall accept for filing all properly-executed proofs of claim for property taxes, even when such proofs of claim are filed prior to the date that the taxes in question are last payable without penalty or interest as provided by applicable state law. Such proofs of claim shall not be administered by the Standing Trustee until the date that such taxes are last payable without penalty or interest has, in fact, passed. Following the passage of such date, the county or municipal taxing authority must provide timely written notification to the Standing Trustee if the taxes that are the subject of the respective proof of claim remain unpaid and if the taxing authority desires to have the debt included for payment by the Standing Trustee through the Chapter 13 plan. Unless and until the taxing authority provides such timely written notice to the Standing Trustee, the proof of claim is deemed to be objected to by the Standing Trustee on the grounds that the claim has been satisfied by payment, and such objection will be sustained by the Court. The Court has entered a Standing Order regarding the above matter which is attached to this Guide as Appendix 5.

5. *Income tax claims.*

The Standing Trustee shall accept for filing all properly-executed proofs of claim for income taxes from the Internal Revenue Service, even when such proofs of claim are filed prior to the due date for the federal tax returns in question, including extensions, under applicable federal law. The Standing Trustee shall proceed with no further administration of such proofs of claim until the due dates for the federal tax returns in question have, in fact, passed. Following the passage of such return due dates, the Internal Revenue Service must provide timely written notification to the Standing Trustee if the taxes that are the subject of the respective proofs of claim remain unpaid and if the Internal Revenue Service desires to have the debts included for payment by the Standing Trustee through the Chapter 13 plan. Unless and until the Internal Revenue Service provides such timely written notice to the Standing Trustee as set forth above, the proofs of claim are deemed to be objected to by the Standing Trustee for the reason that the claims have been satisfied by direct payment, and such objection will be sustained by the Court. The Court has entered a Standing Order regarding the above matter which is attached to this Guide as Appendix 6.

6. *Application of Section 506(b) to secured claims.*

In order for any creditor asserting over-secured status to invoke the application of the provisions of 11 U.S.C. § 506(b) to its proof of claim, the creditor shall attach to its proof of claim a specific itemization of all of the following which it intends to have considered in the determination of the secured value of its claim:

a) The interest which would accrue on such claim under the agreement under which the claim arose between the case filing date and the date of confirmation of the debtor's plan. The applicable per diem interest rate upon which the creditor's computations are based shall be set forth therein; and

b) Any reasonable fees, costs or charges provided for under the agreement under which the creditor's claim arose.

Should the creditor fail to attach such specific itemizations to its proof of claim as set forth above, the Standing Trustee is authorized to recommend to the Court a secured value for such claim which he deems to be appropriate, given the evidence that is available to him.

7. *Lien avoidance / secured claims.*

Unless the debtor files motions to avoid Section 522(f) liens within ninety (90) days of the date of the Section 341 first meeting of creditors, the creditor's claim will be treated as filed and may be a secured claim, to the extent of the value of the collateral.

B. *Disbursements by trustee.*

1. *Minimum disbursements in chapter 13 cases.*

Except for the final payment on a claim, a Standing Chapter 13 Trustee shall not be obligated to issue disbursements of less than $15.00 to any individual claimant. However, such trustee may, in his discretion, issue such disbursements in a smaller sum on a general basis or on a case-by-case basis.

2. *Disposition of funds held by standing trustees upon conversion.*

Upon receipt of notice of the dismissal of a Chapter 13 case prior to the confirmation of the debtor's plan, the trustee shall refund any undisbursed plan payments to the debtor, as set forth in 11 U.S.C. § 1326(a)(2). Upon receipt of notice of the conversion of a Chapter 13 case either prior to or following the confirmation of the debtor's plan, the trustee shall forward any undisbursed funds to the trustee, if any, in the converted case. Upon receipt of notice of the dismissal of a Chapter 13 case following the confirmation of the debtor's plan, the trustee shall disburse any funds then on hand pursuant to the terms of the confirmed plan. Any funds received by the trustee following receipt of notice of the dismissal of the case shall be remitted to the debtor.

C. *Plan modification.*

1. *Definition of plan modification.*

A proposal to modify a Chapter 13 plan includes any proposal to materially:

a) Increase, decrease, or delay periodic payments due under an existing plan;

b) Increase, decrease, or delay periodic disbursements anticipated from an existing plan;

c) Change or revise the order of distribution of payments under an existing plan.

Notwithstanding the foregoing, a voluntary increase in plan payments, or early payoff of plan obligations alone, shall not constitute a proposal to modify a plan.

2. *Service of plan modification.*

Proposed modifications to Chapter 13 plans shall be by motion, served upon all parties in interest by the movant, and allow not less than twenty (20) days notice before the hearing, or twenty (20) days notice for the filing of objections to modifications if the "no-protest" notice procedure is used.

3. *Modification of plans incident to the filing of post-petition tax claims.*

Section 1305 of the Bankruptcy Code authorizes the filing of post-petition tax claims for inclusion in debtors' Chapter 13 plans. The inclusion of such claims in a plan frequently necessitates a request by the trustee that the plan be modified by an increase in the plan payment and/or an extension of the plan term to accommodate payment of such claims, and, pursuant to Section 1329 of the Bankruptcy Code, such requested modifications may not be allowed until after such notice and the opportunity for hearing as is appropriate.

Trustees must process a large volume of such post-petition tax claims, and the resulting modification process imposes a significant administrative burden on the trustees' office. Therefore, in any Chapter 13 case where the filing of a post-petition tax claim pursuant to Section 1305 of the Bankruptcy Code necessitates a modification of the terms of the confirmed plan, the trustee may

proceed to make the necessary modification to the plan and provide written notice of the same to the debtor and the debtor's attorney. If the trustee in his discretion determines that the required plan modification is of such a nature that it should be allowed only after service of a formal written motion to modify with such additional notice and opportunity for hearing as is appropriate, he may elect to do so.

D. *Compensation of attorneys and trustee.*

1. *Compensation of attorneys in Chapter 13 cases.*

In addition to complying with all other requirements for professional fee applications, applications for non-base attorneys fees in Chapter 13 cases shall cover only time and expenses incurred on non-base matters, shall not cover time or expenses incurred on base fee matters, and shall be submitted on Local Form 13. A proposed order in the format of Local Form 14 shall be submitted to the Court at the time the application is filed. It shall be completed except for the date and the amount of the fee and expenses. The accompanying notice shall be in the format of Local Form 15.

The full application and notice must be served on the debtor(s), the trustee, and the Bankruptcy Administrator. If the compensation requested exceeds $500, the notice must be served on all parties in interest.

2. *Noticing costs.*

The actual costs incurred by a Chapter 13 Standing Trustee for the service of Official Form 9I (Notice of Commencement of Case Under Chapter 13 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates) and the Notice of Entry of the Order Confirming Plan are priority claims of administration for which the Standing Trustee should be reimbursed from the respective Chapter 13 bankruptcy estates as such actual costs are incurred, provided that the Standing Trustee shall have given all parties in the respective cases adequate notice of his intention to have such actual costs reimbursed by inclusion of the same in Official Form 9I.

3. *Trustee's compensation in cases dismissed prior to confirmation.*

In any Chapter 13 case dismissed prior to confirmation, the Standing Trustee shall be allowed an administrative claim of One Hundred Dollars ($100.00) as an actual cost to the Standing Trustee for the set-up and processing of the case, and the Standing Trustee is authorized to recover the amount of said claim from any plan payments made by the debtor an being held in anticipation of confirmation by the Standing Trustee, the attorney for the debtor, or any other party, provided that in any case where the Standing Trustee has incurred actual costs in excess of this presumptively reasonable amount of One Hundred Dollars ($100.00), he may, by separate application pursuant to 11 U.S.C. § 503(a), seek reimbursement of such additional expenses as well.

## XIII. Adversary proceedings.

A. *Core and non-core matters.*

Federal Rules of Bankruptcy Procedure 7008 and 7012 require an allegation as to whether a proceeding is core or non-core. A party who alleges that the proceeding is non-core shall state whether the party does or does not consent to the entry of a final Order of Judgment by the Bankruptcy Judge. Failure to include the statement of consent does not constitute consent. Amendments to Rule 7012 require the defendant to admit or deny the allegation as to whether the proceeding is core or non-core.

In the event a party moves for a ruling as to whether an action is a core or non-core proceeding, the Court will ordinarily allow adverse parties twenty (20) days from the service of the motion within which to file responses. The filing of such a motion shall not postpone any time periods unless so stipulated by the parties or ordered by the Court.

Title 28 U.S.C. Section 157(c)(1) requires the Bankruptcy Judge to submit proposed findings of fact and conclusions of law to the District Court when the Bankruptcy Judge has heard a non-core proceeding and consent to such hearing under Section 157(c)(2) is not given. Federal Rule of Bankruptcy Procedure 9033 provides the procedure for objecting to, and review by the District Court of, specific findings and conclusions.

B. *Settlements in pending adversaries.*

Federal Rule of Bankruptcy Procedure 2002(a) requires that all creditors in a case receive notice of any proposed settlements, including those arising in adversary proceedings. In the Clerk's office, the settlement procedure is coordinated between the adversary and base case file. To facilitate this process, parties should follow the procedures set forth herein.

Parties should caption all documents (Motion to Approve Settlement, Notice, Certificate of Service and Proposed Order) with both the adversary and base case captions. Notice of the proposed settlement should be served on all parties in interest in the base case with service certified in writing. Copies of the documents are required as follows — Motion (original only), Notice and Certificate of Service (original plus one copy), Proposed Order (original plus two copies for Court and sufficient copies for each party to adversary).

C. *Settlements in closed adversaries.*

Caption all documents with base case caption only. Notice is provided as in the above paragraph regarding notice in pending adversaries. Copies of documents are required as follows — Motion, Notice and Certificate of Service (originally only), Proposed Order (original plus two copies for Court and sufficient copies for each party to adversary).

## XIV. Taxation of costs.

A. *Bill of costs.*

A party allowed costs shall, within ten (10) days after entry of the order or judgment, file and serve any desired bill of costs on the attorney for the opposing party. The bill of costs shall state the time that the costs thereon will be taxed, which time shall be no less than three (3) days from the date the bill of costs is served on the opposing party. A certificate of service that the opposing party was served shall be filed with the bill of costs. The provisions of Federal Rule of Bankruptcy Procedure 9006(f) should be considered in the computation of the deadline.

Note that while Federal Rule of Civil Procedure 54(d) provides for costs to the prevailing party as a matter of course unless the Court otherwise directs, Federal Rule of Bankruptcy Procedure 7054(b) provides that the Court *may* allow costs to the prevailing party. As to the allowability of attorney's fees as costs, note the requirement of Federal Rule of Bankruptcy Procedure 7008(b) that they be pleaded as a claim.

B. *Objection and hearing.*

Before the costs are taxed, a party objecting to any costs contained in the bill of costs shall file its objection specifying the ground for the objection, and serve the objection on opposing counsel. The Clerk will hear the objection after prior notice to all parties.

C. *Taxation.*

After the hearing, or if no objection is filed, on the date stated in the bill of costs, the Clerk may enter an order taxing the costs. The taxation of costs made by the Clerk shall be final unless modified on appeal as provided in subdivision (D).

D. *Appeal.*

A party may appeal the decision of the Clerk in the taxation of costs by filing a Motion to Retax Costs with the Court within five (5) days of the entry of the

order of taxation by the Clerk. The party appealing shall give notice and opportunity for a hearing to the opposing party.

## XV. Appeals.

A. *Fees.*

All applicable fees must accompany any notice of appeal filed with the Court. Both the appeal fee and the docketing fee must be tendered at the time the notice of appeal is filed. The Judicial Conference Miscellaneous Bankruptcy Fee Schedule has been amended to make it clear that the $100.00 appeals docketing fee also applies to cross-appeals.

B. *Record on appeal.*

As provided by the Federal Rules of Bankruptcy Procedure 8006, any party filing a designation of items to be included in the record on appeal shall provide to the Clerk a copy of the items designated. The Clerk will provide the party or parties in question with twenty (20) days written notice of this requirement. No record on appeal will be considered complete for transmission until copies of all designated items are tendered to the Clerk.

In addition, the Clerk's office will now promptly refer procedurally defective, incomplete records on appeal to the District Court for appropriate action. Problems frequently arise where parties fail to file timely designations of records on appeal or fail to arrange for the preparation of any transcripts so designated, as required by Federal Rule of Bankruptcy Procedure 8006.

C. *Post-appeal motions.*

The District Court has instituted a procedure whereby it now sets up an appeal file upon notification from the Bankruptcy Clerk that a notice of appeal has been filed. As a result of this change, motions for particular kinds of relief that only the District Judge may grant pursuant to Federal Rules of Bankruptcy Procedure 8001 *et seq.* may be filed directly with the District Clerk prior to the docketing of the appeal pursuant to Federal Rule of Bankruptcy Procedure 8007 (b).

D. *Interlocutory appeals.*

Be aware of the special procedural requirements in Federal Rules of Bankruptcy Procedure 8001 and 8003 affecting interlocutory appeals.

## XVI. Reopening cases.

Any party seeking to reopen a case pursuant to Section 350(b) of the Bankruptcy Code shall file with the Court a motion and give ten (10) days notice of the filing of the motion and the opportunity to request a hearing to the Trustee, the Trustee's attorney, the debtor, the debtor's attorney, and the Bankruptcy Administrator.

Do not notice a hearing on a particular matter in a previously closed case without first filing and noticing the motion to reopen and tendering the appropriate filing fee.

Unless the case or proceeding is to be reopened to correct an administrative error in the record, to aid the debtor in furtherance of the discharge, or to file a complaint to determine dischargeability other than under Section 523(c), a filing fee equal to the current case or proceeding filing fee must be paid. It is not necessary to pay the administrative fee along with the filing fee when the case is reopened. If the fee is not timely paid as required, the motion to reopen will be ordered stricken from the record.

If the original case was closed without payment in full of the filing fee, the outstanding balance of that initial filing fee must be tendered prior to reopening, as well.

## XVII. Court mailing list.

The Clerk will maintain a master mailing list of all attorneys and any other persons who desire to receive notification of certain matters affecting practice and procedure in the Court. Each person who wishes to be included on this mailing list should provide the Clerk with a current mailing address and update this information as necessary.

The Clerk's office prepares and distributes an edition of *The Bankruptcy Newsletter* once every three months to those attorneys and members of the general public who send a self-addressed stamped envelope to the Clerk's office and request a copy. The envelope and postage should be sufficient to mail twenty (20) pages. The *Newsletter* is prepared during the first week of March, June, September, and December of every year. The *Newsletter* covers such topics as recent caselaw from the Supreme Court, the Fourth Circuit Court of Appeals, and the Bankruptcy Court for the Western District of North Carolina; legislative changes; calendar matters; educational matters; and other matters of interest in the Clerk's office, the Bankruptcy Administrator's office, and the offices of the Chapter 13 Standing Trustees.

## Rule XVIII. Administrative guide for electronic case filing procedures.

1. *Registration for training in case management/Electronic case filing system (CM/ECF).*

A. *Passwords.*

Each attorney who receives training and is admitted to practice in this court shall be entitled to one CM/ECF system password to permit the attorney to participate in the electronic retrieval and filing of pleadings and other papers in accordance with the system. The password will be issued after receiving court training. A separate PACER password will be required to access case information from the court's Internet website.

B. *Training registration.*

1.) After completion of training with the court, each registering attorney will select a password for the training system. Upon completion of the training materials, a registering attorney may contact the Clerk's Office for selection/activation of a live system password.

2.) The training registration form shall be completed and submitted for each party requesting training. The form may be duplicated for use.

3.) All registration forms shall be mailed or delivered to the Charlotte divisional office. Attention: United States Bankruptcy Court, Western District of North Carolina, Post Office Box 34189, Charlotte, North Carolina 28234-4189, Attention: Systems Administrator.

4.) Once registered, an attorney may withdraw from participation in the system by providing the court with written notice of such withdrawal. Upon receipt of written notice, the court will immediately cancel the attorney's password and will delete the attorney from any applicable electronic service list.

2. *Electronic filing and service of documents.*

A. *Filing.*

1.) All documents should be separately filed, imaged and related to the pleading to which they refer, with the exception that exhibits may be electronically filed together under one docket number.

2.) Exhibits/Attachments to documents — including but not limited to leases, notes and the like, which are not available in electronic form, shall be electronically imaged (i.e., scanned) and filed using Portable Document Format (pdf).

3.) *Expedited Matters.*

a. Charlotte, Shelby and Wilkesboro — Attorneys shall contact the judges' chambers in Charlotte by telephone before such expedited matters are filed on the system.

b. Asheville and Bryson City — Attorneys shall contact the division Clerk's Office in Asheville by telephone before such expedited matters are filed on the system.

B. *Service.*

1.) Whenever a pleading or other paper is filed electronically in accordance with the electronic filing procedures, the system will automatically generate a "Notice of Electronic Filing" at the time of docketing.

2.) The filing party shall serve the pleading or other paper upon all persons entitled to notice or service in accordance with the applicable rules, or, if service by first class mail is permitted under the rules, the filing party may make service in accordance with 2-B-3 below.

3.) If the recipient of notice or service is a registered attorney in the CM/ECF system, service of the Notice of Electronic Filing shall be the equivalent of service of the pleadings or other paper by first class mail, postage prepaid.

C. *Signatures; Affidavits of service.*

1.) *Registered attorneys and parties with legal representation.* Petitions, lists, schedules, statements, amendments, pleadings, affidavits, claims and other documents which must contain original signatures, or which require verification under FRBP 1008, or an unsworn declaration as provided in 28 U.S.C. § 1746, shall be filed electronically or in accordance with the Administrative Order and Administrative Guide. Originally executed copies must be maintained by the filer until four (4) years after the closing of the case, and upon request of the court, the filer must provide original documents for review. The pleadings or other documents electronically filed shall indicate a signature with the party's name typed in full, e.g. "/s/Jane Doe."

2.) *Pro Se Filers.* Petitions, lists, schedules, statements, amendments, pleadings, affidavits, claims and other documents which must contain original signatures, or which require verification under FRBP 1008, or an unsworn declaration as provided in 28 U.S.C. § 1746, must be submitted with full signature. These documents will be scanned by the Clerk's Office, and shall be maintained in the Clerk's Office after scanning.

D. *Fees payable to the clerk.*

1.) *Registered users.* For filings that require a fee, application for authorization of credit card payment must have been mailed or delivered to Office of the Clerk, United States Bankruptcy Court, Western District of North Carolina, Post Office Box 34189, Charlotte, North Carolina 28234-4189. The Clerk's Office in Charlotte will retain the original credit card application form and provide copies to the other applicable divisions.

2.) *Non-registered users.* For filings that require a fee, current rules for methods of payments must be followed.

E. *Orders.*

In order to facilitate the entry of the order, proposed orders shall be submitted following the instructions found on the court's Internet website (www.ncwb.uscourts.gov). Only attorneys who are registered users on the court's CM/ECF System will be allowed to file orders electronically. Multiple signature agreements will need to be submitted to the court after the completion of all signatures. The pleading may be scanned and submitted by one party.

Note: Parties without legal representation will be handled on a case-by-case basis.

F. *Docketing of pleadings or other documents.*

The person electronically filing a pleading or other document will be responsible for docketing the pleading or document by selecting the appropriate event from the categories contained in the system.

3. *Conventional (non-electronic) filing of documents.*

A. *Conventional (non-electronic) filings.*

The following documents shall be filed non-electronically unless specifically authorized by the court:

1.) *Documents to be filed under seal.* A motion to file document(s) under seal shall be filed electronically; however, the actual document(s) to be filed under seal shall be filed conventionally. The order of the court authorizing the filing of such document(s) under seal shall be entered electronically by the Clerk's Office or the presiding judge, and shall indicate that the motion to file documents under seal has been "so ordered" in accordance with Paragraph 2-E above. The order only shall be attached to the document(s) under seal and be delivered to the Clerk of Court.

2.) *Trial Exhibits.* Trial Exhibits shall be filed conventionally.

3.) *Transcripts.* Transcripts shall be filed conventionally.

4.) *Claims.* Claims shall be filed conventionally.

B. *Service of conventional or 3.5 inch floppy disk filings.*

Pleadings or other documents which are filed conventionally shall be served in the manner provided for, and on those parties entitled to notice, in accordance with the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules except as otherwise provided by order of the court.

C. *Cover sheet for documents filed conventionally.*

A completed cover sheet shall be attached to documents filed conventionally, noting the number of pages in the document.

D. *Maintenance of documents filed conventionally.*

Petitions, lists, schedules, statements, amendments, pleadings, affidavits, claims and other documents which must contain original signatures, or which require verification under FRBP 1008, or an unsworn declaration as provided in 28 U.S.C. § 1746, shall be filed electronically or in accordance with the Administrative Order and Administrative Guide. Originally executed copies must be maintained by the filer until four (4) years after the closing of the case, and upon request of the court, the filer must provide original documents for review.

E. *Receipt of case number.*

Petitions and complaints filed over the counter under CM/ECF will receive the case number and copies back within 24 hours of filing. Emergency filings will be processed at the time of filing.

F. *Envelopes.*

Petitions, pleadings and complaints filed over the counter must include a pre-addressed, stamped envelope, with sufficient postage to return processed documents. If an attorney has a mail slot in the Clerk's Office, it will not be necessary to provide an envelope.

G. *Number of copies.*

The court requires the following number of full copies of bankruptcy petitions, including all schedules, and statements filed over the counter.

Chapter 7: Original plus one (1) copy
Chapter 9: Original plus four (4) copies
Chapter 11: Original plus three (3) copies
Chapter 13: Original plus one (1) copy

After the original petition is filed and scanned, it will be returned to the debtor's attorney. The copy requirements listed above include those required for service on the trustee, SEC, IRS and the Bankruptcy Administrator. The court will only retain original petitions, including schedules and statements, filed by *pro se* debtors.

4. *Public access to the system docket.*

A. *Internet access.*

Any person or organization can access the CM/ECF system for information purposes through the national PACER system. PACER passwords can be obtained by contacting PACER directly.

Such access to the system through Internet site will allow retrieval of the docket sheet and documents. Access to the system will be on a "read only" basis.

B. *Public access at the court.*

The public will have electronic access in the Clerk's Office for viewing the documents and docket record filed in the system during regular business hours, Monday through Friday.

C. *Conventional copies and certified copies.*

Conventional copies of the electronically filed documents may be purchased at the Clerk's Office during regular business hours, Monday through Friday. Certified copies may be purchased at the Clerk's Office during regular business hours Monday through Friday. The fee for copying and certification will be in accordance with the fee charged by the copy service and/or 28 U.S.C. § 1930. (February 2001)

# APPENDICES

## APPENDIX 1

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

IN RE: )
)
_____ )
_____ ) Bankruptcy Case No. _____
)
)
_____ ) _____

CERTIFICATE OF DISCHARGE

The undersigned Clerk of the United States Bankruptcy Court for the Western District of North Carolina hereby gives notice that:

1. The above-named debtor(s) filed a Chapter ____ bankruptcy petition on _____.

2. The debtor(s) listed a judgment in his/her/their Schedule of Liabilities as follows:

_____
_____
_____
_____

3. The case file records for the above-named debtor(s) indicate that this judgment creditor was given due notice of the bankruptcy filing as required by law.

4. This judgment is therefore discharged to the extent provided by 11 U.S.C. 523(a) and 11 U.S.C. 524(a).

_____
J. Baron Groshon
Clerk of Court
United States Bankruptcy Court
Western District of North Carolina

## APPENDIX 2

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | |
| | ) | ADMINISTRATIVE ORDER |
| PROCEDURES IN AID OF | ) | AUTHORIZING ADMINISTRATIVE |
| THE ADMINISTRATION OF | ) | CLAIM BY TRUSTEE IN CASES |
| CHAPTER 13 PLANS | ) | DISMISSED PRIOR TO |
| | ) | CONFIRMATION |

The Court having considered this matter and it appearing that Section 1326(a) (2) of the Bankruptcy Code authorizes the Chapter 13 trustee to recover from any plan payments returned to a debtor in any Chapter 13 case dismissed prior to confirmation any costs of administration approved by the Court, and it further appearing that the costs incurred by the trustee in the set-up and processing of a case dismissed prior to confirmation total at least one hundred dollars ($100.00),

And the Court concluding that the trustee is entitled to an administrative claim in such amount in any such Chapter 13 case administered through his office and that he should be allowed to recover such claim from plan payments made by the debtor,

Based upon the foregoing, IT IS HEREBY ORDERED that, pursuant to the notice and authorization provided herein, in any Chapter 13 case dismissed prior to confirmation, the trustee shall be allowed an administrative claim of one hundred dollars ($100.00), said claim representing the actual costs to the trustee for the set-up and processing of the case, and that the trustee is authorized to recover, pursuant to Section 1326(a) (2), the amount of said claim from any plan payments made by the debtor and being held in anticipation of confirmation by the trustee, the attorney for the debtor, or any other party, PROVIDED; however, that in any such case where the trustee has incurred actual costs in excess of the presumptively reasonable amount of one hundred dollars ($100.00), he may, by separate application pursuant to Section 503(a) of the Bankruptcy Code, seek reimbursement of such additional expenses, as well.

Dated this the 23rd day of August, 1991.

/s/Marvin R. Wooten
Bankruptcy Judge

/s/George R. Hodges
Bankruptcy Judge

## APPENDIX 3

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | |
| | ) | ADMINISTRATIVE ORDER |
| PROCEDURES IN AID OF | ) | ESTABLISHING PROCEDURE FOR |
| THE ADMINISTRATION OF | ) | THE ALLOWANCE OF CLAIMS |
| CHAPTER 13 PLANS | ) | AND SETTING OF PERCENTAGE |
| | ) | DIVIDEND IN ALL CASES |

Upon consideration of this matter and the Court concluding that a procedure should be established herein for the allowance of claims to be paid pursuant to confirmed Chapter 13 plans, and for the designation of a minimum percentage dividend that must be paid to the general unsecured creditors in any such case,

Based upon the foregoing, IT IS HEREBY ORDERED that following expiration of claims bar date as set forth in Federal Rule of Bankruptcy Procedure 3002, the trustee shall file with the Court and serve upon all parties a motion for allowance of claims determination which shall include a report of all claims filed in the case and the trustee's proposed treatment of such claims under the plan. The motion shall also set forth the minimum percentage dividend that the trustee believes should be paid to the general unsecured creditors through the plan and request approval of the sam. The motion shall be accompanied by a notice to all parties which shall provide that any party objecting to the proposed treatment of any claim and/or the proposed minimum percentage dividend as reported therein must file a written response and request for hearing with the Clerk within the appropriate time period as prescribed by the Federal Rules of Bankruptcy Procedure. If no written responses are filed as set forth therein, the trustee's motion shall be granted pursuant to the authority of this administrative order.

Dated this the 23rd day of August, 1991.

/s/Marvin R. Wooten
Bankruptcy Judge

/s/George R. Hodges
Bankruptcy Judge

## APPENDIX 4

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | |
| | ) | ADMINISTRATIVE ORDER |
| PROCEDURES IN AID OF | ) | AUTHORIZING PROCEDURE |
| THE ADMINISTRATION OF | ) | FOR TRUSTEES' MODIFICA- |
| CHAPTER 13 PLANS | ) | TION OF PLANS INCIDENT TO |
| | ) | THE FILING OF POST- |
| | ) | PETITION TAX CLAIMS |

The Court having considered this matter and it appearing that Section 1305 of the Bankruptcy Code authorizes the filing of post-petition tax claims for inclusion in debtors' Chapter 13 plans, and it further appearing that the inclusion of such a claim in a plan frequently necessitates a request by the trustee that the plan be modified by an increase in the plan payment and/or an extension of the plan term to accommodate payment of such claim, and, pursuant to Section 1329 of the Bankruptcy Code, such requested modifications may not be allowed until after such notice and the opportunity for hearing as is appropriate, and it further appearing that the trustees must process a large volume of such post-petition tax claims and the resulting modification process imposes a significant administrative burden on the trustees' offices,

And the Court concluding that an expedited process should be adopted to facilitate the modification of Chapter 13 plans to accommodate the filing of such tax claims in such a way as to reduce the actual costs to the trustees,

Based upon the foregoing, IT IS HEREBY ORDERED that in any Chapter 13 case where the filing of a post-petition tax claim pursuant to Section 1305 of the Bankruptcy Code necessitates a modification of the terms of the confirmed plan, the trustee may, pursuant to the notice and authorization provided by this administrative order, proceed to make the necessary modification to the plan and provide written notice of the same to the debtor and debtor's attorney; PROVIDED, that if the trustee in his discretion determines that the required plan modification is of such a nature that it should be allowed only after service of a formal written motion to modify with such additional notice and opportunity for hearing as is appropriate, he may elect to do so.

Dated this the 23rd day of August, 1991.

/s/Marvin R. Wooten
Bankruptcy Judge

/s/George R. Hodges
Bankruptcy Judge

## APPENDIX 5

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

IN RE:

| | | |
|---|---|---|
| PROCEDURES IN AID OF THE ADMINISTRATION OF CHAPTER 13 PLANS | ) | ADMINISTRATIVE ORDER SETTING PROCEDURE FOR THE PROCESSING OF PROOFS OF CLAIM FOR PROPERTY TAXES |

The Court having considered this matter and it appearing that some county and municipal taxing authorities customarily file proofs of claim with the Chapter 13 standing trustees for the collection of taxes owed by debtors for a current calendar year, and will file such proofs of claim with the trustees during the summer or fall of such calendar year even though the taxes are payable without interest or penalty through the end of such calendar year, and it further appearing to the Court that the majority of such claims will be satisfied by payment by the debtors or their agents on or before the date that the taxes are last payable without interest or penalty, and that requiring the trustees to receive and process all such proofs of claim for inclusion in the debtors' plans when most will ultimately be otherwise satisfied by payment imposes an unnecessary cost upon the trustees' operations,

And the Court concluding that such a process results in a less efficient administration of Chapter 13 plans in this District and should, therefore, be modified in such a way as to accommodate the filing of proofs of claim for property taxes while, at the same time, minimizing unnecessary costs of administration, and,

Based upon the foregoing, THE COURT ORDERS AS FOLLOWS:

1. The standing trustees shall accept for filing all properly-executed proofs of claim for property taxes even when such proofs of claim are filed prior to the date that the taxes in question are last payable without penalty or interest as provided by applicable state law;

2. The trustees shall proceed with no further administration of such proofs of claim until the date that such taxes are last payable without penalty or interest has, in fact, passed;

3. Following the passage of such date, the county or municipal taxing authority MUST PROVIDE TIMELY WRITTEN NOTIFICATION to the trustee if the taxes that are the subject of the respective proof of claim remain unpaid and if the taxing authority desires to have the debt included for payment by the trustee through the Chapter 13 plan;

4. Unless and until the taxing authority provides such timely written notice to the trustee as set forth above, the proof of claim is deemed to be OBJECTED TO by the trustee on the grounds that the claim has been satisfied by payment, and such objection is hereby SUSTAINED by the Court;

Dated this the 20th day of September, 1991.

/s/Marvin R. Wooten
Bankruptcy Judge

/s/George R. Hodges
Bankruptcy Judge

## APPENDIX 6

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

IN RE:

| | |
|---|---|
| PROCEDURES IN AID OF THE ADMINISTRATION OF CHAPTER 13 PLANS | ADMINISTRATIVE ORDER SETTING PROCEDURE FOR THE PROCESSING OF CERTAIN PROOFS OF CLAIM OF IRS |

The Court having considered this matter and it appearing that from time to time, the Internal Revenue Service (hereinafter "IRS") will file proofs of claim with the Chapter 13 standing trustees for the collection of federal taxes prior to the due date for the federal tax return, including extensions, under applicable law, and it further appearing to the Court that the majority of such claims will be satisfied by direct payment to IRS by the debtors on or before such due date, and that requiring the trustees to receive and process all such proofs of claim for inclusion in the debtors' plans when most will ultimately be otherwise satisfied by payment imposes an unnecessary administrative cost upon the trustees' operations,

And the Court concluding that such a process results in a less efficient administration of Chapter 13 plans in this District and should, therefore, be modified in such a way as to accommodate the filing of such proofs of claim for federal taxes while, at the same time, minimizing unnecessary costs of administration, and,

Based upon the foregoing, THE COURT ORDERS AS FOLLOWS:

1. The standing trustees shall accept for filing any and all properly-executed proofs of claim from IRS even when such proofs of claim are filed prior to the due date for the federal tax returns in question, including extensions, under applicable federal law;

2. The trustees shall proceed with no further administration of such proofs of claim until the due dates for the federal tax returns in question have, in fact, passed;

3. Following the passage of such return due dates, the IRS MUST PROVIDE TIMELY WRITTEN NOTIFICATION to the trustee if the taxes that are the subject of the respective proofs of claim remain unpaid and if the IRS desires to have the debts included for payment by the trustee through the respective Chapter 13 plans;

4. Unless and until the IRS provides such timely written notice to the trustee as set forth above, the proofs of claim are deemed to be OBJECTED TO by the trustee for the reason that the claims have been satisfied by direct payment, and such objections are hereby SUSTAINED by the Court;

Dated April 8th, 1993.

/s/Marvin R. Wooten
Bankruptcy Judge

/s/George R. Hodges
Bankruptcy Judge

## APPENDIX 7

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

| | |
|---|---|
| IN RE: ) | |
| ) | |
| PROCEDURES IN AID OF ) | ADMINISTRATIVE ORDER |
| THE ADMINISTRATION OF ) | AUTHORIZING REIMBURSEMENT |
| CHAPTER 13 PLANS ) | OF CERTAIN NOTICING COSTS |
| ) | INCURRED BY TRUSTEES |
| ) | |

The Court having considered this matter and it appearing that pursuant to Federal Rules of Bankruptcy Procedure 2002 and 3020, the Clerk of Court having delegated to the offices of the Chapter 13 Standing Trustees in this District responsibility for the service of the Notice of the Section 341 Meeting of Creditors and the Time Fixed for Filing Objections to and the Hearing to Consider Confirmation of Chapter 13 Plans, and Notice of the Entry of the Order Confirming Plan, and it further appearing that the actual costs incurred in the service of said notices are presently being paid for by the Standing Trustees from their respective percentage fee allowances,

And the Court concluding that the actual costs incurred by the Standing Trustees incidental to the service of said notices constitute priority claims of administration pursuant to Sections 503 and 507 of the Bankruptcy Code which should, after appropriate notice and the opportunity for hearing, be allowed and reimbursed to the Standing Trustees from the respective Chapter 13 bankruptcy estates,

Based upon the foregoing, IT IS HEREBY ORDERED that the actual costs incurred by the Chapter 13 Standing Trustees of this District for the service of the notices referenced hereinabove are priority claims of administration for which the Standing Trustees should be reimbursed from the respective chapter 13 bankruptcy estates as such actual costs are incurred, PROVIDED that the Standing Trustees shall have given all parties in the respective cases adequate notice of their intention to have such actual costs reimbursed to them by inclusion of the same in the Notice of the Section 341 Meeting of Creditors.

Dated this the 23rd day of August, 1991.

/s/Marvin R. Wooten
Bankruptcy Judge

/s/George R. Hodges
Bankruptcy Judge

## APPENDIX 8

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| IN RE: | ) | Case No. _____ |
| | ) | Chapter _____ |
| Debtor(s). | ) | |
| _____ | ) | |
| | ) | Adversary Proceeding |
| | ) | No. _____ |
| Plaintiff(s), | ) | |
| v. | ) | |
| Defendant(s). | ) | |
| _____ | ) | |

### INITIAL PRE-TRIAL ORDER

Pursuant to Bankruptcy Rules 7016 and 7026 (which incorporate Rules 16 and 26 Fed. R. Civ. Pro.), it is hereby ORDERED that:

1. The parties shall meet pursuant to Rule 26(f) by [Order date +20 days]. (The meeting requirement may be satisfied by correspondence, telecommunication, facsimile transmission or other forms of communication).
2. The parties shall comply requirements of Rule 26(a) by [+10 days].
3. The parties shall file with the court by [+5 days] a Report which contains the following matters:
   a. A statement that the joinder of all parties and issues is complete or a statement of how such joinder is incomplete;
   b. A statement of whether the parties have discussed settlement and whether the assistance of the court regarding settlement is desired at this time;
   c. The discovery plan setting forth those matters specified in Rule 26(f)(1)-(4);
4. All discovery in this action shall be completed by [+90 days].
5. Any dispositive motions shall be filed by [+15 days];
6. Paragraphs 1—3 of this Order shall not apply in adversary proceedings to recover money or property having a value of less than $15,000.
7. The provisions of this Order may be modified or substituted for by agreement of all of the parties by preparing a proposed substitute Order signed by the parties and submitted to the court for its consideration and entry. In the absence of agreement, any party may move the court to modify this Order or for any other matter relating to pre-trial administration at any time by proper motion and notice of hearing. These provisions are deemed to satisfy the requirement that the court conduct conferences with counsel pursuant to Rules 16 and 26.
8. At the conclusion of the period for discovery, the court will send a Notice to Counsel which solicits a mutually convenient trial date. Two weeks thereafter, the court will enter a Final Pre-Trial Order and Notice of Trial which will require supplementation of disclosure and discovery, exchange of exhibits, identification of witnesses and which will set a time certain for trial.

After entry of that Order, continuances will be granted only for compelling circumstances.

Dated: _____.

_____
United States Bankruptcy Judge

## APPENDIX 9

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

| | |
|---|---|
| IN RE: | Case No. _____ |
| | Chapter _____ |
| Debtor(s). | |
| _____ | Adversary Proceeding No. _____ |
| Plaintiff(s), | |
| v. | |
| Defendant(s). | |
| _____ | |

### NOTICE TO COUNSEL

Our records indicate that the period for discovery set out in the Pre-Trial Order has now elapsed, and the case should be ripe for trial.

If the case is ready for trial, within fourteen days of the date of this Notice, confer with opposing counsel and the calendar clerk for scheduling a mutually convenient trial date. If this has not been accomplished within fourteen days, the court will set a trial date.

If the case is not ready for trial for any reason, within fourteen days notify the court in writing of the status of the case and state the reasons that the case is not ripe for trial.

This the ____ day of _____, 1995.

_____
United States Bankruptcy Judge

APPENDIX 10

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

| | | |
|---|---|---|
| IN RE: | ) | Case No. _____ |
| | ) | Chapter _____ |
| | ) | |
| Debtor(s). | ) | |
| _____ | ) | |
| | ) | Adversary Proceeding |
| | ) | No. _____ |
| | ) | |
| Plaintiff(s), | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| | ) | |
| Defendant(s). | ) | |
| _____ | ) | |

FINAL PRE-TRIAL ORDER
AND
NOTICE OF TRIAL

Pursuant to Bankruptcy Rule 7016 (which incorporates Rule 16 Fed. R. Civ. Pro. 16), it is hereby ORDERED that:

1. The trial of this matter is set for ____.m. on _____ at the _____.

2. By [trial date -7 days] the parties shall do the following:
   a. Supplement disclosures pursuant to Rule 26(a);
   b. Supplement discovery responses;
   c. Number and exchange copies of all anticipated trial exhibits (with respect to exhibits which cannot reasonably be copied, permitting inspection of the exhibit satisfies this requirement);
   d. Identify by name all witnesses anticipated to be called at the trial; and
   e. Exchange a list of issues to be decided at the trial.

3. By [trial date -3 days] each party shall file with the court the following documents:
   a. List of witnesses;
   b. List of exhibits; and
   c. Statement of issues to be decided.

4. If any party desires to submit a trial brief or other submission of authorities, it must be filed and served on opposing parties no later than the deadline set out in paragraph 3 above.

5. Failure to timely comply with these requirements may subject the offending party to sanctions (which may include exclusion of evidence, refusal to consider submissions and entry of adverse judgment on some or all issues).

Dated: _____

_____
United States Bankruptcy Judge

## APPENDIX 11

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

| | |
|---|---|
| IN RE: | ) |
| | ) |
| | ) |
| Order in aid of case administration: | ) |
| Electronic Case Filing Procedures | ) |
| | ) |
| | ) |
| _____ | ) |

### ADMINISTRATIVE ORDER ADOPTING ELECTRONIC CASE FILING PROCEDURES

Federal Rule of Civil Procedure 83 and Federal Rules of Bankruptcy Procedure (FRBP) 50055(a)(2), and 9011 authorize this court to establish practices and procedures for the filing, signing and verification of pleadings and papers by electronic means.

An Administrative Guide for Electronic Filing outlining procedures for filing, signing an verifying pleadings and papers by electronic means has been presented to and reviewed by this court.

It has been found that these Electronic Case Filing Procedures are consistent with the present fee structure adopted by the Judicial Conference of the United States pursuant to 28 USC §§ 1913, 1914 and 1930. It has been found that these procedures do not impair the ability of the Clerk of this Court to control the court's docket under FRBP 5005, nor do these procedures impair the ability of the clerk to perform her statistical reporting responsibilities to this court and to the Administrative Office of the United States Courts.

It is therefore ORDERED that:

1. The procedures for filing, signing, noticing and verifying pleadings and papers by electronic means, entitled *Administrative Guide for Electronic Case Filing* , are hereby approved by this court and will be updated periodically and made available on the court's Internet website. Updates will also be approved by this Administrative Order;

2. The electronic filing of a petition, pleading, motion, claim or other paper by an attorney who is a registered participant in the Electronic Case Filing system shall constitute the signature of that attorney under FRBP 9011;

3. No attorney shall knowingly permit or cause to permit his/her password to be utilized by anyone other than an authorized employee of his/her law firm;

4. No person shall knowingly utilize or cause another person to utilize the password of a registered attorney unless such person is an authorized employee of his/her law firm;

5. The electronic filing of a pleading or other paper in accordance with the Electronic Case Filing Procedures shall constitute entry of that pleading or other paper on the docket kept by the clerk pursuant to FRBP 5003;

6. The Office of the Clerk shall enter all orders, decrees, judgments and amendments of the court in accordance with the Electronic Filing Procedures, which shall constitute entry of the order, decree, judgment or proceeding on the docket kept by the clerk under FRBP 9021;

7.

a. Whenever a pleading or other paper is filed electronically in accordance with the Electronic Filing Procedures, the Office of the Clerk shall serve the

filing party with a "Notice of Electronic Filing" by electronic means at the time of docketing;

b. The filing party shall serve the pleading or other paper upon all persons entitled to notice or service in accordance with the applicable rules, or, if service by first class mail is permitted under the rules, the filing party may make service in accordance with sub-paragraph (c) below;

c. If the recipient of notice or service is a registered participant in the Electronic Case Filing System, service by electronic means of the Notice of Filing shall be the equivalent of service of the pleadings or other paper by first class mail, postage prepaid.

8. Participation in the Electronic Case Filing System by receipt of a password from the court shall constitute a request for service and notice electronically pursuant to FRBP 9036. Participants in the Electronic Case Filing System, by receiving a password from the court, agree to receive notice and service by electronic means;

9. Any order filed and signed electronically and hence without the original signature of a judge shall have the same force and effect as if the judge had affixed his signature to a paper copy of the order and it had been entered on the document in a conventional manner;

10. When an attorney electronically files a verified pleading, the filing must include an image of the verified pleading including the page upon which the original signature appears. The attorney will thereafter maintain in his or her files the original document so filed (electronically or manually) for a period ending four (4) years after the case or proceeding in which the verified pleading is filed is closed;

11. Tendered orders submitted to the court may be submitted by electronic means and must be submitted in a format that is outlined by the court.

_____

George R. Hodges
Chief United States Bankruptcy Judge

_____

J. Craig Whitley
United States Bankruptcy Judge

(February 2001)

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# RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

As amended through August 1, 1982.
With amendments received through September 10, 1997.


Rule
1. Scope of rules.
2. Petition.
3. Filing petition.
4. Preliminary consideration by judge.
5. Answer; Contents.
6. Discovery.
7. Expansion of record.
8. Evidentiary hearing.
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10. Powers of magistrates.

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**Appendix of Forms**

Model form for use in applications for habeas corpus under 28 U.S.C. § 2254.
Model form for use in 28 U.S.C. § 2254 cases involving a Rule 9 issue.

Index follows Rules.


## Rule 1. Scope of rules.

(a) *Applicable to cases involving custody pursuant to a judgment of a state court.* These rules govern the procedure in the United States district courts on applications under 28 U.S.C. § 2254:

(1) By a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and

(2) By a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.

(b) *Other situations.* In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.

**Legal Periodicals.** — For a note discussing the development of habeas corpus relief, the application of the doctrines of exhaustion, comity and federalism, and O'Sullivan v. Boerckel, see 78 N.C.L. Rev. 1604 (2000).

### CASE NOTES

**Constitutionality.** — The § 2254(d)(1) standard of review does not violate the due process clause or result in an unconstitutional suspension of the writ Fisher v. Lee, 215 F.3d 438 (4th Cir. 2000), cert. denied, — U.S. —, 121 S. Ct. 822, 148 L. Ed. 2d 706 (2001).

**U.S. Supreme Court Review under and Application of § 2254.** — The U.S. Supreme Court has determined that the following basic premise shall inform its interpretation of both parts of § 2254(d)(1): first, the requirement that the determinations of state courts be tested only against "clearly established Federal law, as determined by the Supreme Court of the United States," and second, the prohibition on the issuance of the writ unless the state court's decision is "contrary to, or involved an unreasonable application of," that clearly established law. As to the second prong of this interpretation, the court said that this statute (the federal version) directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody—or, as in this case, his sentence of death—violates the Constitution, that independent judgment should prevail. Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

**Denial of Habeas Relief Held Proper.** — The United States Court of Appeals for the Fourth Circuit was required to deny the defendant relief under 28 U.S.C. § 2254 where the

Virginia Supreme Court's ruling that the defendant was not entitled to a jury instruction on parole ineligibility under Virginia's three-strikes law was neither contrary to, or an unreasonable application of, clearly established federal law. Ramdass v. Angelone, 530 U.S. 156, 120 S. Ct. 2113, 147 L. Ed. 2d 125 (2000).

Defendant who claimed that his counsel was ineffective for failing to put forth available evidence that would support the mitigating circumstance that he aided in the apprehension of another capital felon, as recognized by § 15A-2000(f)(8), was not entitled to habeas corpus relief, because the state MAR court's denial of defendant's ineffectiveness of counsel claim was not contrary to, or an unreasonable application of, Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Bacon v. Lee, 225 F.3d 470 (4th Cir. 2000), cert. denied, — U.S. —, 121 S. Ct. 1420, 149 L. Ed. 2d 360 (2001).

**Petitioner's Allegation of Error Did Not Raise a Constitutional Issue.** — This rule requires that an application for writ of habeas corpus shall only be entertained on the grounds that the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States". Where petitioner's allegation of error in questioning the jury on views regarding life sentence and the possibility of parole did not raise a constitutional issue, his petition was denied. Skipper v. Lee, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 21347 (E.D.N.C. Nov. 30, 1999), aff'd, 238 F.3d 414 (4th Cir. 2000).

**Applied** in Moore v. Brown, — F.3d —, 2000 U.S. App. LEXIS 11963 (4th Cir. May 30, 2000).

**Cited** in McCarver v. Lee, 221 F.3d 583 (4th Cir. 2000), cert. denied, 531 U.S. 1089, 121 S. Ct. 809, 148 L. Ed. 2d 694 (2001); Adkins v. North Carolina Att'y Gen., — F.3d —, 2000 U.S. App. LEXIS 14442 (4th Cir. June 22, 2000).

## Rule 2. Petition.

(a) *Applicants in present custody.* If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.

(b) *Applicants subject to future custody.* If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.

(c) *Form of petition.* The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

(d) *Petition to be directed to judgments of one court only.* A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

(e) *Return of insufficient petition.* If a petition received by the clerk of a district court does not substantially comply with the requirements of Rule 2 or Rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.

CASE NOTES

**Petitioner failed to forecast evidence of material issues of disputed facts.** — Petitioner's motion for an evidentiary hearing was denied where he failed to forecast evidence of material issues of disputed fact regarding ineffective assistance of counsel for: (1) failing to present a diminished capacity defense, (2) failing to request an instruction regarding nonstatutory mitigating circumstances, and (3) failing to present evidence on petitioner's's mental age and retardation. Skipper v. Lee, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 21347 (E.D.N.C. Nov. 30, 1999), aff'd, 238 F.3d 414 (4th Cir. 2000).

## Rule 3. Filing petition.

(a) *Place of filing; Copies; Filing fee.* A petition shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. If the petitioner desires to prosecute the petition in forma pauperis, he shall file the affidavit required by 28 U.S.C. § 1915. In all such cases the petition shall also be accompanied by a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined as to the amount of money or securities on deposit to the petitioner's credit in any account in the institution, which certificate may be considered by the court in acting upon his application for leave to proceed in forma pauperis.

(b) *Filing and service.* Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with Rules 2 and 3, the clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.

CASE NOTES

**Defendant's federal habeas petition was timely filed** because the limitations period did not expire until April 24, 1997, and she still had one day to spare when she filed her MAR on April 23, 1997, at which time the statute was tolled until the state court denied certiorari on September 8, 1997; consequently, when the defendant filed her federal habeas petition the next day (her one spare day), her petition was timely. Hernandez v. Caldwell, 225 F.3d 435 (4th Cir. N.C. 2000).

## Rule 4. Preliminary consideration by judge.

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

## Rule 5. Answer; Contents.

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural

rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

## Rule 6. Discovery.

(a) *Leave of court required.* A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g).

(b) *Requests for discovery.* Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) *Expenses.* If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.

### CASE NOTES

**Discovery, Generally.** — As is now expressly provided in the rules governing habeas corpus cases, the district judge (or a magistrate to whom the case may be referred) may employ a variety of measures in an effort to avoid the need for an evidentiary hearing. Under Rule 6, a party may request and the judge may direct that discovery take place, and there may be instances in which discovery would be appropriate (prior to an evidentiary hearing) and would show such a hearing to be unnecessary. Under Rule 7, the judge can direct expansion of the record to include any appropriate materials that enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing. Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

## Rule 7. Expansion of record.

(a) *Direction for expansion.* If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

(b) *Materials to be added.* The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) *Submission to opposing party.* In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be

offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) *Authentication.* The court may require the authentication of any material under subdivision (b) or (c).

CASE NOTES

**Applied** in Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

## Rule 8. Evidentiary hearing.

(a) *Determination by court.* If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

(b) *Function of the magistrate.*

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) *Appointment of counsel; Time for hearing.* If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the case if the interest of justice so requires.

CASE NOTES

**Applied** in Williams v. Currie, 103 F. Supp. 2d 858 (M.D.N.C. 2000).

**Cited** in Frye v. Lee, 89 F. Supp. 2d 693 (W.D.N.C. 2000).

## Rule 9. Delayed or successive petitions.

(a) *Delayed petitions.* A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) *Successive petitions.* A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are

alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

CASE NOTES

**The abuse of the writ doctrine** which mandates dismissal of claims presented in habeas petitions if the claims were raised, or could have been raised, in an earlier petition. The doctrine's rationale is rooted in the limited resources available in the federal judicial system. Noble v. Barnett, 24 F.3d 582 (4th Cir. 1994).

Abuse of the writ is not confined to instances where litigants deliberately abandon claims; it also applies to instances where litigants, through inexcusable neglect, fail to raise available claims. Noble v. Barnett, 24 F.3d 582 (4th Cir. 1994).

The standard for excusing a failure to raise an available claim in the abuse of writ context is substantially the same as that required in procedural default cases, namely a showing of cause and prejudice. In the abuse of the writ context, for cause to exist, the external impediment, whether it be governmental interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim. Noble v. Barnett, 24 F.3d 582 (4th Cir. 1994).

The cause and prejudice standard in the abuse of the writ context need not be met in cases where a fundamental miscarriage of justice would otherwise occur. But this occurs only in a very narrow realm of cases where a constitutional violation may have resulted in the conviction of an innocent person. Noble v. Barnett, 24 F.3d 582 (4th Cir. 1994).

The abuse of the writ doctrine has nothing to do with the doctrine of waiver. Unlike waiver, abuse of the writ focuses not on a party's state of mind, but rather on a petitioner's objective conduct, and addresses not whether conduct is knowing and voluntary, but rather the interests of judicial economy and justice for all by limiting petitioners, in certain circumstances, to one bite of the habeas apple. Noble v. Barnett, 24 F.3d 582 (4th Cir. 1994).

**Third petition for a writ of habeas corpus** which raised the claims that petitioner was incompetent to stand trial and that he received ineffective assistance of counsel owing to his counsel's failure to raise the incompetency issue did not meet the cause and prejudice standard required under this rule, where petitioner had full knowledge of the facts central to each of these claims at the time that he filed his second petition for a writ of habeas corpus, and where he produced no evidence that any objective factors prevented him from raising in his second petition either of these claims presented. Noble v. Barnett, 24 F.3d 582 (4th Cir. 1994).

**Applied** in Young v. Sams, 510 F. Supp. 141 (E.D.N.C. 1981).

## Rule 10. Powers of magistrates.

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636. (Amended effective August 1, 1979.)

## Rule 11. Federal rules of civil procedure; Extent of applicability.

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

# APPENDIX OF FORMS

*(Amended effective August 1, 1982)*

## Model Form for Use in Applications for Habeas Corpus Under 28 U.S.C. § 2254

Name _____
Prison number _____
_____
Place of confinement _____
United States District Court _____ District of _____
Case No. _____
(To be supplied by Clerk of U.S. District Court)
_____, PETITIONER
(Full name)

v.

_____, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF _____
_____, ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future,* petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Instructions — Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.
(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.
(4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis,* in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis,* you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $_____, you must pay the filing fee as required by the rule of the district court.
(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts

either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, *the original and two copies* must be mailed to the Clerk of the United States District Court whose address is

_____

_____

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack _____

_____

2. Date of judgment of conviction _____
3. Length of sentence _____
4. Nature of offense involved (all counts) _____

_____

_____

_____

5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☐
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

_____

_____

_____

6. Kind of trial: (Check one)
   (a) Jury ☐
   (b) Judge only ☐
7. Did you testify at the trial?
   Yes ☐ No ☐
8. Did you appeal from the judgment of conviction?
   Yes ☐ No ☐
9. If you did appeal, answer the following:
   (a) Name of court _____
   (b) Result _____
   (c) Date of result _____
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes ☐ No ☐
11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court _____
    (2) Nature of proceeding _____

    _____

    (3) Grounds raised _____

    _____

    _____

    _____

    _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐
(5) Result _____
(6) Date of result _____

(b) As to any second petition, application or motion give the same information:
(1) Name of court _____
(2) Nature of proceeding _____
(3) Grounds raised _____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐
(5) Result _____
(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:
(1) Name of court _____
(2) Nature of proceeding _____
(3) Grounds raised _____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐
(5) Result _____
(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☐ No ☐
(2) Second petition, etc. Yes ☐ No ☐
(3) Third petition, etc. Yes ☐ No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:
_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional ground and *facts* supporting same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded

by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: _____

_____

Supporting FACTS (tell your story *briefly* without citing cases or law):

_____
_____
_____
_____
_____
_____
_____

B. Ground two: _____

_____

Supporting FACTS (tell your story *briefly* without citing cases or law):

_____
_____
_____
_____
_____
_____
_____

C. Ground three: _____

_____

Supporting FACTS (tell your story *briefly* without citing cases or law):

_____
_____
_____
_____
_____

D. Ground four: _____

Supporting FACTS (tell your story *briefly* without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing _____
(b) At arraignment and plea _____
(c) At trial _____
(d) At sentencing _____
(e) On appeal _____
(f) In any post-conviction proceeding _____
(g) On appeal from any adverse ruling in a post-conviction proceeding

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☐
(a) If so, give name and location of court which imposed sentence to be served in the future: _____
(b) And give date and length of sentence to be served in the future:
(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.
(date)

_____
Signature of Petitioner

## IN FORMA PAUPERIS DECLARATION

_____
[Insert appropriate court]

_____
(Petitioner)

v.

_____
(Respondent(s))

DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, _____, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes ☐ No ☐
   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.
   _____
   _____
   _____
   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.
   _____
   _____

2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or form of self-employment? Yes ☐ No ☐
   b. Rent payments, interest or dividends? Yes ☐ No ☐
   c. Pensions, annuities or life insurance payments? Yes ☐ No ☐
   d. Gifts or inheritances? Yes ☐ No ☐
   e. Any other sources? Yes ☐ No ☐

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.
   _____
   _____
   _____
   _____
   _____
   _____

3. Do you own cash, or do you have money in checking or savings account? Yes ☐ No ☐ (Include any funds in prison accounts.)
   If the answer is "yes," state the total value of the items owned.
   _____
   _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
Yes ☐ No ☐
If the answer is "yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. _____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.
(date)

_____
Signature of Petitioner

Certificate

I hereby certify that the petitioner herein has the sum of $ _____ on account to his credit at the _____ institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said _____ institution: _____

_____
Authorized Officer of
Institution

## Model Form for Use in 28 U.S.C. § 2254 Cases Involving a Rule 9 Issue

Form No. 9
United States District Court,
_____ District of _____
Case No. _____

_____, PETITIONER
v.
_____, RESPONDENT
and
_____, ADDITIONAL RESPONDENT

Petitioner's Response as to Why His Petition Should Not Be Barred Under Rule 9

Explanation and Instructions—Read Carefully

(I) Rule 9. Delayed or successive petitions

(a) **Delayed petitions.** A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) **Successive petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(II) Your petition for habeas corpus has been found to be subject to dismissal under rule 9( ) for the following reason(s):

_____
_____
_____
_____

(III) This form has been sent so that you may explain why your petition contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within _____ days. Failure to do so will result in the automatic dismissal of your petition.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____

_____

(V) This response must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(VI) Additional pages are not permitted except with respect to the *facts* which you rely upon in item 4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

(VII) Respond to 4 *or* 5 below, not to both, unless (II) above indicates that you must answer both sections.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your petition is attacking was entered? Yes ☐ No ☐
2. If you checked "yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present. _____
3. Describe the nature of the assistance, including the names of those who rendered it to you. _____
4. If your petition is in jeopardy because of delay prejudicial to the state under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions. _____
5. If your petition is in jeopardy under rule 9(b) because it asserts the same grounds as a previous petition, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior petition, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions. _____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.

_____ (date)

_____

Signature of Petitioner

# Index to Rules Governing Section 2254 Cases in the United States District Court


A

**ANSWER,** Rule 5.

D

**DELAYED PETITIONS,** Rule 9.

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**RECORD.**
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# RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

As amended through June 1, 1993,
with amendments received through September 10, 1997.


Rule
1. Scope of rules.
2. Motion.
3. Filing motion.
4. Preliminary consideration by judge.
5. Answer; Contents.
6. Discovery.
7. Expansion of record.
8. Evidentiary hearing.
9. Delayed or successive motions.
10. Powers of magistrates.
11. Time for appeal.
12. Federal rules of criminal and civil procedure; Extent of applicability.

**Appendix of Forms**

Model form for motions under 28 U.S.C. § 2255.
Model form for use in 28 U.S.C. § 2255 cases involving a Rule 9 issue.

Index follows Rules.


## Rule 1. Scope of rules.

These rules govern the procedure in the district court on a motion under 28 U.S.C. § 2255:

(1) By a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and

(2) By a person in custody pursuant to a judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

### CASE NOTES

**Second Motion.** — Habeas corpus petition styled as a § 2241 motion would be dismissed as being an uncertified, and therefore unauthorized, second § 2255 motion. Lowery v. United States, 47 F. Supp. 2d 645 (W.D.N.C. 1999), aff'd, 181 F3d 93 (4th Cir. 1999), cert. denied, 528 U.S. 982, 120 S. Ct. 440, 145 L. Ed. 2d 344 (1999).

**Applied** in Bradley v. United States, 51 F. Supp. 2d 696 (W.D.N.C. 1999); United States v. Crawford, — F.3d —, 2000 U.S. App. LEXIS 8231 (4th Cir. Apr. 26, 2000); United States v. Miller, — F.3d —, 2000 U.S. App. LEXIS 11011 (4th Cir. May 18, 2000).

**Cited** in United States v. Brewer, — F.3d —, 2000 U.S. App. LEXIS 19048 (4th Cir. Aug. 9, 2000).

## Rule 2. Motion.

(a) *Nature of application for relief.* If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.

(b) *Form of motion.* The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank

motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

(c) *Motion to be directed to one judgment only.* A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate motions.

(d) *Return of insufficient motion.* If a motion received by the clerk of a district court does not substantially comply with the requirements of Rule 2 or Rule 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.

CASE NOTES

**When Applicable** — The defendant had to raise his ineffective assistance of counsel claims by way of a motion under this section where his claim of ineffective assistance, based on an alleged promise of a lesser sentence, did not plainly appear on the face of the record. United States v. Debty, — F.3d —, 2000 U.S. App. LEXIS 12446 (4th Cir. June 6, 2000).

## Rule 3. Filing motion.

(a) *Place of filing; Copies.* A motion under these rules shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof.

(b) *Filing and service.* Upon receipt of the motion and having ascertained that it appears on its face to comply with Rules 2 and 3, the clerk of the district court shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.

## Rule 4. Preliminary consideration by judge.

(a) *Reference to judge; Dismissal or order to answer.* The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.

(b) *Initial consideration by judge.* The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United

States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

CASE NOTES

**Ineffectiveness of Counsel** — The pro se defendant who did not label either of his filings as a § 2255 motions stated cognizable claims of ineffective assistance of counsel under this section and was therefore entitled to have his motion construed pursuant to this section. United States v. Curry, — F.3d —, 2000 U.S. App. LEXIS 8744 (4th Cir. May 2, 2000).

**Ineffective Assistance of Counsel** — Where it did not conclusively appear from the record on appeal that the defendant received ineffective assistance of counsel, this claim was more properly raised in a § 2255 motion. United States v. Quick, — F.3d —, 2000 U.S. App. LEXIS 12140 (4th Cir. June 2, 2000).

## Rule 5. Answer; Contents.

(a) *Contents of answer.* The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available federal remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules. The answer shall also state whether an evidentiary hearing was accorded the movant in a federal court.

(b) *Supplementing the answer.* The court shall examine its files and records to determine whether it has available copies of transcripts and briefs whose existence the answer has indicated. If any of these items should be absent, the government shall be ordered to supplement its answer by filing the needed records. The court shall allow the government an appropriate period of time in which to do so, without unduly delaying the consideration of the motion.

## Rule 6. Discovery.

(a) *Leave of court required.* A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a movant who qualifies for appointment of counsel under 18 U.S.C. § 3006A(g).

(b) *Requests for discovery.* Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) *Expenses.* If the government is granted leave to take the deposition of the movant or any other person, the judge may as a condition of taking it direct that the government pay the expenses of travel and subsistence and fees of counsel for the movant to attend the taking of the deposition.

## Rule 7. Expansion of record.

(a) *Direction for expansion.* If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(b) *Materials to be added.* The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) *Submission to opposing party.* In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to

be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) *Authentication.* The court may require the authentication of any material under subdivision (b) or (c).

**Rule 8. Evidentiary hearing.**

(a) *Determination by court.* If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

(b) *Function of the magistrate.*

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) *Appointment of counsel; Time for hearing.* If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the proceeding if the interest of justice so requires.

(d) *Production of statements at evidentiary hearing.*

(1) In General. — Federal Rule of Criminal Procedure 26.2(a)-(d), and (f) applies at an evidentiary hearing under these rules.

(2) Sanctions for Failure to Produce Statement. — If a party elects not to comply with an order under Federal Rule of Criminal Procedure 26.2(a) to deliver a statement to the moving party, at the evidentiary hearing the court may not consider the testimony of the witness whose statement is withheld. (Amended by order adopted April 22, 1993, effective December 1, 1993.)

**Editor's note.** — The rule set out above reflects the amendment approved and authorized for transmittal to Congress on April 22, 1993. The amendment took effect December 1, 1993.

CASE NOTES

**The court granted a certificate of appealability,** — vacated the district court's order and remanded for further proceedings in regard to the defendant's attorney's alleged failure to note an appeal where the record contained conflicting allegations about whether the defendant asked his attorney to file an appeal. United States v. Strickland, — F.3d —, 2000 U.S. App. LEXIS 15086 (4th Cir. June 28, 2000).

**Rule 9. Delayed or successive motions.**

(a) *Delayed motions.* A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) *Successive motions.* A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior action constituted an abuse of the procedure governed by these rules.

**Rule 10. Powers of magistrates.**

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636.

**Rule 11. Time for appeal.**

The time for appeal from an order entered on a motion for relief made pursuant to these rules is as provided in Rule 4(a) of the Federal Rules of Appellate Procedure. Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court.

CASE NOTES

**Conviction Finalized on Date of Mandate.** — For purposes of this section, the conviction of a federal prisoner whose conviction is affirmed by United States Court of Appeals for the Fourth Circuit and who does not file a petition for certiorari becomes final on the date that this court's mandate issues in his direct appeal. United States v. Torres, 211 F.3d 836 (4th Cir. 2000).

**Rule 12. Federal rules of criminal and civil procedure; Extent of applicability.**

If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

CASE NOTES

**Procedure for Amending Motions.** — The rules governing § 2255 motions do not specify a procedure for amending motions, therefore, courts have typically applied Federal Rule of Civil Procedure 15 to the amendment of a § 2255 motion. United States v. Pittman, 209 F.3d 314 (4th Cir. 2000).

# APPENDIX OF FORMS

(Amended effective August 1, 1982.)

## Model Form for Motions Under 28 U.S.C. § 2255

Name _____
Prison Number _____
Place of Confinement _____
United States District Court _____ District of _____
Case No. _____ (to be supplied by Clerk of U.S. District Court) United States,

v.

_____
(full name of movant)

(If movant has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

Instructions—Read Carefully

(1) This motion must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.
(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
(3) Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.
(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis,* in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis,* you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgment.
(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.
(7) When the motion is fully completed, the *original and two copies* must be mailed to the Clerk of the United States District Court whose address is

_____
_____

(8) Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court which entered the judgment of conviction under attack _____
2. Date of judgment of conviction _____
3. Length of sentence _____
4. Nature of offense involved (all counts) _____
5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____
6. Kind of trial. (Check one)
   (a) Jury ☐
   (b) Judge only ☐
7. Did you testify at the trial?
   Yes ☐ No ☐
8. Did you appeal from the judgment of conviction?
   Yes ☐ No ☐
9. If you did appeal, answer the following:
   (a) Name of court _____
   (b) Result _____
   (c) Date of result _____
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
    Yes ☐ No ☐
11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court _____
    (2) Nature of proceeding _____
    (3) Grounds raised _____
    (4) Did you receive an evidentiary hearing on your petition, application or motion?
    Yes ☐ No ☐
    (5) Result _____
    (6) Date of result _____
    (b) As to any second petition, application or motion give the same information:
    (1) Name of court _____
    (2) Nature of proceeding _____

(3) Grounds raised _____

_____

_____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

_____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(3) Third petition, etc. Yes ☐ No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

_____

_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

Caution: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, *you should raise in this motion all available grounds* (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: _____

Supporting FACTS (tell your story *briefly* without citing cases or law):

_____

B. Ground two: _____

Supporting FACTS (tell your story *briefly* without citing cases or law):

_____

C. Ground three: _____

Supporting FACTS (tell your story *briefly* without citing cases or law):

_____

D. Ground four: _____

Supporting FACTS (tell your story *briefly* without citing cases or law):

_____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing _____

(b) At arraignment and plea _____

(c) At trial _____

(d) At sentencing _____

(e) On appeal _____

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☐
(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.
(date)

_____
Signature of Movant

## IN FORMA PAUPERIS DECLARATION

_____
[Insert appropriate court]

United States

v.

_____
(Movant)

DECLARATION IN SUPPORT OF REQUEST TO PROCEED *IN FORMA PAUPERIS*

I, _____, declare that I am the movant in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable

to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes ☐ No ☐
   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

   _____

   _____

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

   _____

   _____

2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or form of self-employment? Yes ☐ No ☐
   b. Rent payments, interest or dividends? Yes ☐ No ☐
   c. Pensions, annuities or life insurance payments? Yes ☐ No ☐
   d. Gifts or inheritances? Yes ☐ No ☐
   e. Any other sources? Yes ☐ No ☐

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

   _____

   _____

   _____

3. Do you own any cash, or do you have money in a checking or savings account?
   Yes ☐ No ☐ (Include any funds in prison accounts)

   If the answer is "yes," state the total value of the items owned.

   _____

   _____

   _____

4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
   Yes ☐ No ☐

   If the answer is "yes," describe the property and state its approximate value. _____

   _____

   _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. _____

   _____

   _____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.

(date)

_____

Signature of Movant

CERTIFICATE

I hereby certify that the movant herein has the sum of $ _____ on account to his credit at the _____ institution where he is confined. I further certify that movant likewise has the following securities to his credit according to the records of said _____ institution: _____

_____

_____

Authorized Officer of
Institution

## Model Form For Use in 28 U.S.C. § 2255 Cases Involving a Rule 9 Issue

Form No. 9

United States District Court

_____ District of _____

Case No. _____

United States

v.

_____

(Name of Movant)

Movant's Response as to Why His Motion Should Not Be Barred Under Rule 9

Explanation and Instructions—Read Carefully

(I) **Rule 9. Delayed or Successive Motions**

(a) **Delayed motions.** A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) **Successive motions.** A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

(II) Your motion to vacate, set aside, or correct sentence has been found to be subject to dismissal under Rule 9( ) for the following reason(s):

_____

_____

_____

_____

(III) This form has been sent so that you may explain why your motion contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within _____ days. Failure to do so will result in the automatic dismissal of your motion.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____

_____

(V) This response must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(VI) Additional pages are not permitted except with respect to the *facts* which you rely upon in item 4 or 5 in the response. Any citation of authorities

should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

(VII) Respond to 4 *or* 5, not to both, unless (II) above indicates that you must answer both sections.

## RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your motion is attacking was entered?
   Yes ☐ No ☐
2. If you checked "yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present. _____
   _____
3. Describe the nature of the assistance, including the names of those who rendered it to you. _____
   _____
   _____
   _____
4. If your motion is in jeopardy because of delay prejudicial to the government under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions. _____
   _____
   _____
   _____
   _____
5. If your motion is in jeopardy under rule 9(b) because it asserts the same grounds as a previous motion, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior motion, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions. _____
   _____
   _____
   _____
   _____
   _____
   _____
   _____
   _____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.
(date)

_____
Signature of Movant

# Index to Rules Governing Section 2255 Proceedings for the United States District Courts


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# RULES OF PROCEDURE FOR THE TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES

## ABROGATED.

**Editor's note.** — The Rules of Procedure for the Trial of Misdemeanors before United States Magistrates were abrogated, effective December 1, 1990, and were replaced by Rule 58 of the Federal Rules of Criminal Procedure. The Report of the Judicial Conference Committee on Rules of Practice and Procedure provided in part: "Proposed new Rule 58 would replace the 'Rules of Procedure for the Trial of Misdemeanors before United States Magistrates' with a single rule of criminal procedure. Although the proposed rule would make a number of technical changes, no substantive change to the current procedures for the trial of misdemeanors is intended."

# REMOVAL OF CASES

(Removal from state courts to District Courts of the United States. Title 28, U.S. Code, Chapter 89, §§ 1441-1452, and Rule 81(c) of Federal Rules of Civil Procedure.)

**Title 28**

**Chapter 89.**
**District Courts; Removal of Cases From State Courts**


Section
1441. Actions removable generally.
1442. Federal officers sued or prosecuted.
1442a. Members of armed forces sued or prosecuted.
1443. Civil rights cases.
1444. Foreclosure action against United States.
1445. Nonremovable actions.
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**Federal Rules of Civil Procedure**


Rule
81(c). Applicability in general; Removed actions.


Index follows Rules.

## TITLE 28

CHAPTER 89.
DISTRICT COURTS; REMOVAL OF CASES
FROM STATE COURTS

### § 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim. (June 25, 1948, ch. 646, § 1, 62 Stat. 937; Oct. 21, 1976, Pub. L. 94-583, § 6, 90 Stat. 2898; June 19, 1986, Pub. L. 99-336, § 3(a), 100 Stat. 637; Nov. 19, 1988, Pub. L. 100-702, Title X, § 1016(a), 102 Stat. 4669; Dec. 1, 1990, Pub. L. 101-650, Title III, § 312, 104 Stat. 5114; Dec. 9, 1991, Pub. L. 102-198, § 4, 105 Stat. 1623.)

### § 1442. Federal officers sued or prosecuted.

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties.

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process. (June 25, 1948, ch. 646, § 1, 62 Stat. 938.)

### § 1442a. Members of armed forces sued or prosecuted.

A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof, or under the law of war, may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States for the district where it is pending in the manner prescribed by law, and it shall thereupon be entered on the docket of the district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine the cause. (Added Aug. 10, 1956, ch. 1041, § 19 (a), 70A Stat. 626.)

### § 1443. Civil rights cases.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. (June 25, 1948, ch. 646, § 1, 62 Stat. 938.)

### § 1444. Foreclosure action against United States.

Any action brought under section 2410 of this title against the United States in any State court may be removed by the United States to the district court of the United States for the district and division in which the action is pending. (June 25, 1948, ch. 646, § 1, 62 Stat. 938; May 24, 1949, ch. 139, § 82, 63 Stat. 101.)

### § 1445. Nonremovable actions.

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States.

(b) A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11707 of Title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

(d) A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 may not be removed to any district court of the United States. (June 25, 1948, ch. 646, § 1, 62 Stat. 939; July 25, 1958, Pub. L. 85-554, § 5, 72 Stat. 415; Oct. 17, 1978, Pub. L. 95-473, § 2(a)(3)(A), 92 Stat. 1465; Oct. 20, 1978, Pub. L. 95-486, § 9(b), 92 Stat. 1634; Sept. 13, 1994, Pub. L. 103-322, Title IV, § 40302(e)(5), 108 Stat. 1942.)

### § 1446. Procedure for removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of

the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court. (June 25, 1948, ch. 646, § 1, 62 Stat. 939; May 24, 1949, ch. 139, § 83, 63 Stat. 101; September 29, 1965, Pub. L. 89-215, 79 Stat. 887; July 30, 1977, Pub. L. 95-78, § 3, 91 Stat. 321; Nov. 19, 1988, Pub. L. 100-702, Title X, § 1016(b), 102 Stat. 4669; Dec. 9, 1991, Pub. L. 102-198, § 10(a), 105 Stat. 1626.)

### § 1447. Procedure after removal generally.

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court. (June 25, 1948, ch. 646, § 1, 61 Stat. 939; May 24, 1949, ch. 139, § 84, 63 Stat. 102; July 2, 1964,

Pub. L. 88-352, Title IX, § 901, 78 Stat. 266; Nov. 19, 1988, Pub. L. 100-702, Title X, § 1016(c), 102 Stat. 4670; Dec. 9, 1991, Pub. L. 102-198, § 10(b), 105 Stat. 1626.)

### § 1448. Process after removal.

In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court.

This section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case. (June 25, 1948, ch. 646, § 1, 62 Stat. 940.)

### § 1449. State court record supplied.

Where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any district court of the United States, and the clerk of such State court, upon demand, and the payment or tender of the legal fees, fails to deliver certified copies, the district court may, on affidavit reciting such facts, direct such record to be supplied by affidavit or otherwise. Thereupon such proceedings, trial, and judgment may be had in such district court, and all such process awarded, as if certified copies had been filed in the district court. (June 25, 1948, ch. 646, § 1, 62 Stat. 940; May 24, 1949, ch. 139, § 85, 63 Stat. 102.)

### § 1450. Attachment or sequestration; Securities.

Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual notwithstanding such removal.

All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court. (June 25, 1948, ch. 646, § 1, 62 Stat. 940.)

### § 1451. Definitions.

For purposes of this chapter—

(1) The term "State court" includes the Superior Court of the District of Columbia.

(2) The term "State" includes the District of Columbia. (July 29, 1970, Pub. L. 91-358, Title I, § 172(d)(1), 84 Stat. 591.)

### § 1452. Removal of claims related to bankruptcy cases.

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending,

if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. (Added Pub. L. 98-353, Title I, § 103(a), July 10, 1984, 98 Stat. 335, and amended Pub. L. 101-650, Title III, § 309(c), Dec. 1, 1990, 104 Stat. 5113.)

## FEDERAL RULES OF CIVIL PROCEDURE

### Rule 81(c). Applicability in general; Removed actions.

(c) *Removed actions.*

These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury. (Amended March 2, 1987, effective August 1, 1987.)

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# AUTHENTICATION OF RECORDS

(Title 28, U.S. Code, §§ 1738-1741, and Rule 44 of Federal Rules of Civil Procedure.)


**Title 28**

**Chapter 115.**
**Evidence; Documentary**

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1738. State and territorial statutes and judicial proceedings; Full faith and credit.
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## TITLE 28

CHAPTER 115.
EVIDENCE; DOCUMENTARY

### § 1738. State and territorial statutes and judicial proceedings; Full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (June 25, 1948, ch. 646, § 1, 62 Stat. 947.)

### § 1738A. Full faith and credit given to child custody determinations.

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term —

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child; and

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if —

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the Child because he has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if —

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination. (Dec. 28, 1980, Pub. L. 96-611, § 8(a), 94 Stat. 3569.)

### § 1739. State and territorial nonjudicial records; full faith and credit.

All nonjudicial records or books kept in any public office of any State, Territory, or Possession of the United States, or copies thereof, shall be proved or admitted in any court or office in any other State, Territory, or Possession by the attestation of the custodian of such records or books, and the seal of his office annexed, if there be a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept, or of the Governor, or secretary of state, the chancellor or keeper of the great seal, of the State, Territory, or Possession that the said attestation is in due form and by the proper officers.

If the certificate is given by a judge, it shall be further authenticated by the clerk or prothonotary of the court, who shall certify, under his hand and the seal of his office, that such judge is duly commissioned and qualified; or, if given by such Governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or Possession in which it is made.

Such records or books, or copies thereof, so authenticated, shall have the same full faith and credit in every court and office within the United States and its Territories and Possessions as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken. (June 25, 1948, c. 646, § 1, 62 Stat. 947.)

### § 1740. Copies of consular papers.

Copies of all official documents and papers in the office of any consul or vice consul of the United States, and of all official entries in the books or records of any such office, authenticated by the consul or vice consul, shall be admissible equally with the originals. (June 25, 1948, ch. 646, § 1, 62 Stat. 947.)

### § 1741. Foreign official documents.

An official record or document of a foreign country may be evidenced by a copy, summary, or excerpt authenticated as provided in the Federal Rules of Civil Procedure. (June 25, 1948, ch. 646, § 1, 62 Stat. 948; May 24, 1949, ch. 139, § 92 (b), 63 Stat. 103; Oct. 3, 1964, Pub. L. 88-619, § 5 (a), 78 Stat. 996.)

## FEDERAL RULES OF CIVIL PROCEDURE

### Rule 44. Proof of official record.

(a) *Authentication.*

(1) *Domestic.* An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office

and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

(2) *Foreign.* A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

(b) *Lack of record.*

A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a) (1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a) (2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) *Other proof.*

This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

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# EXTRADITION

(The following publication, "State of North Carolina Extradition Manual," was published by the Institute of Government, the University of North Carolina at Chapel Hill, in 1987.)

## STATE OF NORTH CAROLINA EXTRADITION MANUAL


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# ARTICLE I. EXTRADITION GENERALLY

Extradition is the procedure by which a person who committed a crime in one state (or escaped from prison or violated probation or parole) and fled to another state is returned to the first state. This introductory section of the Extradition Manual seeks to give the reader an overview of the extradition process. For those with a limited role, such as the arresting officer or the magistrate, this general description should help them understand how their actions fit in the overall process. More specific instructions for the different stages in the extradition process appear in other sections of the manual.

To begin, consider the case of a person who committed a crime — say, armed robbery — in another state, Ohio, and fled to North Carolina. Probably he is already formally charged in Ohio, either by indictment or by the issuance of an arrest warrant there. When his presence in North Carolina is discovered, he may be arrested by a North Carolina officer, either with or without an arrest warrant from a North Carolina magistrate.

An arrest without a warrant, which is the less common practice, may be made only if the crime committed in Ohio is punishable there by more than one year's imprisonment. After arresting without a warrant, the officer must take the defendant before a North Carolina magistrate without unnecessary delay for issuance of a magistrate's order (see AOC-CR-909M in this manual's Forms section), just as he would do if he were arresting for a crime committed in this state. The magistrate determines whether the person is charged in Ohio with armed robbery, whether armed robbery is punishable by more than a year's imprisonment in Ohio, and whether the person fled from Ohio. The magistrate is not determining whether there is probable cause to believe the person committed the armed robbery — only whether he is so charged in Ohio. If the magistrate finds that such is the case, he puts the defendant under bail as he would someone charged with a North Carolina crime, but bail may not be allowed if the crime is punishable by either death or life imprisonment.

More likely, the officer will go to a magistrate to obtain a North Carolina arrest warrant, called a fugitive warrant (see AOC-CR-901M in this manual's Forms section), before making the arrest. In that case, it is not necessary that the crime be punishable by more than one year's imprisonment; a warrant may be issued if the defendant has been charged with any crime in another state. Once the fugitive warrant is issued, the officer is to make the arrest and take the defendant before the magistrate without unnecessary delay for the setting of bail, just as he would for a North Carolina crime.

Usually, the basis for determining that the defendant has been charged with a crime in another state is a National Crime Information Center (NCIC) message on the Police Information Network (PIN) terminal. Such a message by itself is a sufficient basis for the magistrate to find that the fugitive is charged in the other state. Although a message is not supposed to appear in the NCIC files unless the warrant is still outstanding and the other state intends to extradite, the officer may want to confirm the NCIC report with someone in the other state before making an arrest.

Sometimes the officer's information that a person is a fugitive may come from another source, such as a telephone call, telegram, or letter from an officer in another state. Such information may be used to determine whether the defendant is charged in the other state. In cases like these, and in cases in which an NCIC message is used, the other state should be asked to send a copy of the warrant or indictment as soon as possible so that it can be attached to the North Carolina warrant.

Another possibility, though unusual, is that the person has not yet been formally charged in the other state. For example, a person may have robbed a convenience store in Virginia late at night and fled to North Carolina but no

warrant was issued because no judicial official was on duty in Virginia. The statutes allow North Carolina officers to arrest fugitives in such cases, but only after a North Carolina warrant has been issued; and that warrant may be issued only after the magistrate has made the same kind of finding of probable cause he would have to make if the crime had occurred in North Carolina. That is, the magistrate must find probable cause that the defendant committed the crime in Virginia. The most likely basis for that probable cause will be information relayed by Virginia officers through North Carolina officers. Once the warrant has been issued, the officer proceeds the same as in other fugitive cases mentioned above.

It may also be that the fugitive has already been convicted in the other state and has escaped or has fled in violation of the conditions of his probation or parole. In such cases the magistrate simply determines that the fugitive was convicted and fled. The procedures are otherwise the same as for the person who has not yet been tried in the other state.

Once arrested, the fugitive is held until formal extradition procedures can take place. If he wishes to do so, he may waive extradition before a clerk of court or a judge and be immediately released to the state from which he fled. Many fugitives choose to do this, knowing that they will be extradited and not wishing to spend the time required for formal extradition. The waiver must be in writing (see AOC-CR-912M in this manual's Forms section).

If the fugitive does not waive extradition, the state from which he fled then must formally request the Governor of North Carolina to extradite. The request will come from the governor of the other state, on the basis of information supplied by the prosecutor in the county where the crime was committed. The extradition request to North Carolina includes a copy of the warrant or indictment against the fugitive, plus other papers establishing all the requirements of the formal extradition process. These papers are sent by the Governor's Extradition Secretary to the North Carolina Attorney General's office, which determines whether they are legally sufficient to justify extradition through issuance of a Governor's Warrant. The only questions the Governor of North Carolina asks in deciding whether to extradite are whether the fugitive is actually charged with a crime in another state and whether the person arrested in North Carolina is the fugitive. The Governor's office does not attempt to determine whether there was probable cause for the charge; that is considered a matter between the other state and the fugitive — just like other defenses he might raise, such as self-defense or alibi. The magistrate and the district court judge should notify the fugitive that he may question the legal sufficiency of the papers submitted by the other state to the Governor's office. The fugitive does this by sending a written request to the Governor's office outlining the basis of his challenge. If the Governor determines that the fugitive should be heard on this matter, he will direct that the Attorney General's office hold a hearing.

If the Governor's office is satisfied, either with or without a hearing, that the other state has met the requirements of extradition, a Governor's Warrant is issued. This paper authorizes the taking of the fugitive into custody — in fact, he may already be in custody if he was not allowed bail or could not make bail — to be turned over to an agent of the other state. If he was released on bail, he is to be picked up and his bail revoked pursuant to the Governor's Warrant. Before he is turned over, the fugitive must be taken before a judge to be informed that he has the right to challenge the legality of his arrest through habeas corpus proceedings and to have counsel appointed for that purpose if he cannot afford a lawyer. The habeas corpus proceeding is held in North Carolina; the only grounds for challenging the arrest under the Governor's Warrant are that (1) the person has not been charged with a crime in the other state, or (2) he is not the person being sought. If the fugitive does not try to

obtain a writ of habeas corpus or if he tries and fails, he is turned over to the agents from the other state. (The Governor may recall the Governor's Warrant at his discretion, and he occasionally does so when new facts arise after the Warrant was issued. He then may reissue the Warrant if circumstances so indicate.)

If a person who committed a crime in North Carolina flees to another state and is found there, essentially the same procedure takes place. A North Carolina fugitive may be extradited from another state if he committed any crime in this state, whether a felony or a misdemeanor. But the State pays the expenses of extradition only if the crime is a felony, escape (felony or misdemeanor), or a violation of probation or parole (felony or misdemeanor). The county pays for all other misdemeanors, and some other states are reluctant to extradite for minor crimes.

Once the fugitive is arrested in the other state, the North Carolina district attorney of the county where the fugitive is charged is notified and must put together the documents that the North Carolina Governor's office will need in requesting extradition (assuming that the fugitive does not waive extradition). These documents include copies of the arrest warrant with supporting affidavit or indictment, a statement that the extradition is not sought to enforce a private claim, certain further information about the circumstances of the crime, and certifications that the documents are all true copies. Some states require further information, such as photographs, fingerprints, or a physical description. The Governor's Extradition Secretary reviews the materials to be sure they comply with the requirements of the other state and then formally requests extradition from that state. Once extradition is granted, the Governor commissions one or more North Carolina officers named by the district attorney of the judicial district from which the fugitive fled to bring him back.

The procedures for extradition are essentially the same in all the states. Nearly all states, including North Carolina, have passed the Uniform Criminal Extradition Act, and the others have statutes similar to the uniform act. But extradition practice may vary somewhat from state to state. For example, many states will not extradite for misdemeanors. The North Carolina Governor's office knows the peculiar requirements of other states and tries to review all documents to be certain they will satisfy the recipient state.

## ARTICLE II. FUGITIVE FROM NORTH CAROLINA FOUND IN ANOTHER STATE

### PART 1. CRIMES SUBJECT TO EXTRADITION

Any person who is charged with a crime in North Carolina and flees to another state may be extradited to North Carolina to stand trial. (Also subject to extradition are those persons who have been *convicted* in North Carolina and have escaped or have violated the conditions of probation or parole). But G.S. 15A-744 provides that the State of North Carolina is to pay the expenses of extradition only when the fugitive is charged with a felony or has violated the conditions of probation or parole (whether felony or misdemeanor). (The State will also pay the expenses of extraditing a person who has escaped, whether the escape is a felony or misdemeanor.) Thus a fugitive charged with a misdemeanor may be extradited, but in most cases the costs of that procedure (the greatest expense is sending an agent to bring the fugitive back) must be paid by the county where the crime was committed. For that reason extradition should never be initiated against someone charged with a misdemeanor unless there is some assurance that the county commissioners will pay the costs.

The National Association of Extradition Officials recommends the policies set out below on extradition for certain offenses. The law allows extradition for each of the offenses mentioned, but the Governor's office agrees with the recommended policies and expects all law enforcement officers and district attorneys to follow them.

*Nonsupport.* For abandonment and nonsupport, bastardy, and all similar offenses, action should first be taken under Chapter 52A of the General Statutes, the Uniform Reciprocal Enforcement of Support Act (URESA). Only if that procedure has failed should extradition be requested. If the URESA procedure has not been used, the extradition request should include an affidavit from the district attorney or the appropriate law enforcement officer explaining fully the reason for not using URESA.

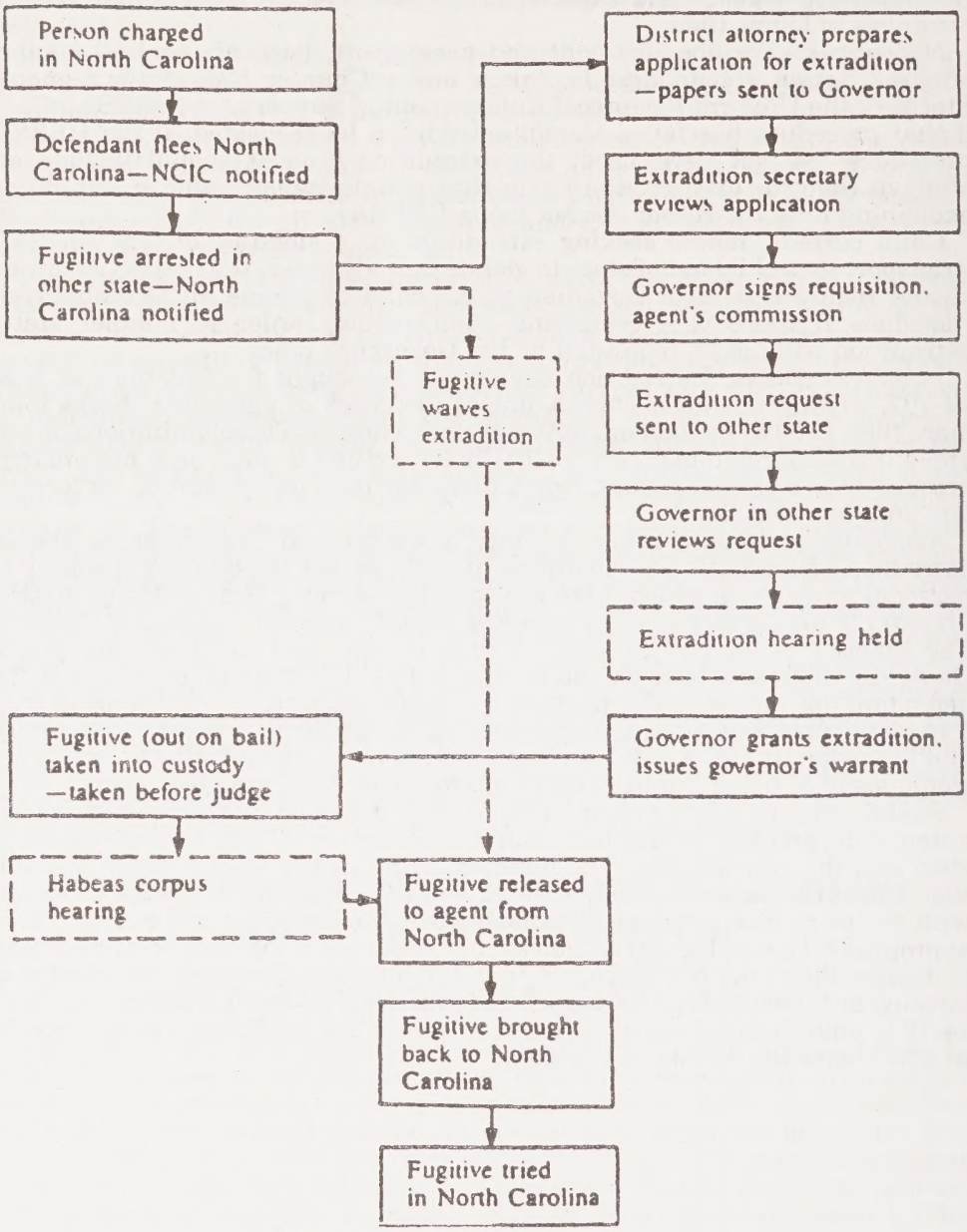
*Child custody.* Before seeking extradition for a violation of G.S. 14-320.1 (transporting a child out of state to violate custody order) the District Attorney should require the legal custodian of the child to pursue all available civil remedies. If there is a competing child custody order in another state, extradition will not be requested by the Governor's office.

*Worthless checks.* Extradition should not be sought for violations of G.S. 14-107, writing worthless checks, unless the check or aggregate checks total more than $100 or the defendant is a chronic violator. These limitations do not apply if the charge under G.S. 14-107 is for writing a check on a nonexistent account or on a closed account. Nor is there any limit on extradition for forgery and similar offenses.

*Removing mortgaged property.* Only in exceptional circumstances should extradition be sought for violations of G.S. 14-114 (fraudulent disposal of personal property on which there is a security interest), G.S. 14-115 (secreting property to hinder enforcement of lien or security interest), or similar statutes. The amount of money involved in such a case does not alter the policy. Generally these problems should be handled as civil matters, especially if the defendant has made regular payments on the merchandise and now owes only a small balance. But if the defendant purchased a vehicle or other merchandise and immediately left North Carolina, making no payments whatsoever, there would seem to be an intent to defraud and extradition may be sought.

*Rental property.* If a person fails to return rented property, such as an automobile, and the car has been found, there would appear to be no intent to steal and this matter should be handled civilly rather than through extradition. But if the person immediately leaves North Carolina for parts unknown with rented property, larceny is probably the proper charge and extradition is appropriate. Generally, extradition should be sought if the facts show an intent to deprive the owner of the property permanently and thus support a charge of larceny; but it should not be sought if the facts support only a charge like G.S. 14-72.2, unauthorized use of conveyance (unless the conveyance is an aircraft, in which case the offense is a felony).

## PART 2. FLOW CHART OF PROCEEDINGS



## PART 3. DUTIES OF THE LAW ENFORCEMENT OFFICER

A. *Review the evidence in the case.* When notified that the fugitive has been taken into custody in the other state and refuses to waive extradition, you as the officer should first review the evidence in the case to be certain that extradition is appropriate and that a prosecution might succeed. Review the section of this manual entitled Crimes Subject to Extradition. If the crime is appropriate for extradition, consider whether the witnesses need to be interviewed again. Determine whether the witnesses are likely to change their testimony, whether any of them has already received restitution, whether they are willing to testify in court, and whether they can identify the fugitive by a photograph or other means. If witnesses or officers have submitted affidavits in the case, review these and determine whether they support or contradict the other information in the case. Also review all investigative reports.

B. *Obtain a warrant if necessary.* If, for some reason, the fugitive has not yet been charged in an arrest warrant or an indictment, relate the facts in the case to a magistrate so that an arrest warrant may be issued (unless you know that the district attorney would prefer to submit a bill of indictment). Five copies of the warrant will be needed eventually, so ask the magistrate for five copies, each one signed separately. If a warrant or indictment has already been issued (which is usually the case), have a copy available for reference when you talk with the district attorney. If the charging document is a warrant rather than an indictment, it must be accompanied by an affidavit (usually by the investigating officer or victim) that states the basis for issuing the warrant. This affidavit must be sworn to before a magistrate or judge and should have the same date as the warrant (or earlier). Some states will not extradite if the date of the affidavit (for example, January 25, 1987) is later than the date that the arrest warrant was issued (for example, January 20, 1987). Therefore, when a warrant was issued without an accompanying affidavit (oral sworn testimony is sufficient to support an arrest warrant in North Carolina), a new arrest warrant must be issued when the affidavit is prepared so that the dates of the arrest warrant and the affidavit will be the same.

C. *Check the fugitive's criminal record.* Check the fugitive's criminal record and have a copy of it with you when you talk with the district attorney.

D. *Meet with the district attorney.* Bring to this meeting with the district attorney or assistant district attorney all the information and documents discussed above. Be candid about any problems you foresee with witnesses or with the methods of investigation in the case and any other factor that might affect the outcome of the case. At this meeting the district attorney should decide whether to proceed with extradition. Usually an assistant district attorney will then take responsibility for preparing the proper papers, but he may well ask your help. If he does, review the section of this manual entitled Checklist of Documents Needed for an Extradition Request.

## PART 4. DUTIES OF THE DISTRICT ATTORNEY

A. *Decide whether to seek extradition.* After a law enforcement officer has been notified that a fugitive from North Carolina is in custody in another state and refuses to waive extradition, he should come to you with the relevant information (see the section of this manual on Duties of the Law Enforcement Officer). You must decide whether extradition should be sought. First, review the section of this manual entitled Crimes Subject to Extradition. If you are satisfied that extradition is appropriate for the kind of offense with which the fugitive has been charged, next consider the following factors:

—The seriousness of the offense.

—The evidence available to prove the crime.

—The challenges that might be mounted against the evidence or the methods of investigation.

—The defendant's character, including prior convictions.

—The probability that the defendant will commit similar crimes elsewhere.

—The probable length of time the defendant will be imprisoned if he is returned to North Carolina and convicted and the effect of that imprisonment on his conduct after he is released.

—The probability that the governor of the other state will grant extradition.

—The cost of having the defendant returned to North Carolina.

—The effect of not extraditing on others in the community who might consider committing similar crimes.

B. *Prepare the proper papers for extradition.* A separate section of this manual lists the documents that must be submitted to the Extradition Secretary in the Governor's office. An assistant district attorney or administrative assistant may prepare those documents, and a law enforcement officer may assist. The application for requisition may be signed by the district attorney or an assistant. If the fugitive has not yet been charged in North Carolina in an arrest warrant or indictment, the next step is to have such process issued. Although an arrest warrant is sufficient, usually the proceedings in the other state go faster when an indictment is used. For that reason an indictment should be sought if possible. If an arrest warrant is used, it must be accompanied by an affidavit (usually by the investigating officer or the victim) that states the grounds for charging the defendant. This affidavit must be sworn to before a magistrate or judge and should have the same date as the warrant (or earlier). Some states will not extradite if the date of the affidavit (for example, January 25, 1987) is later than the date of the arrest warrant (for example, January 20, 1987). Therefore, when a warrant was issued without an accompanying affidavit (oral sworn testimony is sufficient to support an arrest warrant in North Carolina), a new arrest warrant must be issued when the affidavit is prepared so that the dates of the arrest warrant and the affidavit will be the same.

C. *Select the agents to go to the other state.* The application for requisition is to include the names of the agents who will go to the other state to return the fugitive. It is best to have the investigating officers or other officers who are familiar with the case named as agents. It is required that an *individual* be named as an agent, and that person must have the option of naming someone else. For example, the appointment might read: "Sheriff W.C. Fain of Sampson County and/or his agent." The Governor's Extradition Office (and many states) requires that a female agent be named when the fugitive to be returned is a woman. Agents are expected to be ready at any time to travel to the other state when extradition has been granted by the other state or when a hearing is to be held there. The State does not pay travel expenses for a hearing unless the fugitive is returned on that trip.

## PART 5. DUTIES OF THE CLERK OF COURT

The clerk of court has only a limited role in bringing a fugitive back to North Carolina. When the district attorney makes his request for extradition to the Governor of North Carolina (who will in turn make the same request to the governor of the state where the fugitive now is), he includes various documents, including a copy of the arrest warrant or indictment. Each document must be certified by the official who issued it or by the keeper of the original, the clerk of court. Also, the clerk must certify that the various other officials who certify the documents — the district attorney, magistrate, or judge — are indeed the officials they claim to be. In turn, a judge must certify that the clerk is indeed the clerk. A summary of the documents and certifications needed for

the extradition request is included in the section of this manual entitled Checklist of Documents Needed for an Extradition Request. Otherwise, the clerk has no duties in connection with extradition of a North Carolina fugitive from another state.

## PART 6. DUTIES OF THE AGENT SENT TO BRING THE FUGITIVE BACK

When the district attorney applies to the Governor of North Carolina to seek the extradition of a fugitive who is in another state, he names the law enforcement officers to be designated the Governor's agents for bringing the fugitive back. An officer who has been designated an agent should not go to the other state until he has been notified that the governor of that state has approved extradition and the authorities there are ready to hand over the fugitive. Also, when more than one agent is to make the trip, the North Carolina Extradition Secretary should be notified before they leave. Expenses will not be paid for any trip made before that notification (except possibly when the officer must attend a hearing before extradition is ordered).

Your commission as an agent of the Governor of North Carolina will be sent to the other state with the Governor's request for extradition and will be waiting for you there. When you return the fugitive to the North Carolina county where he is to be tried, the sheriff should complete the part of the commission form indicating that he has received the prisoner. You must complete the return portion of the commission and submit it to the Governor's office. If for some reason the fugitive could not be brought back, that fact must be stated on the return portion of the commission and an explanation given.

If the fugitive decided to waive extradition, the officer who brought the fugitive back must send a copy of that waiver to the Governor's office.

A copy of the form used for reimbursement of expenses appears in this manual's Forms section.

## PART 7. CHECKLIST OF DOCUMENTS NEEDED FOR AN EXTRADITION REQUEST

Listed below are all the documents that might be needed when a request for extradition is sent to the Governor's Extradition Secretary. Usually an assistant district attorney is responsible for gathering the documents, though in some districts he may have substantial assistance from an administrative assistant, a law enforcement officer, or someone else. The list states when a document must be certified or signed by a particular person. Whoever gathers the documents should collect *five* complete sets, four to go to the Extradition Secretary and one to be retained in the district attorney's files.

When there is more than one charge, the person who prepares the request should base the request on the strongest charge. Once the fugitive is returned, he may be charged with any number of offenses. The fact that charges were not included in the request for extradition does not mean that they are waived.

*Arrest warrant.* Copies of the arrest warrant are needed if the fugitive has not yet been indicted. If he has been indicted, the arrest warrant is not needed; copies of the indictment will be used instead. The warrant or indictment should be reviewed to see that it properly charges the offense and cites the statute violated. Use of an indictment simplifies the process. An order for arrest is not sufficient by itself.

*Affidavit supporting the warrant.* When the charging document is an arrest warrant, it must be supported by an affidavit. The most likely person to write the affidavit is the investigating officer or the victim. The affidavit must state enough facts to establish probable cause for the issuance of the warrant. Also,

to avoid questions in the other state concerning the authority of the official to issue the warrant, the affidavit must be sworn to before a magistrate or judge rather than a clerk. To show that the affidavit was the basis for issuing the warrant, the affidavit must have the same date as the warrant. Some states will not extradite if the date of the affidavit (for example, January 25, 1987) shows that it was issued after the date that arrest warrant was issued (for example, January 20, 1987). Therefore, when a warrant was issued without an accompanying affidavit (oral sworn testimony is sufficient to support an arrest warrant in North Carolina), a new arrest warrant must be issued so that the dates of the arrest warrant and the affidavit will be the same.

An affidavit is clearly not necessary when the charging document is an indictment, though a few other states prefer to have an affidavit then also.

*Certification of documents.* If a warrant and affidavit are submitted, they must be accompanied by a certification of the magistrate or judge who issued the warrant or took the affidavit. A clerk of court may certify copies of documents when he is the keeper of the original. Each copy must be certified.

*Certifications of office.* When a judge or magistrate certifies a document, the clerk of court must certify that person's official character. Then a district court or superior court judge must certify the official character of the clerk. And in turn the clerk must certify the official character of the judge who certified the clerk.

*The indictment.* If the fugitive has been indicted, the indictment should be submitted rather than the arrest warrant. The district attorney should make certain that the indictment properly charges the offense and has been signed by the foreman. He should also check to see that it cites the statute violated. The authenticity of each copy must be certified by the clerk of court, the official character of the clerk certified by the judge, and the official character of the judge certified by the clerk.

*Application for a requisition.* This form, included in this manual's Forms section, must be filled out in full. Note that it includes the following information:

—The fugitive's full name, properly spelled.

—A statement that in the district attorney's opinion the ends of public justice require that the fugitive be brought to North Carolina for trial.

—A statement that the district attorney believes that he has sufficient information to convict the fugitive.

—The names and addresses of the agents who are to bring the fugitive back to North Carolina from the other state and a statement that the persons recommended as agents are proper persons and have no private interest in the arrest or conviction of the fugitive.

—A statement whether there has been any earlier application for requisition of the same person for the same transaction, including the date of such request, and a statement of the reason for the present request if there was an earlier one.

—If the fugitive is under arrest in the other state, a statement that he is under arrest, the nature of the proceedings, and the place (with complete address) where he is in custody, if known. If the fugitive is out on bail, the date of his hearing should be stated. If the fugitive's home or business address is known, that should also be stated. The source of this information should be given.

—A statement that the application is not made for the purpose of enforcing the collection of a debt or for any private purpose whatever, and that if the requisition is granted, the criminal proceeding will not be used for any such purposes.

—A statement of the crime charged and the approximate time, date, places, and circumstances of its occurrence. This statement should include a citation to the statute violated.

—A statement that the person was in North Carolina when the crime was committed and has since fled. Or if the person committed an act in another state that intentionally resulted in the crime in North Carolina, that fact must be stated.

—If the crime did not occur recently, an explanation for the delay in making application.

The requisition form provides blanks for all this information or notes the need to include the information.

*Certification of the district attorney.* Again, the clerk must certify the official character of the district attorney who submits the application, and in turn the clerk must be certified by a judge, who must then be certified by the clerk. Note that only one such certification of official character per official is required, no matter how many documents that official has signed.

*Special affidavits.* In any case involving fraud, false pretense, embezzlement, or forgery, there must also be an affidavit of the principal complaining witness or informant that (a) the application is made in good faith for the sole purpose of criminal punishment, and (b) he does not desire or expect to use the prosecution for the purpose of collecting a debt or for any other private purpose, either directly or indirectly. If such an affidavit is not included, a good explanation for its absence must be given.

*Photograph and fingerprints of the fugitive.* Many states now require some identification of the fugitive. Therefore, a requisition request should be accompanied by fingerprints, a photograph, and/or a physical description. Although a photograph is not required, it can be very helpful in identification and should be included whenever possible. It should be accompanied by an affidavit to the effect that the person shown is the person charged with the crime. Nor are fingerprints required, but they should be provided for identification when available.

*The statute.* Copies of the statute the fugitive is charged with violating should be included.

## PART 8. WHEN THE FUGITIVE HAS ESCAPED FROM CUSTODY OR VIOLATED PROBATION OR PAROLE

Extradition procedures are slightly different when the fugitive from North Carolina has already been convicted in this state and has escaped from custody or has left the state in violation of parole or probation conditions. A separate form (see this manual's Forms section) is used for requisition in these cases. The application is to be made by the district attorney or the sheriff if the person was in jail awaiting transfer to the Department of Correction or if he was out of jail pending appeal. If the person escaped from the Department of Correction's custody, the application is to be made by the Secretary of Correction or a properly designated official of the Department. For a fugitive who left the state in violation of probation conditions, the application may be made by the district attorney of the district where the person was serving probation (or it might be prepared for the district attorney's signature by the Division of Probation and Parole). If the person was on parole, the request may be made by either the district attorney or the Parole Commission. The application for requisition is to be accompanied by the following documents:

—The indictment (or the arrest warrant, if the person was tried on a warrant).

—The judgment of conviction and sentence on which the person was being held when he escaped.

—An affidavit of the officer from whose custody the person escaped, showing that an escape occurred and the circumstances of it.

—The record of escape, which includes the transcript and fingerprints.

Five copies of each document should be prepared; four are sent to the Governor's Extradition Secretary, and one is retained by the official who made the application. The clerk of court who holds the original must certify to the authenticity of the indictment (or warrant) and the judgment of conviction and sentence. The clerk must also certify the official character of the person who made the affidavit that describes the fugitive's escape. The official character of the clerk must be certified by a judge and vice versa.

## PART 9. EXTRADITION OF MILITARY PERSONNEL

If extradition is requested for someone who is on active duty with the Air Force, Army, Marine Corps, or Navy, the application must be accompanied by an agreement by the appropriate authorities that:

—The fugitive's commanding officer will be informed of the outcome of any trial; and

—If the military authorities desire his return, the fugitive will, if acquitted or when his sentence is completed, be returned to the military authorities at the place where he was taken into custody or taken to the nearest receiving ship, station, or barracks at the expense of the authority that seeks the requisition.

If the crime is a felony and the requisition is made through the Governor's office, this agreement will be prepared by the Governor's office and the State will pay the expenses. If the crime is a misdemeanor, so that the expenses of extradition are to be borne by the county, then the district attorney or other official who applies for the requisition must prepare and execute the agreement. The agreement may be in the form of a letter to the Secretary of the appropriate branch of the service, setting out the required promises. An example of such an agreement appears on the next page.

## PART 10. OTHER SPECIAL CASES

*Fugitives out of the United States.* In cases of international extradition, the district attorney completes the same papers and sends his application to the Governor's Extradition Secretary. The Governor's office will process the request, add its endorsement, and send it to the Secretary of State in Washington.

*Fugitives in United States possessions.* If the fugitive is in a United States territory the district attorney completes the same papers and sends his application to the Governor's Extradition Secretary. The Governor's office will process the request, add its endorsement, and send it directly to the territorial governor.

*Fugitives in the District of Columbia.* If the fugitive is in the District of Columbia, the district attorney completes the same papers and sends his application to the Governor's Extradition Secretary. The Governor's office will process the request, add its endorsement, and send it to the Chief Judge of the Superior Court of the District of Columbia. The District of Columbia has several special requirements for extradition. One requirement is that the fugitive must be identified by photograph or other description or by sending a witness who can identify him. The District of Columbia is also very strict in requiring a timely application; the application should not be delayed.

*Renewal of the application.* When an application must be renewed — for example, when the fugitive could not be found in the state from which requisition was first sought — new or recertified copies of the papers required for extradition must be furnished.

## PART 11. AGREEMENT BETWEEN GOVERNOR OR DISTRICT ATTORNEY AND THE ARMED FORCES

_____
(date)

TO WHOM IT MAY CONCERN:

In consideration of the delivery of _____
(name of fugitive, grade, service number, and branch

of armed forces) _____ to _____ (county) at _____ (city and state), for trial

upon the charge of _____
(list charge or charges)

_____

I hereby agree, pursuant to the authority vested in me as _____
(Governor or District Attorney)

_____, that the commanding officer in charge of the _____
(branch of service,

_____,
location of base or station, city and state)

and the Secretary of the _____ will be informed of the
(branch of service)

outcome of the trial and that said _____ will be returned to
(name of fugitive)

the _____ authorities at the place of delivery named above or
(name of branch of service)

to such other place as may be designated by the _____
(name of branch of service)

or issued transportation to the nearest receiving _____
(ship, station, or base)

without expense to the United States or to the person delivered, immediately upon the completion of the trial if the person is acquitted or immediately upon satisfying the sentence of the court if he is convicted and a sentence imposed, or upon other disposition of his case, provided that the _____ authorities shall then desire his return.
(name of branch of service)

_____
(signature and typed name of Governor or District Attorney)

# ARTICLE III. FUGITIVE FROM ANOTHER STATE FOUND IN NORTH CAROLINA

## PART 1. DUTIES OF THE ARRESTING OFFICER

### Section 1. Before an arrest is made.

A. *Determine whether the person is a fugitive.* The first thing the officer needs to know is whether the suspect is charged with a crime in another state (by warrant or indictment), or has escaped from imprisonment there (following a conviction), or has violated probation or parole by leaving that state. An officer usually learns that someone is a fugitive by receiving an NCIC message on the PIN terminal, less often by telephone, letter, or telegram from an officer in the other state. The PIN message by itself is sufficient to obtain a North Carolina arrest warrant for the fugitive, but the information should be verified by phone or otherwise if possible. As mentioned below, a copy of the other state's warrant or indictment should be obtained as soon as possible and attached to the North Carolina warrant.

B. *Determine whether to arrest with or without a North Carolina warrant.* If the fugitive has been formally charged with a crime in the other state and the crime is punishable in that state by death or imprisonment for more than one year, you may arrest him without a North Carolina warrant. Otherwise, an arrest may not be made until a North Carolina magistrate has issued a warrant. It is always preferable to obtain a warrant first if time allows.

### Section 2. If the arrest is to be made without a warrant, follow these steps.

C. *Arrest the fugitive.* Follow the same procedure you use when arresting for a North Carolina crime. Tell the fugitive why he has been arrested.

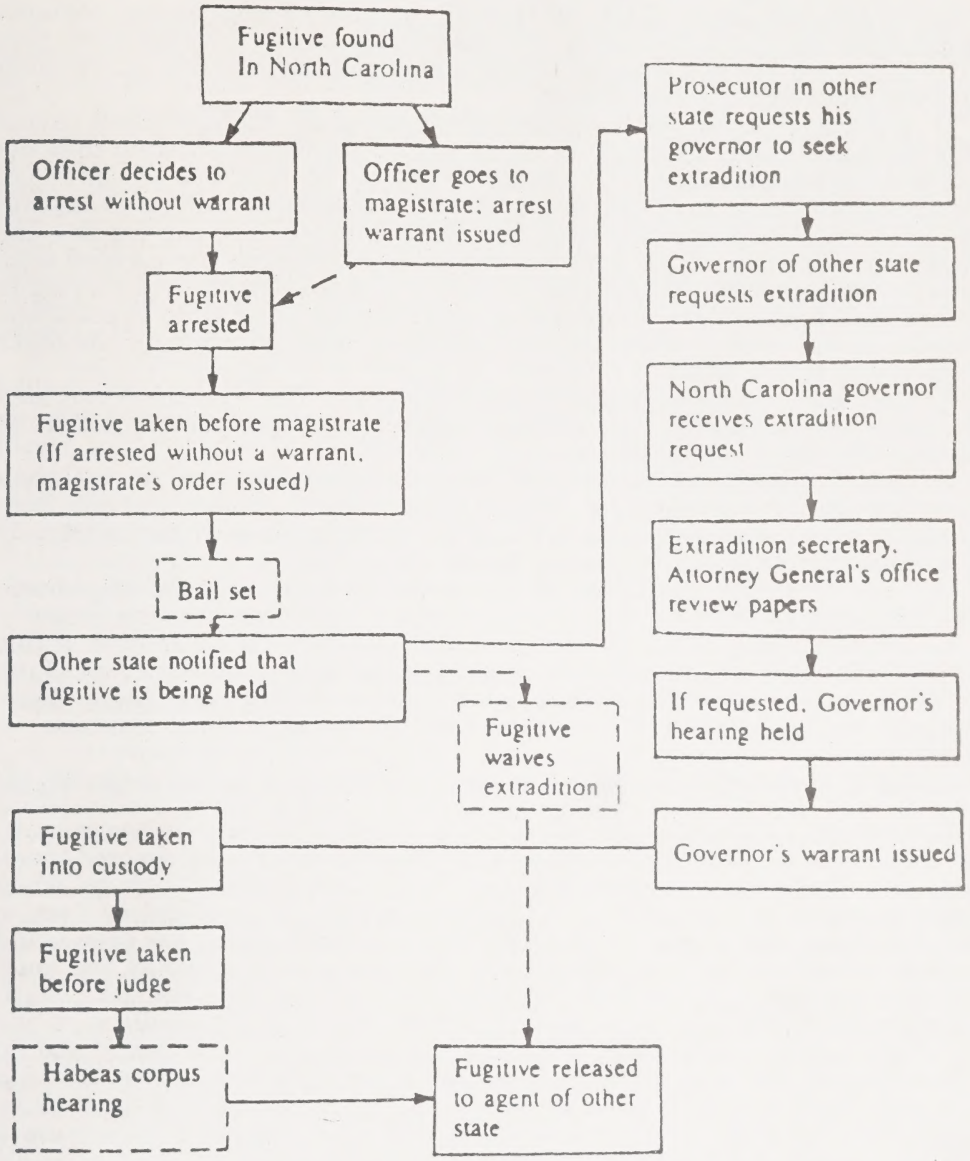
D. *Take the fugitive to a magistrate.* This requirement is the same as when you arrest for a North Carolina crime.

E. *Tell the magistrate the reason for the arrest.* State why you believe the person has been charged with a crime in another state. If your reason is a PIN message or a letter or telegram, give that to the magistrate to be attached to the Fugitive Affidavit (see AOC-CR-911M in this manual's Forms section). The magistrate is to determine only whether the person has been formally charged in the other state; he does not determine whether there is probable cause to believe the fugitive actually committed the crime. Is this case, since you arrested without a warrant, the magistrate must also determine that the crime is punishable by death or imprisonment for more than one year.

F. *Take the fugitive to jail or release on bail as ordered by the magistrate.* Unless the crime is punishable by death or life imprisonment, the magistrate may release a fugitive on bail just as if he were charged with a North Carolina crime.

G. *Request a copy of the warrant or indictment from the other state.* If this has not already been done, ask your contact in the other state for a copy of the arrest warrant or indictment charging the fugitive with the crime there. When the copy arrives, attach it to the Magistrate's Order (see AOC-CR-909M in this manual's Forms section).

**Section 3. What happens when a fugitive from another state is found in North Carolina.**



**Section 4. If a warrant is to be obtained before you make the arrest, follow these steps instead.**

C. *Go to the magistrate and complete an affidavit for an arrest warrant.* The Fugitive Affidavit (see AOC-CR-911M in this manual's Forms section) contains instructions on what information is needed. Either you or the magistrate may fill out the form, but you must be certain it accurately reflects your information and you must sign it as the affiant.

D. *Tell the magistrate your reasons for arresting the fugitive.* If you have a PIN message, letter, telegram, or other written document showing that the fugitive has been charged with a crime in another state or has escaped from imprisonment there, show that document to the magistrate and help complete the affidavit. The magistrate is to determine only whether the fugitive has been charged with a crime in the other state or whether he has escaped from imprisonment or violated probation or parole. The magistrate is not trying to determine whether there was probable cause for the other state to make the charge. In this case it is not necessary to show what punishment the other state places on the crime.

E. *Once the warrant is issued, arrest the fugitive.* The warrant is executed the same as if the person were charged with a North Carolina crime. Tell the fugitive the reason for his arrest.

F. *Take the fugitive to a magistrate.* This is the same procedure you use when arresting with a warrant for a North Carolina crime. The magistrate is to decide whether to allow bail, except that bail is not allowed when the crime is punishable by death or life imprisonment.

G. *Take the fugitive to jail or release on bail as ordered by the magistrate.* The procedure is the same as when you arrest for a North Carolina crime.

H. *Request a copy of the warrant or indictment from the other state.* If this has not already been done, ask your contact in the other state for a copy of the arrest warrant or indictment charging the fugitive with the crime there. When the copy arrives, attach it to the arrest warrant issued in North Carolina.

**Section 5. If the fugitive has not yet been charged in the other state.**

The extradition statutes also allow you to arrest someone who has committed a crime in another state even if he has not yet been formally charged there. This situation should occur only rarely. It is most likely to happen when someone commits a crime in a neighboring state and immediately flees to North Carolina and you are contacted before a judicial official has been found in that other state to issue the warrant. Before making the arrest you must obtain a warrant for arrest from a magistrate. You may use a standard North Carolina arrest warrant form for this purpose, modifying it to allege (a) the name of the crime in the other state (without giving all the elements) and (b) the statute of the other state. Because the other state has not yet issued a warrant, you must show the magistrate probable cause to believe the fugitive committed the crime in the other state, just as if you were requesting a warrant to arrest for a crime committed in North Carolina. Your probable cause will be the information you received from the officers in the other state that links the person with the crime there. Once the arrest warrant is issued, proceed just as if it were a warrant charging a North Carolina crime. Ask the other state's officers for a copy of the warrant issued there when the defendant is charged in that state. When the copy arrives, attach it to the North Carolina arrest warrant.

## PART 2. DUTIES OF THE MAGISTRATE

### Section 1. If the officer comes to you before arresting the fugitive.

A. *Determine whether there are grounds for an arrest.* Place the officer under oath and ask his reasons for making an arrest. The three grounds that justify an arrest are (1) the person is charged with a crime in another state and fled, (2) he was convicted of a crime in another state and has escaped from imprisonment there, and (3) he was convicted of a crime in another state and violated the conditions of his probation or parole by fleeing. The officer's information must be reliable. Usually it will consist of a PIN message, but it could be a letter or telegram or phone call from an officer in the other state, or even a copy of the warrant or indictment from the other state. You are *not* to determine whether there is probable cause to believe the person committed the crime — only whether he is charged in the other state or has escaped and whether this is the person wanted by the other state.

B. *Complete the affidavit and arrest warrant.* It is necessary to complete both the Fugitive Affidavit (see AOC-CR-911M in this manual's Forms section) and the Warrant for Arrest for Fugitive (see AOC-CR-910M in this manual's Forms section) and be certain that they are attached. Follow the usual procedure on the number of copies to be completed, sending the original to the clerk of court's office. Attach to the original the PIN message or any other document used to establish that the person is a fugitive. Remind the officer to obtain a copy of the arrest warrant or indictment in the other state as soon as possible and have it attached to the original copy of the warrant in the clerk's office.

### Section 2. If the officer brings in the fugitive after arresting him without a warrant.

A. *Determine whether the officer had adequate grounds for the arrest.* Place the officer under oath and ask his reasons for making the arrest. An officer may arrest without a warrant only when the person has been charged with a crime in another state and that crime is punishable by death or by imprisonment for more than one year. The person might have been charged in the other state by the issuance of an arrest warrant there, by an indictment, or by information filed by a prosecutor in that state. You are to determine only whether the person has been charged in the other state, not whether there was probable cause for the charge. The officer's information that the person has been charged must be reliable. Usually it will be a PIN message, but it could be a letter, telegram, or telephone call from an officer in the other state. Sometimes the officer may even have a copy of the warrant or indictment from the other state. If his information is a PIN message, ask him whether he has phoned the other state to verify that the charge is still outstanding and they wish to extradite. This verification is not essential — the PIN message is sufficient justification for arresting the fugitive — but it is a highly recommended practice. Of course you must also determine that the person arrested is the person charged in the other state.

B. *Complete a magistrate's order.* Complete the Fugitive Affidavit (see AOC-CR-911M in this manual's Forms section) and the Magistrate's Order for Fugitive (see AOC-CR-909M in this manual's Forms section). Follow the usual procedure on the number of copies to be completed; the original goes to the clerk's office. Attach to the original the PIN message or other written document used to establish that the person is a fugitive. Remind the officer to obtain a copy of the other state's warrant or indictment as soon as possible and have it attached to the original copy of the magistrate's order in the clerk's office.

C. *Inform the fugitive of the charges.* Follow the same procedure you follow in any other case, informing the person of the charge against him, his right to communicate with counsel and friends, and whether he is entitled to bail. Also point out to him the information about his rights that appears on the reverse side of the magistrate's order form. You need not read all of that information to him, but at least tell him that he may ask the Governor's office for a hearing before the Governor grants extradition. The request must be in writing and must state the person's reasons for challenging his extradition.

D. *Determine whether to allow bail.* G.S. 15A-736 allows a fugitive to be given bail unless the offense with which he is charged in the other state is punishable by death or life imprisonment. Apparently the only form of pretrial release that may be used is a bail bond with sureties. The bail bond schedule given the magistrate by the senior resident superior court judge may include instructions on what bond to set for fugitives. Sometimes the same amount is required as for a similar North Carolina crime, and sometimes that amount is doubled or otherwise multiplied. If bail is not allowed, or if the defendant cannot meet the bail, he should be committed to the county jail. (*Note:* Bail is not allowed after a Governor's Warrant has been issued.)

E. *Order the fugitive to appear in district court.* Whether the fugitive is released on bond or cannot make bond or is ineligible for bail, the release or commitment order should direct that he appear before a district court judge at the earliest possible time. Although the statute does not require an immediate district court appearance for the fugitive who is released on bond, such an appearance will give the district judge an early opportunity to review the fugitive's bond, explain the extradition process, and appoint counsel if necessary. Fugitives often waive formal extradition once they are told about the process and have talked to a lawyer. If the chief district judge for your district prefers not to deal with the fugitive at this point, your release is on condition that the person either (a) return for a district court appearance at a specific time within 30 days or (b) surrender when a Governor's Warrant is issued. If the Governor's Warrant has not been issued by the time of that first district court appearance, the district judge can continue the case for additional 30-day periods.

**Section 3. If the officer arrested the fugitive on the basis of a warrant and is now bringing him before you.**

A. *Inform the fugitive of the charges against him.* The procedure is the same as if the person were charged with a North Carolina crime. He should be informed of the charge against him, the right to communicate with counsel and friends, and whether he is entitled to bail. Also point out to him the information about his rights that appears on the reverse side of the arrest warrant form. You need not read all of that information to the fugitive, but be sure to tell him that he may ask the Governor's office for a hearing before extradition is granted. The request must be in writing and must state the fugitive's reasons for challenging his extradition.

B. *Determine whether to allow bail.* G.S. 15A-736 allows bail for a fugitive unless the offense with which he is charged in the other state is punishable by death or life imprisonment. Apparently the only form of pretrial release that may be used is bail bond with sureties. The bail bond schedule given the magistrate by the senior resident superior court judge may include instructions on what bond to set for fugitives. Sometimes the same amount is required as for a similar North Carolina crime, and sometimes the amount is doubled or otherwise multiplied. If bail is not allowed, or if the defendant cannot meet the bail, he should be committed to the county jail. (*Note:* Bail is not allowed after a Governor's Warrant has been issued.)

C. *Order the fugitive to appear in district court.* Whether the fugitive is released on bond or cannot make bond or is ineligible for bail, the release or commitment order should direct that he appear before a district court judge at the earliest possible time. Although the statute does not require an immediate district court appearance for the fugitive who is released on bond, such an appearance will give the district judge an early opportunity to review the fugitive's bond, explain the extradition process, and appoint counsel if necessary. Fugitives often waive formal extradition once they are told about the process and have talked to a lawyer. If the chief district judge for your district prefers not to deal with the fugitive at this point, your release is on condition that the fugitive either return for a district court appearance at a specific time within 30 days or surrender when a Governor's Warrant is issued. If the Governor's Warrant has not been issued by the time of that first district court appearance, the district judge can continue the case for additional 30-day periods.

**Section 4. If the fugitive has been arrested on a governor's warrant.**

A. *Inform the fugitive of the charges against him.* Tell the fugitive what crime he is charged with in the other state (he was also given this information when he was first arrested in North Carolina) and that the Governor of North Carolina has issued a warrant for him to be taken into custody and returned to the state from which he fled. Also inform the fugitive of his right to communicate with counsel and friends. The Governor's Warrant requires that he be held without bond.

B. *Commit the fugitive to jail.* Commit the fugitive to jail to await his appearance before a district court judge.

C. *Order the fugitive returned to district court at the earliest possible date.* The order of commitment should specify the time and date that the fugitive is to appear before a district court judge, which should be as early as possible. At that time he will be informed of his right to apply for habeas corpus.

**Section 5. When the fugitive has not yet been charged with a crime in the other state.**

The extradition statutes also allow a fugitive to be arrested in North Carolina even though he has not yet been formally charged in the other state. This situation should occur only rarely. It is most likely to happen when the person commits a crime in a neighboring state and flees to North Carolina immediately, and then law enforcement officers in North Carolina are asked to arrest him before officers in the other state have found a judicial official to issue an arrest warrant in that state. Before a North Carolina officer may make an arrest in this situation, he must obtain an arrest warrant. The procedure you follow in issuing such a warrant is the same one used when the officer wants to charge someone with a North Carolina crime. That is, the officer must be placed under oath and must state facts from which you can independently determine that there is probable cause to believe the person committed the crime in another state. You cannot just accept the word of the officers from the other state that the person committed the crime; you must be told the reasons for reaching that conclusion. (This is different from other situations involving a fugitive in which you need only establish that the person has been charged in the other state and you may not inquire as to the probable cause for that charge.) If you determine that there is probable cause, complete an arrest warrant. The standard arrest warrant form will need to be modified to indicate that the crime is one committed against the law of another state. You need not spell out the elements of the offense but can simply state the name of the crime in the other state. Use the name of the crime given by the

officers from that state, which may be different from the name used in North Carolina (for example, "second degree robbery"). After the warrant is issued, the case proceeds like any other involving a fugitive.

## PART 3. DUTIES OF THE CLERK OF COURT

### Section 1. When the fugitive is first arrested.

A. *Assign a docket number and set a district court hearing.* When the fugitive is arrested, he will be taken to a magistrate like anyone else arrested in North Carolina and will be either committed to jail or given pretrial release. In either case, the magistrate should have scheduled the person to appear in district court as soon as possible. (Although a fugitive released on bail need not be immediately scheduled for a district court appearance — he could simply be released on bond on the condition that he return at the end of 30 days or whenever a Governor's Warrant is issued — the magistrate has been advised in this manual to set a district court appearance for the fugitive at the next session. An early appearance gives the judge an opportunity to explain the extradition process and to determine whether the fugitive needs an attorney, which may well result in an early waiver of the formal extradition procedures.) When the fugitive papers are received from the magistrate, the clerk should assign a docket number and set the case for the *first possible district court session.*

### Section 2. If the fugitive waives extradition in district court, take these steps.

B. *Accept the waiver and see that the file is complete.* While he is in district court, the fugitive may decide to waive extradition. Either the judge or the clerk may take that waiver (not a magistrate). Use AOC-CR-912M (see this manual's Forms section). Whoever accepts the waiver should explain the fugitive's rights to him. The clerk is responsible for seeing that the papers are handled correctly. One copy of the waiver goes in the case file, one copy goes to the Governor's office, and one copy goes to the jail with the fugitive (to be given to the officer from the other state when he takes custody). Generally the clerk is to see that copies of all correspondence involving the fugitive are kept in the case file. The sheriff is responsible for notifying the officers in the other state that the fugitive is ready for return.

### Section 3. If the fugitive refuses to waive extradition, follow these steps instead.

B. *Assign an attorney and set a new court date.* If the fugitive does not waive extradition during his first appearance in district court, the clerk should determine indigency and assign an attorney to represent him. Although the statutes do not require appointment of counsel until later in the process, matters can be expedited if the fugitive has a lawyer. The attorney should be mailed a copy of the appointment, the refusal form, the warrant, and a notice of the next court date. It is likely that at the first appearance in district court, the judge will continue the case for 30 days. The defendant will be ordered to return on a given date to see whether the Governor of North Carolina has issued a Governor's Warrant to have him returned to the other state. If the Governor's Warrant is issued before then, a fugitive who is out on bail should be returned to custody and taken immediately before a district court judge. If no Governor's Warrant is issued and the fugitive returns as scheduled in 30 days, the case can be continued and another appearance scheduled later. The

statute allows the judge to continue the fugitive's bond or commitment for 60 additional days if the Governor's Warrant has not been issued by the end of the first 30-day period, but judges usually continue the case for two additional 30-day periods rather than one 60-day period. The judge will decide whether the fugitive is to be given bond during this time. The clerk's responsibility is to record the information on the commitment paper or release order. If the other state shows no urgency in carrying out formal extradition, the judge may simply release the fugitive after 60 days — not waiting the full 90 days. If the judge releases the fugitive because no Governor's Warrant has been issued, the clerk closes the case as a dismissal.

C. *Prepare copies of the governor's warrant, have the defendant served, and set the court appearance.* When a Governor's Warrant is issued, the original and one copy are sent to the clerk for the sheriff. The clerk should notify the sheriff that the warrant has been received and should make another copy for the fugitive, giving the Governor's Warrant the same docket number as the fugitive warrant used for the original arrest. In addition to the fugitive's copy, the original Governor's Warrant and one other copy are sent to the jail to be signed by the officers from the other state when they come. If the fugitive is not still in custody, the Governor's Warrant is given to an officer to bring him back into custody. The fugitive should be scheduled for the next session of district court. In district court the judge will tell the fugitive that he may apply for habeas corpus, will see that he gets a lawyer if he does not already have one, and will give him a certain amount of time (though still in custody) to decide whether to apply for habeas. The case is then continued for the period set by the district judge. If the fugitive does not apply for habeas corpus by the set time, the district judge orders him turned over to the agents from the other state. If the fugitive does apply for habeas corpus, the docket file is given to the superior court clerks and the case becomes a pending case in superior court to be set for hearing by the district attorney.

D. *Place the original governor's warrant in the file and return the copy to the governor's office.* Once the fugitive is turned over to the agents from the other state — either with or without a habeas corpus hearing in superior court — the original Governor's Warrant is returned to the Governor's office and one copy placed in the court record.

## PART 4. DUTIES OF THE DISTRICT ATTORNEY

### Section 1. When the fugitive is first arrested.

When first arrested, the fugitive may be given bond by a magistrate unless the crime is one punishable by death or life imprisonment. Whether the defendant is held or released on bond, the magistrate should schedule him for the next session of district court. (If the fugitive is released on bail, the immediate appearance in district court is not required by the statute — the magistrate could schedule the district court appearance 30 days later — but an immediate appearance will usually expedite matters.) At the district court appearance the judge should inform the fugitive of the charge against him, see that he has a copy of the arrest warrant or magistrate's order, review the bail, and see whether it is necessary to appoint an attorney. The fugitive may waive extradition and be turned over to an agent from the other state, or he may be continued on bonded release or in commitment for up to 30 days (from the time of the initial arrest in North Carolina) to await issuance of a Governor's Warrant.

**Section 2. When the fugitive appears in district court at the end of 30 days.**

If the recommended procedure has been followed, the fugitive will have already appeared before a district judge once, when first arrested, although he could have been released by a magistrate for 30 days without having seen a judge. In either case, the only purpose of this district court appearance is to determine whether the Governor of North Carolina has issued a Governor's Warrant ordering the fugitive's return to the other state. Before the hearing, the district attorney should determine whether the Governor's Warrant has been issued. If the warrant has been issued, proceed as indicated below. If not, the fugitive may be held or released on bond for another 60 days to await issuance of the Governor's Warrant. Judges usually continue the case for 30 days at a time. Before he asks for another 30-day commitment, the district attorney should try to determine whether the other state is diligently pursuing extradition.

**Section 3. When a governor's warrant is issued.**

When a Governor's Warrant is issued, the fugitive is to be taken into custody (he may already be in custody if he was not given bail or could not make bail) and brought before a district court judge. The judge is to inform him of the other state's demand for his surrender, the crime he has been charged with, that he is entitled to counsel, and that he has a reasonable time, set by the judge, within which to apply for a writ of habeas corpus. The fugitive may *not* be turned over to the agent of the other state until this appearance has been held. Bail is not allowed once a Governor's Warrant has been issued.

**Section 4. When the fugitive applies for the writ of habeas corpus.**

The district attorney is to be notified if the fugitive applies for habeas corpus; the district attorney will represent the State of North Carolina at that hearing. As discussed in the section of this manual entitled Some Legal Issues in Extradition, the issues that may be raised at the habeas corpus hearing are limited to the following:

*Whether the demand for extradition was made in the proper form.* G.S. 15A-723 requires the demand for extradition to include a copy of the indictment, information, or warrant, plus supporting affidavits used to charge the defendant in the other state. If the fugitive is an escapee, the other state must send a copy of the judgment of conviction or the sentence imposed with a statement that the person has escaped or has broken the terms of his bail, probation, or parole. The indictment, information, or warrant and affidavit must substantially charge the person with a crime in the other state and must be authenticated by the governor of that state. Minor defects in the wording of the charge from the other state do not invalidate a charge, nor is there any particular form required for the authentication by the governor.

*The identity of the fugitive.* The defendant has the burden of showing that he is not the fugitive being sought. Identification is facilitated when photographs or fingerprints accompany the extradition papers. Sometimes an identifying witness must be brought from the other state. A determination that the defendant is not the fugitive does not prevent a subsequent extradition proceeding against the same person for a similar charge.

*Whether the person is a fugitive from the other state.* The recital in the Governor's Warrant that the defendant is a fugitive from the other state creates a presumption that he is, placing the burden on the defendant to show otherwise. If the charge is one that required his presence in the other state, he can meet the burden by showing that he was not there when the crime was

committed. His reason for leaving the other state is irrelevant. The demand from the other state may omit a statement that the defendant was present when the crime was committed, if the nature of the crime is such that his presence is implicit in the commission.

*Whether the defendant has been charged with a substantial crime.* The defendant may show, by introducing the relevant statutes, that his acts do not amount to a crime in the other state.

The Governor's Warrant is presumed valid, and the burden is on the defendant to disprove its allegations. Unless the matter is related to one of the issues above, it is not relevant to consider the defendant's guilt or innocence, his alibi, the other state's motive in extraditing, the expiration of the statute of limitations, or any constitutional matter such as whether the defendant is likely to receive a fair trial. Nor are the prison conditions of the other state relevant, though there is some authority that the defendant should be allowed to show great likelihood of being lynched or being subjected to cruel and unusual punishment in the other state.

A judgment denying habeas corpus is a final judgment of the superior court for which the defendant may seek certiorari to the North Carolina Court of Appeals. (The State may seek certiorari to review a judgment granting habeas corpus.) The superior court judge or a Court of Appeals judge may issue a stay to allow the Court of Appeals to hear the defendant's appeal.

### Section 5. If the fugitive is also charged with a crime in North Carolina.

G.S. 15A-739 allows the Governor of North Carolina to delay extradition if the person being sought by the other state has been charged with a crime in North Carolina. The Governor's Extradition Secretary should be notified that a North Carolina charge is pending before she issues the Governor's Warrant.

## PART 5. DUTIES OF THE DISTRICT COURT JUDGE

### Section 1. When the fugitive is first arrested.

Normally a district court judge will have no involvement in the initial arrest of a fugitive. The judge could be called on to issue an arrest warrant just as a magistrate would, but that should rarely happen.

### Section 2. The first appearance before a district court judge.

G.S. 15A-601, the statute requiring a first appearance before a district court judge, refers to crimes "in the original jurisdiction of the superior court." Because the fugitive is charged with a crime in another state, it is probably not required under that statute that a first appearance be held, but magistrates are advised to schedule all fugitives, whether committed or released on bail, to appear at the next session of district court. This procedure can expedite matters considerably. At the first appearance, the judge can tell the fugitive the charge against him, see that he has a copy of the arrest warrant or magistrate's order, and review the bail set by the magistrate. The fugitive may waive extradition at this appearance (see the separate section on waiver below).

At the first appearance, the judge should also tell the fugitive that he may apply in writing for a Governor's hearing before a Governor's Warrant is issued. The request must state the grounds for opposing extradition. The only issues that will be considered are (1) whether the person has been charged in the other state, (2) whether the papers are in proper form, (3) whether the person demanded is the person charged, and (4) whether the accused is a

fugitive. A Governor's hearing may be granted or denied at the Governor's discretion.

If the fugitive cannot make bail or if he is denied bail, he should be committed to jail to be returned to district court on a specific date within 30 days of his arrest. At that time there will be a determination whether a Governor's Warrant has been issued. If he is released on bond after the first appearance, his release should be conditioned on a return to district court on a specific date within 30 days to determine whether the Governor's Warrant has been issued, or to return whenever the warrant is issued if it is sooner than 30 days.

Usually the first appearance is used to determine whether counsel should be appointed. Although the extradition statutes, in particular G.S. 15A-730, provide for the fugitive to be notified of the right to counsel after the Governor's Warrant has been issued (when the fugitive is returned to custody and taken before a judge to be informed of his right to apply for habeas corpus), the need for counsel should be determined at the first appearance. Doing so often helps in informing the defendant of the extradition process and in helping him decide whether to waive formal extradition.

**Section 3. When the fugitive returns to court after 30 days.**

Whether the fugitive is out on bond or has been committed to the jail, he is to return to district court within 30 days of his arrest in North Carolina. This appearance is used to determine whether the Governor of North Carolina has issued a Governor's Warrant ordering that the fugitive be returned to the other state. If the warrant has been issued, proceed as indicated in the next section. If the Governor's Warrant has not been issued, the fugitive may be continued on bond or committed to jail for up to 60 additional days to await issuance of the Governor's Warrant. The usual practice is to continue the case for 30 days at a time. Before an additional 30-day custody is imposed, the district attorney or a law enforcement officer should be required to determine whether the other state is diligently pursuing extradition. Of course the fugitive may use this opportunity to waive extradition and return voluntarily to the other state.

**Section 4. When a governor's warrant has been issued.**

Once a Governor's Warrant is issued, G.S. 15A-730 requires that the fugitive be brought before a judge before he is delivered to the agent of the other state. At the district court appearance after the arrest on a Governor's Warrant, the judge is to inform the fugitive of the other state's demand for his return, the charge against him in that state, that he has the right to demand and procure counsel, and that he may challenge the legality of his arrest by applying for a writ of habeas corpus. If the fugitive wants counsel and is indigent, the judge should appoint counsel if that has not already been done. The statute also requires that the fugitive be given a reasonable time within which to apply for habeas corpus. The time limit is to be fixed by the district court judge. The judge should order the fugitive held in the county jail (or other place of confinement) until the time expires for applying for habeas corpus; the person is then to be turned over to the agent for the other state. Once a Governor's Warrant is issued, bail is not allowed.

**Section 5. If the fugitive wishes to waive extradition.**

At any time after he has been arrested, the fugitive may waive extradition and be delivered to an agent from the other state. G.S. 15A-746 allows the waiver to be made before a judge or a clerk of court. The waiver must be in writing; use AOC-CR-912M (see this manual's Forms section). Before the form

is signed, the fugitive must be told that (a) he may refuse to waive extradition and may require the other state to make a formal request for extradition; and (b) if a Governor's Warrant is issued, he may apply for a writ of habeas corpus. When the waiver is signed, one copy is to be forwarded to the Governor's Extradition Secretary and one copy is to be given to the agent from the other state. The judge should order the fugitive released to that agent. If the agent is not present, the fugitive should be ordered held in jail until he arrives.

## PART 6. DUTIES OF THE SUPERIOR COURT JUDGE

### Section 1. When the fugitive is first arrested.

The superior court judge should have no direct involvement in the extradition case unless the fugitive applies for a writ of habeas corpus. The senior resident superior court judge is to issue a bail policy to be used by the magistrates in his district, and that policy should indicate what bond is to be required of a fugitive. The extradition statute on bail, G.S. 15A-736, allows bail unless the offense is punishable by death or life imprisonment, but only on a secured appearance bond. Once a Governor's Warrant is issued, bail is not allowed.

### Section 2. When the fugitive applies for a writ of habeas corpus.

After the Governor's Warrant is issued, a fugitive may apply for a writ of habeas corpus. As discussed in greater detail in the section of this manual entitled Some Legal Issues in Extradition, the issues that may be raised at the habeas corpus hearing are limited to the following:

*Whether the demand for extradition has been made in the proper form.* G.S. 15A-723 requires the demand for extradition to include a copy of the indictment, information, or warrant — with supporting affidavits — used to charge the defendant in the other state. If the fugitive is an escapee, the other state must send a copy of the judgment of conviction or the sentence imposed with a statement that the person has escaped or has broken the terms of his bail, probation, or parole. The indictment, information, or warrant and supporting affidavit must substantially charge the person with a crime in the other state and must be authenticated by the governor of that state. Minor defects in the wording of the charge from the other state do not invalidate a charge, nor is there any particular form required for the authentication by the governor.

*The identity of the fugitive.* The defendant has the burden of showing that he is not the fugitive being sought. Identification can be facilitated by photographs or fingerprints accompanying the extradition papers. Sometimes an identifying witness must be brought from the other state. A determination that the defendant is not the fugitive does not prevent a subsequent extradition proceeding against the same person for a similar charge.

*Whether the person is a fugitive from the other state.* The recital in the Governor's Warrant that the defendant is a fugitive from the other state creates a presumption that he is, and the burden is on the defendant to show otherwise. If the charge is one that required his presence in the other state, he can meet that burden by showing that he was not there when the crime was committed. His reason for leaving the other state is irrelevant. The demand from the other state may omit a statement that the defendant was present when the crime was committed, if the nature of the crime is such that his presence is implicit in the commission.

*Whether the defendant has been charged with substantial crime.* The defendant may show, by introducing the relevant statutes, that his acts do not amount to a crime in the other state.

The Governor's Warrant is presumed valid and the burden is on the defendant to disprove the allegations. Unless the matter is related to one of the issues above, it is not relevant to consider the defendant's guilt or innocence, his alibi, the other state's motive in extraditing, the expiration of the statute of limitations, or any constitutional matter such as whether the defendant is likely to receive a fair trial. Nor are the prison conditions of the other state relevant, though there is some authority that the defendant should be allowed to show great likelihood of being lynched or being subjected to cruel and unusual punishment in the other state.

A judgment denying habeas corpus is a final judgment of the superior court for which the defendant may seek certiorari to the North Carolina Court of Appeals. (The State may seek certiorari to review a judgment granting habeas corpus.) The superior court judge or a Court of Appeals judge may issue a stay to allow the Court of Appeals to hear the defendant's appeal.

**Section 3. If the fugitive wishes to waive extradition.**

At any time after he has been arrested, the fugitive may waive extradition and be delivered to an agent from the other state. G.S. 15A-746 allows the waiver to be made before a judge or a clerk of court. The waiver must be in writing; use AOC-CR-912M (see this manual's Forms section). Before the form is signed, the fugitive must be told that (a) he may refuse to waive extradition and may require the other state to make a formal request for extradition; and (b) if a Governor's Warrant is issued, he may apply for a writ of habeas corpus. When the waiver is signed, one copy is to be forwarded to the Governor's Extradition Secretary and one copy is to be given to the agent from the other state. The judge should order the fugitive released to that agent. If the agent is not present, the fugitive should be ordered held in jail until he arrives.

**Editor's note.** — At this point, the Extradition Manual quotes the Uniform Criminal Extradition Act, Article 37, §§ 15A-721 to 15A-750, of G.S. Chapter 15A. The Article has been omitted here as it may be found in Volume 4 of the General Statutes of North Carolina.

## ARTICLE IV. SOME LEGAL ISSUES IN EXTRADITION

***1. Is the fugitive entitled to a hearing before a Governor's Warrant can be issued?***

The general rule is that he is not. *Application of Dugger,* 17 Ariz. App. 297, 497 P.2d 413 (1972); *Horne v. Wilson,* 306 F. Supp. 753 (E.D. Tenn. 1969); *Scheinfain v. Aldredge,* 191 Ga. 479, 12 S.E.2d 868 (1941).

***2. What issues may the Governor consider in deciding whether extradition is proper in a given case?***

The United States Supreme Court has ruled that a Governor has a mandatory duty to comply with a proper demand for a fugitive, and a federal court has the authority to compel the Governor to perform this duty. *Puerto Rico v. Branstad,* 483 U.S. 219, 107 S. Ct. 2802, 97 L. Ed. 2d 187 (1987). A Governor may only consider the following issues when deciding whether extradition is proper: (1) whether the extradition documents on their face are in order; (2) whether the accused has been charged with a crime in the demanding state; (3) whether the accused is the person named in the request for extradition; and (4) whether the accused is a fugitive. *Michigan v. Doran,* 439 U.S. 282, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1978); *California v. Superior Court,* 482 U.S. 342, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987).

***3. Is the fugitive entitled to be released on bail before the Governor's Warrant is issued?***

G.S. 15A-736 says that the magistrate or judge "may admit the person arrested to bail by bond" unless the person is charged with a crime punishable

by death or life imprisonment under the laws of the state in which it was committed. The statute mentions only release by bail with sufficient sureties.

***4. Does a person held for extradition have a right to be released on bail after a Governor's Warrant has been issued?***

The majority rule is that the Uniform Extradition Law does *not* grant a right to bail to a person held for extradition after a Governor's Warrant is issued. *Emig v. Hayward,* 703 P.2d 1043 (Utah 1985); *In re Iverson,* 135 Vt. 255, 376 A.2d 23 (1977); *In re Lucas,* 136 N.J. Super. 24, 343 A.2d 845 (1975), *aff'd,* 136 N.J. Super. 460, 346 A.2d 624 (1975); *Balasco v. State,* 52 Ala. App. 99, 289 So.2d 666 (1974); *State ex rel. Howard v. St. Joseph Superior Court,* 262 Ind. 367, 316 N.E.2d 356 (1974). Most courts have also held that judges have no common law or inherent power to grant release on bail in such circumstances (see the cases cited above). *But see Carrio v. Watson,* 171 Conn. 366, 370 A.2d 950 (1976), which ruled that releasing a fugitive on bail was proper, even after a Governor's Warrant had been served on the fugitive; the opinion was based on the court's common law power to allow bail "in all cases"; and *Ex parte Quinn,* 549 S.W.2d 198 (Tex. Crim. App. 1977), granting bail on the basis of state statute giving right to bail in "any habeas corpus proceeding" except capital cases.

The Office of the Governor agrees with the National Association of Extradition Officials' resolution (1986) opposing bail in all cases when a Governor's Warrant has been issued. It takes the position that the Governor's Warrant is an executive — not judicial — warrant and bail is not allowed.

***5. Is a fugitive entitled to counsel at a habeas corpus hearing to contest the legality of an extradition proceeding?***

Yes, pursuant to G.S. 15A-730, any accused is entitled to have counsel present at such hearings. Most courts have held that counsel in such cases is required solely by statute and is not constitutionally required under the Sixth Amendment. *Hystad v. Rhay,* 12 Wash. App. 872, 533 P.2d 409 (1975); *Wertheimer v. State,* 294 Minn. 293, 201 N.W.2d 383 (1972); *Roberts v. Hocker,* 85 Nev. 390, 456 P.2d 425 (1969). Nevertheless, courts have held that counsel must be appointed for indigents contesting extradition proceedings at habeas corpus proceedings. *People v. Braziel,* 17 Mich. App. 411, 169 N.W.2d 513 (1969); *Ex parte Turner,* 410 S.W.2d 639 (Tex. Crim. App. 1967). In North Carolina, G.S. 7A-451(a)(5) entitles an indigent held for extradition to appointed counsel. Appointed counsel is not required at an initial arraignment on a fugitive warrant or at a hearing before the Governor. *Rutledge v. Preadmore,* 21 Mich. App. 726, 176 N.W.2d 417 (1970).

***6. On what grounds may a fugitive attack a Governor's Warrant in a habeas corpus proceeding?***

The United States Supreme Court has ruled that a court may only consider the following issues when deciding whether extradition is proper: (1) whether the extradition documents on their face are in order; (2) whether the accused has been charged with a crime in the demanding state; (3) whether the accused is the person named in the request for extradition; and (4) whether the accused is a fugitive. *California v. Superior Court,* 482 U.S. 342, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987). See also *Michigan v. Doran,* 439 U.S. 282, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1978); *Dodd v. State,* 56 N.C. App. 214, 287 S.E.2d 435 (1982); *In re Armstrong,* 49 N.C. App. 175, 270 S.E.2d 619 (1980). The defendant's evidence must be conclusive; mere conflicting testimony as to an accused's absence from the demanding state at the time of the alleged crime will not support his release from custody at a habeas corpus proceeding. *People ex rel. Garner v. Clutts,* 20 Ill.2d 447, 170 N.E.2d 538 (1970); *State ex rel. Zack v. Kriss,* 195 Md. 559, 74 A.2d 25 (1952).

***7. Must an indictment, information, or warrant from the demanding state be accompanied by affidavits or other documents showing the basis for the probable cause to arrest the fugitive?***

Courts generally hold that an indictment carries with it a sufficient finding of probable cause so that an asylum state may not look behind the document to see for itself whether probable cause exists. *U.S. ex rel. Davis v. Behagen,* 436 F.2d 596 (2d Cir. 1970); *People v. Jackson,* 180 Colo. 135, 502 P.2d 1106 (1972).

If the documents sent by the demanding state do not contain an indictment, they must show that a detached and neutral judicial official in the demanding state has found probable cause in the case; if the Governor in the asylum state decides to issue a Governor's Warrant, the courts of that state may not review the documents to see whether they contain a showing of probable cause. *Michigan v. Doran,* 439 U.S. 282, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1978); *California v. Superior Court,* 482 U.S. 342, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987).

***8. What is the standard of proof required for a fugitive who is attacking a Governor's Warrant in a habeas corpus proceeding? Does the state have the burden of producing evidence if a defendant introduces evidence contesting his status as a fugitive?***

A Governor's Warrant creates a presumption of regularity in an extradition proceeding, and a fugitive who wishes to attack the warrant must show by clear and convincing evidence that the warrant is invalid. *People ex rel. Harris v. Warden,* 42 App. Div. 2d 549, 345 N.Y.S.2d 29 (1973); *Stolz v. Miller,* 190 Colo. 43, 543 P.2d 513 (1975); *McCollough v. Darr,* 219 Kan. 477, 548 P.2d 1245 (1976). Other cases have formulated the standard of proof as requiring "conclusive" evidence, *People ex rel. Pirone v. Police Comm'r,* 15 App. Div. 2d 809, 225 N.Y.S.2d 257 (1962); or as requiring "clear and satisfactory" evidence, *State ex rel. Rhodes v. Omodt,* 300 Minn. 129, 218 N.W.2d 461 (1974). In *Dodd v. State,* 56 N.C. App. 214, 287 S.E.2d 435 (1982), the North Carolina Court of Appeals ruled that the fugitive must prove beyond a reasonable doubt that he is not the person named in the extradition papers.

States differ on whether the prosecution must present evidence to rebut an alleged fugitive's evidence. In *Rhodes,* the court ruled that the state must present "minimal" evidence rebutting an alleged fugitive's evidence that he was not in the demanding state at the time of the crime; in *Stolz,* the court ruled that a statement by an alleged fugitive does not necessarily rebut the presumption of regularity created by the Governor's Warrant.

***9. General Research References***

Annot., *Validity, Construction, and Application of Interstate Agreement on Detainers,* 98 A.L.R.3d 160 (1980 and Supp.).

Annot., *Necessity That Demanding State Show Probable Cause to Arrest Fugitive in Extradition Proceedings,* 90 A.L.R.3d 1085 (1979 and Supp.).

Annot., *Discharge on Habeas Corpus of One Held in Extradition Proceedings As Precluding Subsequent Extradition Proceedings,* 33 A.L.R.3d 1443 (1970 and Supp.).

Annot., *Necessity and Sufficiency of Identification of Accused As the Person Charged, to Warrant Extradition,* 93 A.L.R.2d 912 (1964 and Later Case Service).

Annot., *Court's Power and Duty, Pending Determination of Habeas Corpus Proceeding on Merits, to Admit Petitioner to Bail,* 56 A.L.R.2d 668 (1957 and Later Case Service).

Annot., *Determination, in Extradition Proceedings, or on Habeas Corpus in Such Proceedings, Whether a Crime Is Charged,* 40 A.L.R.2d 1151 (1955 and Later Case Service).

## ARTICLE V. INTERSTATE AGREEMENT ON DETAINERS

Sometimes a person who is wanted for prosecution is already in prison. A prosecutor may lodge a "detainer" against the prisoner by notifying the prison authorities that the person has charges pending against him and thus prevent release of the prisoner without notice to the prosecutor. Virtually all the states, including North Carolina, have joined an Interstate Agreement on Detainers that establishes procedures for resolving pending charges against a prisoner early in his detention in another state. (The Agreement only applies to pending charges. The extradition process must be used to return a prisoner who is a probation or parole violator.) This section of the Extradition Manual briefly explains the detainer procedure.

The Interstate Agreement on Detainers appears in G.S. 15A-761. The Agreement allows both the prisoner and the prosecutor to request early resolution of charges outstanding against the prisoner. The prison officials who have custody of the prisoner are required to notify him of any detainers lodged against him. He may then request final disposition of the charges. When the prisoner makes such a request, the prison officials notify the prosecutor in the other state and offer him the opportunity to take custody of the prisoner. The prosecutor must try the case within 180 days after the prisoner is delivered. A judge may grant a delay in the trial deadline for good cause if either the prisoner or his lawyer is present.

If detainers have been lodged for other charges from the same state, the prosecutors responsible for the other charges are also notified of the prisoner's request for final disposition. His request is considered a request for disposition of all charges pending in that state. Failure to prosecute any of the charges pending against the prisoner in that state within the 180-day period, or the extended deadline, means dismissal of the charges with prejudice.

The prosecutor also can force an early trial. When a prosecutor has a charge against a prisoner in another state, he may request temporary custody for trial. The governor of the other state can refuse to grant that request, but if he agrees — or if he does not object within 30 days — the prisoner is turned over for prosecution. The trial must be held within 120 days after the prisoner is delivered — again with delays possible for good cause — or the charges must be dismissed with prejudice. All prosecutors in the state who have a detainer on the prisoner are notified that he is being returned for prosecution so that they may make their own requests for temporary custody.

After trial, the prisoner is returned to the state where he was serving his sentence. Once he completes his sentence in the state where he was originally in prison, he is given back to the other state to serve the sentence imposed there.

The Department of Correction employs an Administrator for the Interstate Agreement on Detainers. The Administrator (919-733-4926) can provide additional information about detainers and the forms to be used in the procedures described above.

## ARTICLE VI. RETURN OF JUVENILES

North Carolina is a member of the Interstate Compact on Juveniles (G.S. 7A-684 through -712), which provides for the return of juveniles who have been charged with being delinquent, juvenile delinquents who have escaped from custody or absconded from probation or parole, juveniles who are runaways, and the like. The Compact Administrator, who is employed in the Division of Social Services of the Department of Human Resources (919-733-4622), can provide information about the Compact's procedures and the forms to be used to return a juvenile.

# FORMS

The forms designated AOC-CR-909M through -912M and GOV. 1 through GOV. 2-F are not printed for distribution but are available from the clerk of superior court's office in each county for photocopying as necessary.

The last form, designated as Attachment No. 2, is available from the Department of Correction (919-733-3988).

## Form 1.

STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant

**FUGITIVE AFFIDAVIT**

G.S. 15A-733, 15A-734

Crime(s) In Demanding State

Name, Address And Telephone No. Of Contact Person In Demanding State

Date Of Offense

Name Of Demanding State And County Of Offense

Title

I, the undersigned, state that this Affidavit is based upon

☐ criminal process issued by a judicial official of the demanding state, a copy of which is attached.
☐ the affidavit of the contact person named above, a copy of which is attached.
☐ a NCIC-DCI message from the contact person named above, a copy of which is attached.
☐ a telephone message from the contact person named above.
☐ Other:

On or about the date of offense shown and in the demanding state and county named above the crime named above was committed and the defendant named above is now in the State of North Carolina and

☐ has been charged with the commission of that crime and has fled from justice.
☐ has been convicted of that crime and has escaped from confinement.
☐ has broken the terms of his bail, probation and parole.

SWORN AND SUBSCRIBED TO BEFORE ME

Date

Signature Of Affiant

Date

Signature

Name (Type Or Print)

☐ Magistrate ☐ District Court Judge ☐ Superior Court Judge

Title Of Person Signing

AOC-CR-911M
Rev. 6/92

File No.

**WARRANT FOR ARREST FOR FUGITIVE**

Crime(s) In Demanding State

Date Of Offense

Name Of Demanding State And County Of Offense

THE STATE OF NORTH CAROLINA VS.

Name And Address And Telephone No. Of Defendant

| Race | Sex | Date Of Birth | Age |
|---|---|---|---|
| | | | |

Social Security No. | Driver's License No.

Name Of Defendant's Employer

| Offense Code | Arrest Under G.S. |
|---|---|
| 9901 | 15A-733 |

Date Of Arrest And Check Digit No. (From Fingerprint Card)

Complainant (Name, Address Or Department, Phone No.)

**STATE OF NORTH CAROLINA**

_____ County

In The General Court Of Justice
District Court Division

To any officer with authority and jurisdiction to execute a warrant for arrest:

I, the undersigned, find that there is probable cause to believe that on or about the date of offense shown and in the demanding state and county named above the crime named above was committed and the defendant named above is now in the State of North Carolina and

- ☐ has been charged with the commission of that crime and has fled from justice.
- ☐ has been convicted of that crime and has escaped from confinement.
- ☐ has broken the terms of his bail, probation and parole.

This Warrant is issued pursuant to Section 15A-733 of the North Carolina General Statutes upon information furnished under oath by the complainant listed. You are DIRECTED to arrest the defendant and bring him before a judicial official without unnecessary delay to answer the charge above.

| Date Issued | Signature | Location Of Court | |
|---|---|---|---|
| Date Of Service | ☐ Magistrate ☐ District Court Judge ☐ Superior Court Judge | Court Date | Court Time ☐ AM ☐ PM |

AOC-CR-910M
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Form 2

If this Warrant For Arrest is not served within one hundred and eighty (180) days, it must be returned to the Clerk of Court in the county in which it was issued with the reason for the failure of service noted thereon. The officer must state all steps taken by his department in attempting to execute the warrant and any information obtained about the whereabouts of the defendant.

**RETURN OF SERVICE**

I certify that this Warrant was received and served as follows:

*Date Received* | *Date Served* | *Date Returned*

☐ By arresting the defendant and bringing him before:

*Name Of Judicial Official*

☐ This Warrant WAS NOT served for the following reason:

*Signature Of Officer Making Return*

*Department Or Agency Of Officer*

**RETURN FOLLOWING REDELIVERY**

I certify that this Warrant was received and served as follows:

*Date Received* | *Date Served* | *Date Returned*

☐ By arresting the defendant and bringing him before:

*Name Of Judicial Official*

☐ This Warrant WAS NOT served for the following reason:

*Signature Of Officer Making Return*

*Department Or Agency Of Officer*

AOC-CR-910M, Side Two

File No.

**MAGISTRATE'S ORDER FOR FUGITIVE**

Crime(s) In Demanding State

Date Of Offense

Name Of Demanding State And County Of Offense

**THE STATE OF NORTH CAROLINA VS.**

Name And Address And Telephone No. Of Defendant

| Race | Sex | Date Of Birth | Age |
|---|---|---|---|
| | | | |

Social Security No. | Driver's License No.

Name Of Defendant's Employer

| Offense Code | Arrest Under G.S. |
|---|---|
| 9901 | 15A-734 |

Date Of Arrest And Check Digit No. (From Fingerprint Card)

Arresting Officer (Name, Department, Phone No.)

**STATE OF NORTH CAROLINA**

_____ County

In The General Court Of Justice
District Court Division

I, the undersigned, find that the defendant named above has been arrested without a warrant and his detention is justified because the crime named above is punishable by death or imprisonment for a term exceeding one year and there is probable cause to believe that on or about the date of offense shown and in the demanding state and county named above the crime named above was committed and the defendant named above has been charged with the commission of that crime and has fled from justice.

This Magistrate's Order is issued pursuant to Section 15A-734 of the North Carolina General Statutes upon information furnished under oath by the arresting officer(s) shown. A copy of this Order has been delivered to the defendant.

| Date Issued | Signature | Location Of Court | |
|---|---|---|---|
| | ☐ Magistrate ☐ District Court Judge ☐ Superior Court Judge | Court Date | Court Time ☐ AM ☐ PM |

AOC-CR-909M
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**Form 4.**

STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant

**WAIVER OF EXTRADITION**

**FINDINGS AND ORDER BY JUDGE**

G.S. 15A-746

Crime(s) In Demanding State

Date Of Offense

Name Of Demanding State And County Of Offense

**WAIVER OF DEFENDANT**

I, the undersigned, in open court state that:

1. ☐ I understand that I have been arrested in this State under criminal process alleging that I committed the crime(s) shown above on the date and in the demanding state and county named above.

   ☐ I understand that I have been arrested in this State under criminal process alleging that I was convicted of the crime(s) shown above, which was committed on the date of offense and in the demanding state and county named above, and further alleging that I have escaped from confinement or broken the terms of my bail, probation or parole.

2. A Judge or a Clerk of Superior Court has informed me that I am not required to sign this Waiver and that I have a right to be represented by an attorney before signing it and at all other stages of extradition. This judicial official also informed me that if I do not sign this Waiver, I cannot be extradited to the demanding state until a Governor's Warrant has been issued and served on me and if a Governor's Warrant is served on me, I will have a right to apply for a writ of habeas corpus.

3. I freely and voluntarily waive the issuance and service of a Governor's Warrant and all other procedure incidental to extradition proceedings.

4. I freely and voluntarily consent to return to the demanding state shown above upon the arrival of a duly accredited agent of that state.

Date

Signature Of Defendant

**FINDINGS AND ORDER BY JUDGE**

I am a Judge or Clerk of Superior Court of the General Court of Justice of North Carolina, a court of record. The defendant named above appeared before me this day. I informed the defendant of the right to the issuance and service of a Governor's Warrant and to obtain a writ of habeas corpus as provided for in N. C. G.S. 15A-730. The defendant then freely, voluntarily and understandingly executed the above Waiver in my presence.

To any officer having the defendant named above in custody:

You are DIRECTED to deliver the defendant together with a copy of this document, to the duly accredited agent(s) of the demanding state upon their presentation of evidence of their accreditation.

Date

Signature

Name (Type Or Print)

☐ Sup. Ct. Judge ☐ Dist. Ct. Judge ☐ CSC ☐ Asst. CSC

AOC-CR-912M
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Original–File Copy–Sheriff Copy–Governor Copy–Defendant

## Form 5.

FORM GOV. 1
Rev. 5/91

# State of North Carolina

APPLICATION FOR REQUISITION
(NORMAL)

TO THE GOVERNOR OF THE STATE OF NORTH CAROLINA, _____: THE UNDERSIGNED, _____, DISTRICT ATTORNEY (or ASSISTANT DISTRICT ATTORNEY) of the _____Prosecutorial District of North Carolina, *(address)* _____, hereby makes this verified application for the requisition of _____, a Fugitive from Justice of this State, charged with the CRIME of _____, in the COUNTY of _____.

IN SUPPORT OF SUCH APPLICATION, YOUR PETITIONER HEREBY SHOWS THE FOLLOWING FACTS:

1. That the FULL NAME of the person for whom requisition is asked is _____.
2. That in his opinion, the ends of public justice require that the subject be arrested and brought back to the State of North Carolina for trial at public expense.
3. That he believes that he has sufficient evidence to secure the conviction of the subject.
4. That the name of the AGENT—proposed to receive the subject from the proper authorities of the State of _____ and bring said subject to the State of North Carolina for trial is (are) *(name and address)* _____;

   AND that the person—named as AGENT—is (are) a proper person—and that he (they) has (have) no private interest in the arrest and conviction of the subject.

5a. That, according to information and belief, there HAS NOT BEEN a former request for the requisition of the subject, growing out of the same transaction herein alleged.

5b. That, there HAS BEEN a former request for the requisition of the subject, growing out of the same transaction herein alleged: *(date of prior application)* _____ *(explanation of reasons for present request for requisition)* _____.

6. That the subject is now under ARREST in the State of _____, and in the custody of *(name and address)* _____, and the grounds for such belief is as follows: _____, (and has been released on bail from this custody, is scheduled for a hearing in *(place)* _____ at *(time)* _____, and is presently residing at *(home or business address)* _____);

   AND that if the subject is under either civil or criminal arrest in the State of _____ for other than the crime herein charged, the facts are unknown to the maker of this Application.

FORM GOV. 1
Rev. 5/91

PAGE TWO

## APPLICATION FOR REQUISITION
## (NORMAL)

7. That this Application is not made for the purpose of serving the fugitive with civil process, or for the purpose of collecting a debt or enforcing a private claim, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings will not be used for any of said objects.

8. That the extradition of the subject to the State of North Carolina is hereby requested for the purpose of trial on the charge of committing the CRIME of _____,

as defined in North Carolina GENERAL STATUTES *(code-section)* _____, as set forth in:

a. WARRANT, heretofore issued against him, accompanied by COMPLAINT (Affidavit to the facts thereof by a person having actual knowledge thereof), as per quadruplicate copies hereto attached.

b. INDICTMENT, heretofore found against subject on the _____ day of _____, 19 _____, by the Grand Jurors for the State of North Carolina in and for the County of _____, attending the Superior Court of the said county, which Indictment is now pending against the subject, and quadruplicate original copies of which indictment are hereto attached.

9a. That the alleged Crime was committed in *(place-date)* _____; and

That said subject was personally and physically present in _____, North Carolina, at the time of the commission of the alleged crime, and thereafter the subject fled from the State of North Carolina to avoid arrest and prosecution.

9b. That said subject, insofar as is known, WAS NOT IN THE STATE OF NORTH CAROLINA at the time of the commission of the crime of which he is charged, and has not since that time fled from this State, but that this requisition is sought under Section 6 of the Uniform Extradition Act, G.S. 15A-726, which your Applicant is informed has been adopted by the State of _____;

and that the subject, while in the State of _____, committed an Act, to wit

_____, which intentionally resulted in the commission of a crime, to wit

_____, in the State of North Carolina.

10a. That this Application was made as soon as the subject could be located.

10b. That there has been a considerable lapse of time since the date of the alleged crime, explanation of which is as follows:_____

_____.

11a. That this Application is verified by *(name of District Attorney or Assistant District Attorney)* _____, as aforesaid, and is executed in *quadruplicate*, and is accompanied by certified copies of the WARRANT heretofore issued against the said subject by _____, a duly appointed, qualified, and acting *(Magistrate, Clerk of Court or Judge)* _____, and COMPLAINT, Affidavit of identification, and other certifications by proper authorities that the Signers of the Documents are qualified.

11b. That this Application is verified by *(name of District Attorney or Assistant District Attorney)* _____, as aforesaid, and is executed in *quadruplicate*, and is accompanied by certified copies of the INDICTMENT heretofore found against the said subject by the Grand Jurors in the State of North Carolina in and for the County of _____, attending the Superior Court of said county, which indictment is now pending against the subject; and other certifications by proper authorities that the Signers of the Documents are qualified.

FORM GOV. 1
Rev. 5/91

PAGE THREE

## APPLICATION FOR REQUISITION
(NORMAL)

_____
*(Assistant) District Attorney*

SEAL

_____ Prosecutorial District of North Carolina

Sworn and subscribed to before me, this the

_____ day of _____, 19____.

_____
*Clerk, Superior Court Or Proper Official*

_____
*County And Address*

(1) This Application may be used for all fugitives with exception of: Violators of Conditions of Probation, Parole, or Conditional Releases; Escapees or Bail Violators after confinement.

(2) Select the (a) or (b) which applies in your case, as follows: 5a. b.; 8a. b.; 9a. b.; 10a. b.; 11a. b. Leave what you do not use vacant.

(3) Attach copy of applicable Statute.

---

AFFIDAVIT

STATE OF NORTH CAROLINA

COUNTY OF _____

_____, being duly sworn, deposes and says: I am the (Assistant) District Attorney of the County of _____ in the State of North Carolina. I have read the foregoing application for the return of the named fugitive to the State of North Carolina, and the facts therein stated are true according to the best of my knowledge, information, and belief.

_____
*(Assistant) District Attorney*

Sworn and subscribed to before me, this the

_____ day of _____, 19____.

_____
*Clerk, Superior Court Or Proper Official*

_____
*County And Address*

Must be completed by the same (Assistant) District Attorney who signed Application For Requisition.

**Form 6.**

FORM GOV. 1-A
Rev. 5/91

# State of North Carolina

STATE OF NORTH CAROLINA CERTIFICATE

COUNTY OF _____

I, _____, a duly appointed, qualified and acting Magistrate,

*(or Proper Official)* _____, of *(county)* _____, North Carolina,

*(address)* _____, do hereby certify that the foregoing is a true

and correct copy of (1) the WARRANT issued by me on _____, 19 _____, against

_____, charging the said subject with the crime of

_____,

and (2) THE AFFIDAVIT on which the Warrant was issued.

IN TESTIMONY WHEREOF, I have hereunto set my hand, this the _____ day of _____,

19 _____.

_____
*Magistrate Or Proper Official*

**Attach Copy of Warrant, with Complaint or Affidavit on which it was issued, to each of the four (4) Sets of Application for Requisition at the end of the application by the (Assistant) District Attorney, said Copy being certified as shown above.**

**Form 7.**

FORM GOV. 1-B
Rev. 5/91

# State of North Carolina

STATE OF NORTH CAROLINA CERTIFICATE

COUNTY OF _____

I, _____, Clerk of the Superior Court of _____ County, North Carolina, a court of record, do hereby certify:

1. That _____ is District Attorney (or Assistant District Attorney) of the _____ Prosecutorial District of North Carolina; and that the attached application for the requisition of _____ has been signed by _____, District Attorney (or Assistant District Attorney) as aforesaid;

2. That _____, whose genuine signature appears upon the foregoing certificate and warrant, was a duly appointed, qualified, and acting Magistrate (or Proper Official) of _____ County, North Carolina, at the time the said warrant was issued and the certificate executed.

3. That the attached warrant and affidavit, charging _____ with the crime of _____, is a true and correct copy of the warrant issued by the said _____, Magistrate (or Proper Official) as aforesaid, on _____, 19 _____, and of the affidavit on which it was issued.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal of my said office, this the _____ day of _____, 19 _____.

(Seal of Court)

_____
*Clerk Of Superior Court*

_____ County, North Carolina

Attach with Warrant Certification.

**Form 8.**

FORM GOV. 1-C
Rev. 5/91

# State of North Carolina

STATE OF NORTH CAROLINA CERTIFICATE

COUNTY OF _____

I, _____, Clerk of the Superior Court of _____ County, North Carolina, a court of record, do hereby certify:

1. That _____ is District Attorney (or Assistant District Attorney) of the _____ Prosecutorial District of North Carolina; and that the attached application for the requisition of _____ has been signed by _____, District Attorney (or Assistant District Attorney) as aforesaid;

2. That the indictment hereto attached is a true and correct copy of an indictment against _____, found to be a true bill on the _____ day of _____, 19 _____, by the grand jurors for the State of North Carolina, in and for the County of _____, attending the Superior Court of the said county; that the original indictment is on file in my office, and that the said indictment is now pending against the said _____.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, this _____ day of _____, 19 _____.

_____
*Clerk Of Superior Court*

(Seal of Court) _____ County, North Carolina

_____
*Address*

**Attach Copy of Indictment to each of the four (4) sets of Application for Requisition at the end of the application by the (Assistant) District Attorney, said copy being certified as shown above.**

**Form 9.**

FORM GOV. 1-D
Rev. 5/91

# State of North Carolina

STATE OF NORTH CAROLINA

COUNTY OF _____

CERTIFICATE

I, _____, Resident (Presiding) Judge of the _____ Judicial District of North Carolina, embracing the County of _____, do hereby certify that _____, whose name is subscribed to the foregoing and annexed certificate, is Clerk of the Superior Court of _____ County, North Carolina, duly elected and sworn, and that full faith and credit are due his official acts. I further certify that the seal affixed to said certificate is the seal of said Court and the exemplification is authenticated in due form and by proper officer and in his own handwriting, and in such a form and manner that it would be received in any Court in this State.

IN TESTIMONY WHEREOF, I have hereunto set my hand at _____, North Carolina, this the _____ day of _____, 19____.

_____
*Resident (Presiding) Judge*
_____ Judicial District of North Carolina

_____
*Address*

STATE OF NORTH CAROLINA

COUNTY OF _____

CERTIFICATE

I, _____, Clerk of the Superior Court of _____ County, North Carolina, do hereby certify that _____, whose name is subscribed to the foregoing certificate is the Resident (Presiding) Judge of the Superior Court of the _____ Judicial District of North Carolina, embracing the County of _____, duly elected and sworn, and that the signature of said Judge to the said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court at _____, North Carolina, this the _____ day of _____, 19 _____.

(Seal of Court)

_____
*Clerk Of Superior Court*
_____ County, North Carolina

_____
*Address*

**Attach with Warrant Certification.**

**Form 10.**

FORM GOV. 1-E
Rev. 5/91

# State of North Carolina

STATE OF NORTH CAROLINA CERTIFICATE

COUNTY OF _____

I, _____, Resident (Presiding) Judge of the_____ Judicial District of North Carolina, embracing the County of _____, do hereby certify that _____, whose name is subscribed to the foregoing and annexed certificate, is Clerk of the Superior Court of _____ County, North Carolina, duly elected and sworn, and that full faith and credit are due his official acts. I further certify that the seal affixed to said certificate is the seal of said Court and the exemplification is authenticated in due form and by proper officer and in his own handwriting, and in such a form and manner that it would be received in any Court in this State.

IN TESTIMONY WHEREOF, I have hereunto set my hand at _____, North Carolina, this the _____ day of _____ 19__.

_____
*Resident (Presiding) Judge*

_____ Judicial District of North Carolina

_____
*Address*

STATE OF NORTH CAROLINA

COUNTY OF _____ CERTIFICATE

I, _____, Clerk of the Superior Court of _____ County, North Carolina, do hereby certify that _____, whose name is subscribed to the foregoing certificate is the Resident (Presiding) Judge of the Superior Court of the _____ Judicial District of North Carolina, embracing the County of _____, duly elected and sworn, and that the signature of said Judge to the said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court at _____, North Carolina, this the _____ day of _____, 19_____.

_____
*Clerk Of Superior Court*

(Seal of Court) _____ County, North Carolina

_____
*Address*

Attach with Indictment Certification.

## Form 11.

FORM GOV. 2
Rev. 5/91

# State of North Carolina

**APPLICATION FOR REQUISITION**
(After Conviction)

**TO THE GOVERNOR OF THE STATE OF NORTH CAROLINA,** _____: **THE UNDERSIGNED,** *(Department of Correction Official, District Attorney (Assistant District Attorney))* _____,

*(district and address)*_____,

**hereby makes this verified application for the requisition of** _____, **Fugitive from Justice of this State, charged in the County of** _____, **with the** *(crime of escape or violation of terms of parole, conditional release, probation, bail)* _____,

**as defined in North Carolina General Statutes** _____, **and who is now in the jurisdiction of the State of** _____

**IN SUPPORT OF SUCH APPLICATION, YOUR PETITIONER HEREBY SHOWS THE FOLLOWING FACTS:**

1. That the FULL NAME of the person for whom requisition is asked is _____.
2. That in his opinion, the ends of public justice require that the subject be arrested and brought back to the State of North Carolina at state or county expense in accordance with N. C. General Statutes 15A-744 et seq.
3. That he believes that he has sufficient evidence to secure (a) the conviction of the subject; OR (b) to prove that said subject has violated the conditions of _____.
4. That the name of the AGENT—proposed to receive the subject from the proper authorities of the State of _____ and bring said subject to the State of North Carolina for (a) trial OR (b) hearing is (are) *(name and address)* _____

_____;

AND that the person—named as AGENT—is (are) a proper person—and that he (they) has (have) no private interest in the arrest and disposition of said fugitive.

5a. That, according to information and belief, there HAS NOT BEEN a former request for the requisition of the subject, growing out of the same transaction herein alleged.

5b. That, there HAS BEEN a former request for the requisition of the subject, growing out of the same transaction herein alleged: *(date of prior application)* _____ *(explanation of reasons for present request for requisition)*

_____.

FORM GOV. 2
Rev. 5/91

PAGE TWO

## APPLICATION FOR REQUISITION
(After Conviction)

6. That the subject is now under ARREST in the State of _____, and in the custody of

*(name and address)* _____,

and the grounds for such belief is as follows: _____,

(and has been released on bail from this custody, is scheduled for a hearing in *(place)* _____

at *(time)* _____, and is presently residing at *(home or business address)* _____

_____); AND that if the subject is under either civil or criminal arrest in the State of

_____ for other than the crime herein charged, the facts are unknown to the maker of this Application.

7. That this Application is not made for the purpose of serving the fugitive with civil process, or for the purpose of collecting a debt or enforcing a private claim, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings, or hearing, will not be used for any of said objects.

8. That the extradition of the subject to the State of North Carolina is hereby requested for the purpose of (a) TRIAL or (b) HEARING on

the charge of (a) *(escape)* _____

OR for violation of the conditions of (b) *(parole, conditional release, probation, bail)* _____,

as defined in North Carolina General Statutes _____, and as set forth in, and attached in quadruplicate hereto:

(a) Warrant and Affidavit for Escape (District Attorney or Assistant District Attorney), dated _____; OR Certified Statement of Officer from whose custody Fugitive escaped (Department of Correction), dated _____;

(b) Probation Judgment imposed and dated _____;

(c) Conditional Release imposed and dated _____;

(d) Certificate of Parole dated _____;

(e) Allowance of Bail dated _____;

*(details (escape date; revocation date))* _____;

AFTER HAVING BEEN CONVICTED OF THE FOLLOWING CRIME *(Show name of crime; N.C.G.S. citation; date; place; judgment; sentence)*:

_____

_____

_____

_____

_____

_____

_____

FORM GOV. 2
Rev. 5/91

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## APPLICATION FOR REQUISITION
(After Conviction)

9a. That said subject was personally and physically present in *(county or city)* _____,
North Carolina, at the time of the commission of the alleged crime or violation; and thereafter, the subject fled from the State of North Carolina to avoid arrest and prosecution.

9b. That said subject, insofar as is known, WAS NOT IN THE STATE OF NORTH CAROLINA, at the time of the alleged VIOLATION, and has not since that time fled from this State, but that this requisition is sought under Section 6 of the Uniform Extradition Act, G.S. 15A-726, which your Applicant is informed has been adopted by the State of _____; and that the subject, while in the State of _____, committed an Act, to wit: _____ _____, which intentionally resulted in the violation of _____ in the State of North Carolina.

10a. That this Application was made as soon as the subject could be located.

10b. That there has been a considerable lapse of time since the date of the alleged crime or charge, explanation of which is as follows:

_____

_____

_____.

11. That this Application is verified, as aforesaid; is executed in quadruplicate; and is accompanied by the following certified documents:

(a) Warrant and Affidavit or Indictment, Organization of Court, Judgment upon Conviction and Sentence upon which subject was being held at time of escape or violation of conditions of bail. In addition, District Attorney or Assistant District Attorney: Warrant and Affidavit for Escape; Department of Correction: Statement of Officer from whose custody fugitive escaped, and other records, if available, certified to by the Division of Prisons of the Department of Correction. (Fingerprint, FBI Transcript) – **Escapees; Bail Violators.**

(b) Warrant and Affidavit or Indictment, Organization of Court, Judgment upon Conviction and Sentence; (certified to by Clerk of Court). (And other records, certified to by the Division of Prisons of the Department of Correction, such as: Fingerprints, FBI Transcript; and Other Records, certified to by the Parole Commission, such as: (a) Certificate of Parole and Revocation of Parole; (b) Certificate of Conditional Release and Revocation of Conditional Release.) – **Violators of Parole and Conditional Release.**

(c) Warrant and Affidavit or Indictment; Organization of Court; Probation Judgment; Probation Violation Report and Order for Arrest. – **Violators of Probation.**

SEAL

_____
*Name And Title Of Proper Official*

Sworn and subscribed to before me, this the

_____ day of _____,19____.

_____
*Clerk, Superior Court Or Proper Official*

_____
*County And Address*

FORM GOV. 2
Rev. 5/91

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## APPLICATION FOR REQUISITION
(After Conviction)

(1) This Application may be used for: Escapees from the Division of Prisons of the Department of Correction, G. S. 148-45; Escapees, County and Municipal, G. S. 14-256; Violators of conditions of: Probation, G. S. 15A-1343; Parole, G.S. 15A-1374; or violation of conditions of bail, all of which have been committed after conviction or confinement.

(2) Select the appropriate subsection which applies in Sections 3, 4, 5, 8, 9, 10, and 11.

(3) Attach copy of applicable Statute for Escape or Violation.

---

AFFIDAVIT

STATE OF NORTH CAROLINA

COUNTY OF _____

_____, being duly sworn, deposes and says: I am

*(proper title)* _____. I have read the foregoing application for the return of the named fugitive to the State of North Carolina, and the facts therein stated are true according to the best of my knowledge, information, and belief.

_____
*Name And Title Of Proper Official*

Sworn and subscribed to before me, this the

_____ day of _____,19_____.

_____
*Clerk, Superior Court Or Proper Official*

_____
*County And Address*

**Must be completed by the same official who signed Application for Requisition.**

## Form 12.

FORM GOV. 2-A
Rev. 5/91

# State of North Carolina

STATE OF NORTH CAROLINA CERTIFICATE

COUNTY OF _____

I, _____, Clerk of the Superior Court of _____ County, North Carolina, a court of record, do hereby certify:

1. That _____ is District Attorney (Assistant District Attorney) of the _____ Prosecutorial District of North Carolina; and that the attached application for the requisition of _____ has been signed by _____, District Attorney (Assistant District Attorney) as aforesaid.

2. That the attached copy of the (a) Warrant and Affidavit is a true and correct copy issued on _____, 19 _____. OR

(b) The indictment is a true and correct copy of an indictment against the subject, found to be a true bill on the _____ day of _____, 19 _____, by the grand jurors of the State of North Carolina in and for the County of _____, attending the Superior Court of the said county; that the indictment is now pending against the said _____; and that the original indictment is on file in my office.

3. That the attached copy of a judgment of conviction and sentence is a true and correct copy of a judgment rendered against the subject in the _____ Court of _____ County on the _____ day of _____, 19 _____; and that the original judgment is on file in my office.

4. That the Warrant or Indictment, Judgment and Probation Violation Report and Order for Arrest hereto attached are true and correct copies of same. That the original Warrant was duly issued on the _____ day of _____, 19 _____ by _____, duly appointed, qualified and acting *(Magistrate or Proper Official)* _____. That the Judgment was duly signed on the _____ day of _____, 19 _____ by _____, Judge of the *(county)* _____ *(district or superior)* _____ Court. That the Probation Violation Report and Order for Arrest was duly signed on the _____ day of _____, 19 _____ by _____, Judge of the *(county)* _____ *(district or superior)* _____ Court. That the Order for Arrest was duly issued on the _____ day of _____, 19 _____ by _____, Clerk of the Superior Court of _____. That the original Warrant or Indictment, Judgment, Probation Violation Report and Order for Arrest are on file in my office, and that said probation violation is now pending against the said _____.

IN WITNESS WHEREOF, I have set my hand and official seal of my said office, this the _____ day of _____ 19 _____.

(Seal Of Court)

_____
*Clerk Of Superior Court*

_____ County, North Carolina

**This form to be used by the (Assistant) District Attorney in certification of the documents and his signature on the Application for Requisition of Escapees; Violators of Probation; and Bail.**

**Select #2 and #3 for Application for Requisition of Escapees and Bail Violators.**

**Select #4 for Application for Requisition of Violators of Probation.**

**Certifications to be attached in quadruplicate to (Assistant) District Attorney's Application for Requisition of Escapees; Violators of Bail and Probation.**

## Form 13.

FORM GOV. 2-B
Rev. 5/91

# State of North Carolina

STATE OF NORTH CAROLINA CERTIFICATE

COUNTY OF _____

I, _____, Resident (Presiding) Judge of the_____ Judicial District of North Carolina, embracing the County of _____, do hereby certify that _____, whose name is subscribed to the foregoing and annexed certificate, is Clerk of the Superior Court of _____ County, North Carolina, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to said certificate is the seal of said Court and the exemplification is authenticated in due form and by proper officer and in his own handwriting, and in such a form and manner that it would be received in any Court in this State.

IN TESTIMONY WHEREOF, I have hereunto set my hand at _____, North Carolina, this the _____ day of _____ 19 _____.

_____
*Resident (Presiding) Judge*

_____ Judicial District of North Carolina

STATE OF NORTH CAROLINA CERTIFICATE

COUNTY OF _____

I, _____, Clerk of the Superior Court of _____ County, North Carolina, do hereby certify that _____, whose name is subscribed to the foregoing certificate is the Resident (Presiding) Judge of the Superior Court of the _____ Judicial District of North Carolina, embracing the County of _____, duly elected and sworn, and that the signature of said Judge to the said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court at _____, North Carolina, this the _____ day of _____, 19 _____.

_____
*Clerk Of Superior Court*

(Seal of Court)

_____ County, North Carolina

Certifications to be attached to (Assistant) District Attorney's Application for Requisition for return of Escapees; Violators, Bail and Probation in quadruplicate.

**Form 14.**

FORM GOV. 2-F
Rev. 5/91

# State of North Carolina

STATE OF NORTH CAROLINA AFFIDAVIT

COUNTY OF _____

This day _____, personally appeared before me, _____, Clerk of the Superior Court of _____ County, North Carolina, and after first being duly sworn, stated that in the _____ Court for the County (City) of _____, in the State of North Carolina, on the _____ day of _____, 19 _____, the subject _____, was convicted of _____, and was sentenced to confinement in the _____, for a term of _____, as shown by certified copy of the indictment (or warrant) and judgment attached; that the said subject was accordingly confined in the _____ from which he escaped on the _____ day of _____, 19 _____, without having completed his sentence; and that the said subject is now in the State of _____ and in the custody of _____

_____
*Name And Official Title Of Officer Making Affidavit*

Sworn and subscribed to before me, this the

_____ day of _____, 19_____.

_____
*Clerk Of Superior Court*
_____ County, North Carolina

**Form of affidavit to be made in quadruplicate by (Assistant) District Attorney or by officer from whose custody the prisoner escaped.**

**Form 15.**

Attachment No. :

# NORTH CAROLINA DEPARTMENT OF CORRECTION
## SPECIAL SERVICES SECTION

(Fugitive Extradition)

840 West Morgan Street
RALEIGH, NORTH CAROLINA 27603

**LOCAL LAW ENFORCEMENT AGENCY REIMBURSEMENT REQUEST FOR RETURN OF FUGITIVE**

INSTRUCTIONS: This form will be used *only* by Local Government Law Enforcement Agencies. Use this form for each trip when picking up a fugitive. If more than one fugitive was picked up on a single trip, include *all* expenses on this form. Attach necessary expense receipts to this form. If you have questions concerning this form, please telephone the Special Services Section (Fugitive Extradition), telephone number (919) 733-3988.

This is to certify that the expenses as shown below are true and accurate and were necessary in returning _____ fugitive(s) to _____
(Name of Fugitive)

City/County of North Carolina to stand trial on the felony charge(s) of _____

1. Dates of Travel: Date departed _____ Date returned _____

2. Time of day departed _____ Time of day returned _____

3. Subsistence and Travel Cost Estimates

A. Meals

No. of Breakfasts _____ X $ 5.00 X No. Officers _____ = $_____

No. of Lunches _____ X $ 6.00 X No. Officers _____ = $_____

No. of Dinners _____ X $12.00 X No. Officers _____ = $_____

B. Lodging

No. of Nights _____ X $41.00 X No. Officers _____ = $_____

(Attach receipt)

C. Travel

Automobile round trip to _____
(Location)

Total miles driven _____ X .20 = $_____

Air Travel Actual Costs (Attach receipt) = $_____

D. Other Expenses (Attach sheet with detailed explanation of all costs. Include all receipts.) = $_____

E. Total amount due City/County = $_____

_____ Sheriff/Police Chief
(Signature)

This is to certify that the above named fugitive was returned to North Carolina on the felony charge as shown above

_____ District Attorney
(Signature)

Name and Address of Agency

_____
_____
_____

FOR SPECIAL SERVICES SECTION USE ONLY

| | | Amount |
|---|---|---|
| Budget Code | 1450 | |
| Fund | 1110 | |
| Control | 1005 | |
| Object | 3135 | |
| Object | 3145 | |
| Object | | |
| Total amt. to be paid | | |

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STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

*October 1, 1997*

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 1998 Annotated Rules of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

ROY COOPER
*Attorney General of North Carolina*

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